

Opinion No. 72-14

March 23, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General James H. Russell, Jr.,
Assistant Attorney General

TO: Honorable John R. Tomlin, State Representative, Rt. 2, Box 267, Las Cruces, New
Mexico 88001

QUESTIONS

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May a state representative legally serve as a regularly appointed member of a county planning and zoning board?

CONCLUSION

No.

OPINION

{*16} ANALYSIS

This question involves the construction of New Mexico Constitution Article IV, Section 28 which states in part:

"No member of the legislature shall, during the term for which he was elected, be appointed to any **civil office** in the state, . . ." (emphasis added)

The key issue here is whether or not a regularly appointed **member** of a county planning and zoning board is a **civil officer** within the meaning of Article IV, Section 28, **supra**. In order to determine what constitutes a civil office, guidance may be obtained from **State ex rel., Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1936). Under that decision five elements are included in the definition of a civil office.

"(1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature: (2) it must possess a delegation of a portion of the sovereign [sic] power of government, to be exercised for the benefit of the public: (3) the powers conferred and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority: (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature and by it placed under the general control of a superior officer or body: (5) it must have some permanency and

continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority."

Therefore; to determine the answer to the question posed herein, the position of a regularly appointed member of a county planning and zoning board must be compared to the **Gibson** case requirements. This comparison is as follows:

(1) The position of a member of a county planning and zoning board is created by the county through authority conferred on it by the legislature per Laws of 1965, Ch. 300 (Sections 14-20-1 to 14-20-24, NMSA, 1953 Comp.).

(2) A member of the board is delegated the authority to make certain regulations and restrictions to promote the health, safety, morals or general welfare of the county. See Section 14-20-1, **supra**.

(3) The powers conferred on the board and its members and their duties are defined in Sections 14-20-1 to 14-20-24, **supra**.

(4) The duties of a member of the board are those of an inferior or subordinate officer, created or authorized by the legislature and placed under the general control of a superior officer or body. See Section 14-20-5, NMSA, 1953 Comp.

(5) The position of a member on a county planning and zoning board is a permanent and continuous office.

{*17} With regard to the "additional" requirements stated in **Gibson**, there is no statutory requirement that a board member take and file an official oath or hold a commission or other written authority. This fact, however, does not alter this opinion since in New Mexico a person appointed to any office takes and subscribes to an oath or affirmation supporting the State and Federal Constitutions. See Opinion of the Attorney General No. 69-49, dated May 21, 1969. As to the giving of an official bond, **Gibson** only found this necessary where it was required by proper authority. There is no such requirement herein.

This opinion is distinguishable from Opinion of the Attorney General No. 57-93, dated May 8, 1957 in that herein the position in issue is that of a county officer as opposed to that of a county **employee**.

Therefore, it is the opinion of this office that a state representative may not serve as a regularly appointed member of a county planning and zoning board during the term of his legislative position.