

Opinion No. 72-53

October 6, 1972

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

TO: Honorable Turner W. Branch, New Mexico State Representative, 4308 Avenida La
Resolana, N.E., Albuquerque, New Mexico 87110

QUESTIONS

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Under the Municipal Code enacted in 1965 (Sections 14-2-1 to 14-59-2, N.M.S.A., 1953 Comp.) is it possible to have a de facto municipal corporation in the State of New Mexico as opposed to a de jure municipal corporation which has been formed in full compliance with all of the statutory requirements of the Municipal Code?

CONCLUSION

Yes, see analysis.

OPINION

{*84} ANALYSIS

Sections 14-2-1 to 14-2-8, N.M.S.A., 1953 Comp. set forth the specific requirements for the incorporation of a municipality. See opinion of the Attorney General No. 65-73 issued May 3, 1965 wherein the definition of and requirements to be a de facto municipal corporation are succinctly set forth. See also **City of Bethany v. Mason**, 202 Okla. 66, 210 P.2d 353 (1942).

New Mexico first considered the issue of a de facto municipal corporation in the case of **City of Albuquerque v. Water Supply Co.**, 24 N.M. 368, 174 P. 217, 5 A.L.R. 519 (1918). In that case, the court held that a municipal corporation created under an unconstitutional charter is a de facto municipal corporation. The court further indicated that it strongly favored the finding of existence of a de facto municipal corporation in order to prevent "chaos and disorder, confusion and endless litigation." Further indication of the court's support for the doctrine of de facto municipal corporations is found in the case of **Ackerman v. Baird**, 42 N.M. 233, 76 P.2d 947 (1938). Therefore, where the requirements for the creation of a de facto municipal corporation have been met, the courts of the State of New Mexico have shown a favorable inclination to recognize such municipal corporations in order to avoid undue hardship which might otherwise result.

In the Municipal Code of 1965, **supra**, the legislature has indicated a recognition of de facto municipal corporations in Section 14-2-8 B, N.M.S.A., 1953 Comp. which states:

"B. An action by a protestant against the incorporation of a municipality shall be taken to the district court within sixty [60] days after the filing of the certified copies of the papers relating to the incorporation of a municipality in the offices of the county clerk and secretary of state. Any action commenced more than sixty [60] days after the filing of the certified copies of the papers relating to the incorporation of a municipality in the offices of the county clerk and secretary of state and questioning the incorporation, formation or organization of a municipality is perpetually barred."

This curative statute indicates the recognition on the part of the legislature of the existence of de facto municipal corporations in barring actions questioning the incorporation, formation and organization of a municipality. The statute, in essence, makes a de facto municipal corporation a de jure municipal corporation if certain conditions are met and the limitation period has run. However, it should be noted that certified copies of the papers relating to incorporation of a municipality must be filed in the offices of the county clerk and secretary of state in order for the limitation stated therein to begin to run. If a municipal corporation has **not** so filed the necessary papers, it cannot come under the protection of the statutes in regard to attacks upon the legality of its incorporation. Therefore, if this were the case, a de facto municipal corporation would then have to rely upon the common law recognizing the existence of de facto corporations in the State of New Mexico as indicated by the cases of **City of Albuquerque v. Water Supply Co., supra**, and **Ackerman v. Baird, supra**.

Therefore, it is the opinion of this office that there is a recognition of de facto municipal corporations under the common law as it existed prior to the adoption of the Municipal Code of 1965, which has not been changed by the said Code, and under the Code itself.