

Opinion No. 73-72

November 15, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable Raymond Garcia State Representative 600 Isleta Blvd., S.W.
Albuquerque, New Mexico 87105

QUESTIONS

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Based on House Joint Resolution No. 33 (Constitutional Amendment No. 5), approved by the voters on November 6, 1973, is the Bernalillo County Commission or the legislature to divide the county into the five county commission districts?

CONCLUSION

The Bernalillo County Commission.

OPINION

{*141} **ANALYSIS**

Constitutional Amendment No. 5, the one to which your question is addressed, provides as follows in its entirety:

CONSTITUTIONAL AMENDMENT NO. 5

House Joint Resolution No. 33

A Joint Resolution

PROPOSING TO AMEND ARTICLE 10 OF THE CONSTITUTION OF NEW MEXICO BY ADDING A NEW SECTION TO PROVIDE FOR FIVE-MEMBER BOARDS OF COUNTY COMMISSIONERS ELECTED FROM DISTRICTS FOR STAGGERED TERMS OF FOUR YEARS, IN THOSE COUNTIES HAVING A POPULATION OF MORE THAN ONE HUNDRED THOUSAND AS SHOWN BY THE MOST RECENT DECENNIAL CENSUS AND HAVING AN ASSESSED VALUATION IN EXCESS OF SEVENTY-FIVE MILLION DOLLARS (\$ 75,000,000).

Be it Resolved by the Legislature of the State of New Mexico:

Section 1. It is proposed to amend Article 10 of the constitution of New Mexico by adding a new section to read:

"In those counties having a population of more than one hundred thousand, as shown by the most recent decennial census, and having a final, full assessed valuation in excess of seventy-five million dollars (\$ 75,000,000), the elected board of county commissioners shall consist of five members. The county shall be divided into five county commission districts which shall be compact, contiguous and as nearly equal in population as practicable. One county commissioner shall reside within, and be elected from, each county commission district. Change of residence to a place outside the district from which a county commissioner was elected shall automatically terminate the service of that commissioner and the office shall be declared vacant.

County commissioners serving on a five-member boards of county commissioners shall serve terms of four years, and after having served two consecutive terms, shall be ineligible to hold any county office for four years thereafter.

Provided, that in the first general election immediately following the adoption of this amendment, two county commissioners shall each be elected for a term of two years; two county commissioners shall each be elected for a term of four years; and one county commissioner shall be elected for a term of six years; thereafter, each county commissioner shall be elected for a term of four years."

As you have noted, the Amendment does not state whether the Bernalillo County Commission or the legislature is to perform the required districting duty.

Examining the question in historical perspective does provide us with some guidelines. In 1959 the legislature adopted House Joint Resolution No. 8 which proposed an amendment to Article V, Section 13 of the New Mexico Constitution. This Article and the amendment thereto read as follows (with the amending portion underlined):

"All district, county, precinct and municipal officers, shall be residents of *{*142}* the political subdivisions for which they are elected or appointed. **The legislature is authorized to enact laws permitting division of counties of this state into county commission districts. The legislature may in its discretion provide that elective county commissioners reside in their respective county commission districts.**"

Unfortunately such legislation was enacted by amending Section 15-37-3, N.M.S.A., 1953 Comp. **prior to approval** of the proposed amendment by the electorate. This procedure violated the doctrine enunciated by our State Supreme Court in **Gibbany v. Ford**, 29 N.M. 621, 225 P. 577. See Attorney General Opinions 60-25 and 60-48. This oversight was corrected by a subsequent amendment to Section 15-37-3, **supra, after** the constitutional amendment had been approved by the voters so that the section now reads as follows:

"15-37-3. Residence in districts -- Period for districting -- Election at large. -- Each county may be divided by the board of county commissioners into three [3] compact districts, as equal in proportion to population as possible, numbered respectively as one, two and three, and if so divided shall not be subject to alteration oftener than once

in two [2] years and one commissioner shall be elected from each district by the votes of the whole county but he shall be a resident of the district from which he is elected. If made, the division of the county into three [3] districts shall be made within six [6] months after the board of county commissioners is elected to office. Districts as they exist on January 1, 1961, shall not be changed until after July 1, 1961. Any board of county commissioners of counties of the N class may, be [by] resolution adopted in any calendar year in which no election of county commissioners is held, provide that the three [3] county commissioners shall be elected at large and without division of the county into districts, but the resolution shall not be subject to repeal, revision or amendment for a period of two [2] years following its adoption."

We see from this that the legislature authorized counties to be "divided **by the board of county commissioners** into three compact districts . . ." It does not seem amiss to point out the language used in Attorney General Opinion 71-26, referring to the Home Rule Amendment as well as Section 15-37-3, **supra**: "As here, the legislature did not attempt to give itself the authority to actually **do** the districting." Neither does Constitutional Amendment No. 5, now at issue, attempt to give the legislature the authority to actually perform the districting task. It is simply silent on the matter.

But aside from past precedent, although it is admittedly oblique, we see some rather foreboding practical problems if the legislature attempts to do the districting. Under Constitutional Amendment No. 5, the five county commissioners must be elected "in the first general election following the adoption of this amendment." That, of course, will now be the general election to be held in November, 1974.

The legislature will not convene until the third Tuesday in January, 1974. Aside from the necessity of having the Governor place this item in his call, this question of drawing the district lines could become time consuming and perhaps heated and that is not desirable, particularly in a thirty-day session. Further, unless the districting bill passed with an emergency clause, it would not become effective until ninety days after adjournment of the session (Article IV, Section 23) and that would be **after** candidates must file their declarations of candidacy. Section 3-8-21, N.M.S.A., 1953 Comp. Nor could they file their declarations on the assumption that the legislature would accomplish the districting since Constitutional Amendment No. 5 requires that each commissioner reside in his district. Accordingly, until the district lines are drawn he would not know what district to file for.

Based on the considerations set forth herein, it is our conclusion that the burden of drawing the new district lines is on the Bernalillo County Commission.