

Opinion No. [30-44]

September 26, 1930

BY: M. A. OTERO, JR., Attorney General

TO: L. M. Harris, Esquire, Mayor of the Village of Hobbs, Hobbs, New Mexico.

MUNICIPAL CORPORATIONS -- Sewers in Villages.

OPINION

Pursuant to your request, and that of your City Attorney, made at the time of your recent visit to Santa Fe, will say that we have gone very carefully into the question which you asked me and beg to advise as follows:

You have asked first, "Has an incorporated village in New Mexico the right to grant a sewer franchise and to place in that franchise a condition giving the village the right to purchase the said sewer later on?"

The right to grant a franchise, I think is to be found in § 90-402 (90) of the 1929 Code.

"The city council and board of trustees in towns shall have the following powers:

"(90) All towns and villages shall have power to grant, by ordinances, franchises and privileges for * * * and other public conveniences and comforts, for the furnishing of which such franchises and privileges are necessary."

I am of the opinion that the trustees may grant the franchise upon such terms and conditions as they see fit.

The foregoing is in answer to your question as to the power of the village to grant a franchise. In addition we may observe that by § 90-3415 of the Code villages having a population of 1200 or less have authority to construct sewers, to take land or material and to assess and collect taxes to cover the expense of opening, constructing, maintaining and keeping in order such sewers in such proportion as they shall deem equitable, and by § 90-3416 of the Code they have power by ordinance to levy taxes upon all or part of the property within the village, provided that such tax shall not exceed one-half of one per centum in any one year.

Your second question follows:

"In advertising for bids for the construction of a sewer, has the said municipality a right to reject all bids then, of its own initiative, award a contract to anyone to construct the sewer?"

Sections 90-2301 and following outline a procedure for the construction of sewers, the assessment of benefits, the issuing of sewer certificates, and the receiving of bids for construction. The reference to bids is found in § 90-2306 of the Code, which provides for the advertising for the construction of the sewer and entering into a contract with the lowest responsible bidder. This section, however, ends with these words, "and nothing in this article with reference to said assessments shall prevent said city council or board of trustees from proceeding with the construction of said sewer or sewers."

I am not fully satisfied as to what the meaning of the words quoted may be. However, I assume that if in good faith and in the judgment of the members of the board it is deemed to the advantage of the municipality to reject all bids it is within their discretion to do so.

"A. Can the said municipality arrange a paving program whereby the abutting property owners pay 2-3 of the cost of construction and the municipality is to pay the other 1-3?"

Section 90-1221 of the 1929 Code provides the procedure by petition for paving and other improvements; and § 90-1222 follows:

"That the whole or any part of the cost of making such improvement may be paid by the city or by the owners of property abutting on such improvements, as the governing body of the city may determine, and may be assessed against such property owners or their property."

The case *Ellis v. New Mexico Construction Company*, 27 N.M. 312, discusses in part the two statutory procedures provided in the matter of paving. There seems, however, to be no question but that the governing body may assess the whole or any part of the costs against benefitted property, and may pay any part not so assessed from tax levies. See also § 90-402 (80).

"Q. What can the said municipality do towards authorizing the immediate construction of a sewer, and a jail, both of which are needed to such an extent as to really constitute an emergency?"

Section 90-402 (5) of the Code grants authority "to erect all needed buildings for the use of the city or town," and subsection 39, "To establish and erect calaboooses, bridewells, houses of correction and reform schools, and work-houses for the reformation and confinement of vagrant, idle and disorderly persons and persons convicted of violating any city or town ordinance, * * *" It may be well here also to note the provisions of subsection 40, which authorizes the use of the county jail by consent of the board of county commissioners. As we have already seen, authority is given to construct sewers. I note, however, your use of the word "immediate" in connection with the construction of the sewer and the jail.

Section 94-402 (67) authorizes a bond issue for such purposes, and §§ 90-2302 and 2305 provide, in the matter of sewers, for assessment and the issuing and selling of

sewer certificates. This probably provides the speediest and best method of raising the necessary funds.

Your final question presents a situation within which the inhabitants of a village desire to be incorporated as a city, as provided in § 90-220 of the Code, and you ask what may be done about it should the village board of trustees happen to be against the proposition and refuse to act in the premises.

From a reading of the section, it appears to be necessary in the procedure by which towns and villages are incorporated as cities for the governor to issue a proclamation, which he may do only after a sworn statement is filed with him made and executed by the chairman of the board of trustees. It also then becomes necessary for the trustees to organize the village into a city by dividing it into wards and to call an election for the election of a mayor and aldermen. The statute appears to be weak and various necessary steps to have been omitted. I know of no procedure by which the citizens could have standing in court to compel action by the board. As a practical question, however, it would seem that the matter is one which will have to be worked out by you people yourselves.

Trusting that the foregoing will be helpful to you in the matters in which you seem to be particularly interested, and assuring you that if my office can be of any further service to you people at any time you need only to call upon me, I beg to remain,