

Opinion No. 38-1922

March 25, 1938

BY: FRANK H. PATTON, Attorney General

TO: Mr. Garnett R. Burks City Attorney Socorro, New Mexico

{*224} Reference is made to our telephone conversation of March 24th and also to your letter of said date relative to the proposed water works bond issue of the City of Socorro and the failure to obtain the written consent to the holding of the election and the issuance of the bonds by one-half of the owners in value of the real estate situated within the boundaries of the municipality.

Provision for such consent is made by Section 90-1904 and this section, by reference, provides for the procedure for the issuance of bonds as {*225} outlined in Sections 90-2501 to 90-2507, inclusive, of the 1929 Compilation.

The question to be decided is whether or not such consent is mandatory and, if so, whether the failure to follow the statutory provision would be sufficient to void the election.

I find from a check of the authorities that the courts are very liberal in the interpretation of matters which are required to be done in connection with the issuance of bonds and the calling of elections therefor, and in many instances such preliminary steps have been construed to be directory rather than mandatory. Also, in many instances where there have been irregularities in the taking of preliminary steps the courts have been prone to hold that there have been substantial compliances with the statutory provisions and that such irregularities were not sufficient to void the proceedings.

Holdings of this type are particularly numerous insofar as notices of election are concerned. However, in the present instance we are not concerned with an irregularity in preliminary steps. On the other hand we are confronted with an actual failure to take such preliminary steps.

I find the following general statement in 44 C. J. page 1190, Section 4163:

"Before a municipal corporation is authorized to issue its bonds all acts which the legislature has required to be done as a prerequisite to such authority must be done and where the legislature has prescribed a particular manner of doing an act it must be done in the manner prescribed; there must be performance or fulfillment of all conditions precedent and conformity with legal requirements as to preliminary proceedings."

Giving particular consideration to the question of consent of a certain percentage of taxpayers or property owners, I find on page 1193 of 44 Corpus Juris, a statement which shows that this is a condition precedent to the issuance of the bonds and that

statutory requirements of this type are considered to be mandatory rather than directory and the author then states that unless these statutory requirements are complied with the bonds issued will be void, at least in the hands of those to whom they are issued, and it is intimated that this may be true even in the hands of innocent holders.

A statement to the same effect is found in 1 Jones Bonds and Bond Securities, 4th Edition, page 174, Section 192, with the additional comment that the filing of such petition or consent is essential to the jurisdiction of the governing body to act, and that since it is necessary as the authority for the governing bodies to act in calling the election it is a condition precedent to a valid election and the requirement is not merely directory.

In view of the authorities presented and the cases cited in support of the statements made by such authorities it is my opinion that the provisions of Section 90-1904, under consideration herein, and regarding consent of property owners, is mandatory rather than directory and that the obtaining of such consent is a condition precedent to the authority to call the election and that any election held when there has been a failure to obtain such consent would be void.