Opinion No. 60-48

March 15, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Clay Buchanan Director, N. M. Legislative Council P. O. Box 1651 Santa Fe, New Mexico

QUESTION

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1. Was Sec. 15-37-3, N.M.S.A., 1953 Comp. (prior to the 1959 amendment) requiring division into districts unconstitutional under the Constitution as it exists at the present time?

2. If the proposed amendment receives the approval of the people, could the legislature in the future require districting of counties as well as requiring the commissioners to reside in the districts?

3. Would it be possible for a county to avoid a law requiring commissioners to reside in commissioner districts by choosing not to district or by abolishing existing districts?

CONCLUSIONS

1. No.

2. Yes.

3. No, except "H" class counties.

OPINION

*{*402}* **ANALYSIS**

Your first question asks whether Sec. 15-37-3 as it read before the 1959 legislature attempted to amend it is unconstitutional. This section only provides that counties shall be districted and that county commissioners must be elected from each district even though they are elected by a vote of the entire county and need not be residents of the district from which they are elected. This is so on the basis of the rationale of **Gibbany v. Ford,** 29 N.M. 621, 225 Pac. 577, since any residency requirement other than that set out in the Constitution is unconstitutional and void.

We are of the opinion that Sec. 15-37-3, supra, as it stood before the attempted 1959 amendment and as it now stands is not unconstitutional. There is nothing in the

Constitution which prohibits the legislature from providing for districts in counties. The only objection made on the basis of **Gibbany v. Ford,** supra, was that in addition to that requirement the legislature attempted to require commissioners to be residents of these districts. This last requirement, of course, violated Art. V, Sec. 13 of the New Mexico Constitution and is, therefore, unconstitutional. There is however, no constitutional objection to counties being districted when no residence requirement *{*403}* is made. The answer to your first question is that Sec. 15-37-3 is not unconstitutional and is the effective statute on this subject at present.

In light of our discussion under your first question, it is clear that the Constitution may be amended to allow the legislature to district counties. This would, however, be a vain act since without the constitutional amendment the legislature presently has the power to and has districted counties. If the proposed constitutional amendment (Constitutional Amendment No. 8) is passed by the people at the next election, we are of the opinion that the legislature will then have the power to also provide that commissioners must be residents of the districts from which they are elected. With the passage of the amendment, the objection under the rationale of **Gibbany v. Ford,** supra, will have been removed. It should be noted, however, that it will require a new enactment by the legislature to accomplish this. The 1959 amendment to Sec. 15-37-3, supra, will not suffice. See Opinion of the Attorney General No. 60-25.

Your third question is answered generally in the negative. Since Sec. 15-37-3, supra, as it existed before the attempted 1959 amendment is the law on this subject today, counties must be districted. The statute uses the word "shall" which is mandatory rather than permissive. The only exception to this holding is in the case of "H" class counties which have been given permission by the legislature to elect their commissioners at large. See Opinions of the Attorney General Nos. 59-188 and 60-25.

By: Boston E. Witt

Assistant Attorney General