

Opinion No. 53-5643

January 22, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. L. J. Mavetty Assistant District Attorney Third Judicial District Las Cruces, New Mexico

{*28} This is in reply to your letter of January 8, 1953, in which you request the opinion of this office as to the apparent conflict between Section 14-3616 and Section 56-306, N.M.S.A. As you point out, Section 14-3616 requires that the vote in sewer or water board bond elections be cast on separate ballots, which shall be "deposited in a separate ballot box". Section 56-366 (Laws of 1951 Ch. 192, Sec. 3) relating to the adoption of voting machines, provides that such machines shall be used in all elections, including bond elections, in those counties or parts thereof where voting machines have been adopted. You ask in particular whether in a Municipality where voting machines have been adopted, it will be permissible to cast the vote on the bond question on a separate voting machine rather than on separate ballots, to be placed in a separate ballot box.

It is noted that Article 9, Section 12, New Mexico Constitution requires that in all municipal bond elections, the ballots on the bond question shall be placed in a separate ballot box. If it were not for this constitutional provision, any conflict which arose between Sections 14-3616 and 56-366 would be resolved in favor of Section 56-366, it being the later expression of the legislative will. However, in view of the existence of Article 9, Section 12, the question to be resolved is whether that portion of 56-366 relating to bond elections is consistent with Article 9, Section 12 and whether voting machines may be utilized in municipal bond elections.

In our opinion, the reason for the adoption of that portion of Article {*29} 9, Section 12 relating to the use of a separate ballot box in municipal bond elections is readily apparent. In order to be able to vote in any municipal bond election, it is the universal requirement that the voters shall have paid their property tax during the preceding year. Article 9, Section 12. This requirement does not exist for voters in elections for public officers. Article 7, Section 1. It was necessary to provide, therefore, that during the course of the regular municipal elections, when bond elections must likewise be held, that only those voters who meet the necessary property tax qualifications may vote on the bond question. Hence the provision was included in Article 9, Section 12, and in individual bond statutes such as Section 14-3616, that voting on the bond question shall be by separate ballot to be placed in a separate ballot box.

It is conceded that the spirit of Article 9, Section 12 could be followed by the utilization of a separate voting machine for the bond election. However, this section of the Constitution does provide that a "separate ballot box" shall be used, and it is questionable whether in construing this language it would be wise to depart from the

sense of the words actually used. This office is mindful of the great weight of authority which holds that statutes which authorize the use of voting machines in elections do not violate those Constitutional provisions, such as Article 7, Section 5, N.M. Constitution, which provides that all elections shall be by ballot. See Annotation **66 ALR 865; Mooney vs. Phillips 118 SW2d 224; Norris vs. Mayor and City Council of Baltimore 192 A 531; Reynolds vs. Dallas County 203 SW 2d 320; State vs. Keating 163 P 1156; State vs. Green 168 NE 131, 66 ALR 849.** Since these foregoing authorities have held that a voting machine meets the Constitutional concept of a "ballot", it could be argued with some logic that their reasoning may be carried one step further to hold that the tabulation of a voting machine would satisfy our Constitutional requirement of a "separate ballot box" in municipal bond elections. However, in our opinion it would be unwise to carry the analogy this far at the present time.

Firstly, it must be noted that the New Mexico Supreme Court has not even passed upon the question of whether a voting machine is a "ballot" within the language of Article 7, Section 5, and it is possible that if and when this question arises, our Court may choose to follow the minority or Massachusetts rather than the majority rule represented by the cases cited in the foregoing paragraph. If our Supreme Court should take the minority view, a bond issue initiated by bond election where separate voting machines were used rather than separate ballot boxes, could quite probably be voided. Secondly, it must be borne in mind that municipal bond elections and subsequent bonds issued often involve many hundreds of thousands of dollars, and it is therefore wise in our opinion, to follow the strict letter of any Constitutional provision relating to such elections.

It is therefore our opinion that until there is a definite pronouncement from the Supreme Court of New Mexico on the question of voting machines, that portion of 56-366 relating to the use of voting machines in bond elections should be regarded as inconsistent with Article 9, Section 12, and that separate ballot boxes be used in all municipal bond elections.

We trust that this opinion has answered all your questions on this subject.

By: W. F. Kitts

Assist. Attorney General