Opinion No. 59-188

November 13, 1959

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

TO: The Honorable Thomas R. Roberts Representative, Los Alamos County 1217 - 6th Street Los Alamos, New Mexico

QUESTION

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Is the last proviso of § 15-37-3, N.M.S.A., 1953 Compilation (P.S.), operative so as to allow H class counties to elect their county commissioners at large?

CONCLUSION

Yes.

OPINION

*{*291}* **ANALYSIS**

The question to which you refer arises because of the doubt cast upon the constitutionality of the section you cite due to its amendment by Chapter 106, Laws 1959.

Section 15-37-3, N.M.S.A., 1953 Compilation (P.S.), as amended, reads as follows:

"15-37-3. ELECTION BY DISTRICTS -- PERIOD FOR DISTRICTING -- ELECTION AT LARGE. -- Each county may be divided by the first board of commissioners holding office, into three compact districts, as equal in proportion to population as possible, numbered respectively by one, two and three, and if so divided shall not be subject to alteration oftener than once in two years, and if so divided one commissioner shall be elected from each such district by the votes of the whole county and shall be a resident of the district from which he is elected. Such division of the county into three districts if such division is made shall be made within six months after the first board of commissioners of the county have been elected to office; provided that districts as they existed on January 1, 1959, shall not be changed until after January 1, 1961. **Provided, however, that any board of county commissioners of counties of the H class may by resolution adopted in any calendar year in which no election of county commissioners is to be held, provide that the three county commissioners for said county shall be elected at large and without division of the county into districts, and such resolution shall not be subject to repeal, revision or**

amendment for a period of two years following the date of its adoption." (Emphasis supplied)

Chapter 106 amended this section to provide for an additional qualification for a person holding the office of county commissioner. That additional requirement is that a commissioner must be a resident of the district from which he is elected. Argument has been advanced that this chapter is in violation of the Constitution of New Mexico by virtue of the holding in **Gibbany v. Ford,** 29 N.M. 621, 225 P. 577. Assuming arguendo -- we do not so hold -- that the residency requirement is unconstitutional, it is still our opinion that the second and last proviso of Chapter 106 is effective and does not fall with the remainder of Chapter 106.

While it is the general rule that a proviso modifies or restricts only that part of a statute which immediately precedes it and therefore would fall when that part of the statute falls, there is an exception to this rule to the effect that the mere fact that a sentence begins "provided" does *{*292}* not of necessity make it a proviso and that it may, in fact, be used in the disjunctive and contain new matter rather than an exception to what has gone before. See **Burlingham v. Crouse,** 228 U.S. 459; **United States v. Babbit,** 1 Black (U.S.) 55; **State v. Shaw,** 38 Del. 352, 192 A. 610, and generally, 50 Am. Jur. 458 and 59 C.J.S. 1090.

It is our opinion that this exception applies in this instance. Even if a court were to strike the residency requirement in the statute, the last proviso has a substantive meaning apart from that. The statute, before amendment in 1959, provided for commissioner districts. It did not provide for residency nor did it allow commissioners in H class counties to run at large. The amendment by Chapter 106 then attempted two things. It first attempted to require that commissioners be residents of the districts from which they are elected. It next attempted to allow as a substantive enactment H class county commissioners to run at large. While the Legislature chose the unfortunate manner of a proviso to enact this last amendment, it is evident that it was, in fact, a substantive change in the whole statute rather than a mere exception or modifier of the residency requirement provided for in the same chapter. This proviso then would not fall if the residency requirement were to be ruled unconstitutional since it is a substantive enactment notwithstanding the form in which it appears. It is a cardinal rule of construction needing no citation that only that part of a statute which is held unconstitutional becomes inoperative and the portion of the statute which is severable and unaffected can stand alone.

By: Boston E. Witt

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