

## Opinion No. 64-117

September 8, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General James V. Noble, Assistant Attorney General

**TO:** Jean L. Dabney, County Clerk, County Court House, Los Alamos, New Mexico

### QUESTION

#### QUESTIONS

1. If an Ordinance is posted as required by Section 15-36-22, for two consecutive weeks beginning on June 18, 1964, what is the earliest effective date of this Ordinance?
2. If an Ordinance is published as required by Section 15-36-22, once on June 25, 1964, once on July 2, 1964, what is the earliest effective date of this Ordinance?
3. If an Ordinance was posted as required by Section 15-36-22, N.M.S.A., 1953 Compilation, except that through misinterpretation of this section the 15 days of waiting required after posting for two consecutive weeks was not adhered to, would one then assume that this Ordinance is not valid, if not, what additional requirements are needed to assure validity?
4. If a person omitted either the first or second posting or publishing of an Ordinance as required by Section 15-36-18 and Section 15-36-22, could this Ordinance still be enforced?

#### CONCLUSIONS

See analysis.

### OPINION

#### ANALYSIS

New Mexico Session Laws, 1955, Chapter 4 governs the enactment of ordinances of H Class counties. Los Alamos County is an H Class County. A **portion** of that chapter is printed as Sections 15-36-13 to 15-36-23, incl., N.M.S.A., 1953 Compilation (P.S.). The portions here particularly in point are Sections 15-36-18 and 15-36-22, supra. Section 15-36-18 reads as follows:

"H class county ordinances may be proposed by any member of the board of commissioners but shall **not be submitted** to the board for final passage until a majority of the members have directed publication of such ordinances either by printing in a legal

newspaper at least **once** a week for **two (2) successive weeks previous to the meeting** of the board at which such ordinances may be proposed for final passage **or by posting** in two (2) public places **within each precinct** of the county for a period of **not less than fifteen (15) days** previous to the meeting of the board at which such ordinances may be proposed for final passage. The date of the meeting at which published ordinance is to be submitted for final passage shall be included in the publication thereof." (Emphasis added).

The second section being considered, 15-36-22, supra, reads as follows:

"All ordinances, as soon as may be after their passage, shall be recorded in a book kept for that purpose and may be authenticated by the signature of the county clerk; the text of any ordinances shall be published either in a legal newspaper once each week for two (2) successive weeks and the **last date of publication** shall be not **less than fifteen (15) nor more than thirty (30) days prior** to the effective date of the ordinance as **set forth therein**. It shall be deemed a sufficient defense of any suit or prosecution to show that **no such publication** by printing or posting **was made**. No ordinance **shall take effect** nor be applicable **until at least fifteen (15) days** after the last date of publication by printing or posting as required herein. The book of ordinances herein provided for shall be taken and considered in all courts of this state as prima facie evidence that such ordinances have been published as provided by law." (Emphasis added).

Under the provisions of Chapter 4, New Mexico Session Laws, 1955, and H Class county, in addition to having the powers of other counties, also has the powers of incorporated municipalities. See Attorney General Opinions No. 6363, 1955-56 appearing at page 328 and No. 63-66, 1963-64 dated June 13, 1963 and as yet unpublished.

In view of the language of the sections above cited and quoted, certain ambiguities appear which require a construction of the statutory language. **Southerland Statutory Construction**, (3rd Ed.), Vol. 2, Sections 4502 and 4503, pp. 316 et seq.

The statutes here require two publications, by printing or posting, of an ordinance before it takes effect. The first is prior to its first enactment and the second prior to its effective date. It must be supposed that the first such publication is designed to advise the public so that they may be heard on the subject of its passage and the second, upon passage, to inform the public that henceforth they will be governed by the ordinance and must conduct themselves accordingly. **Southerland, Statutory Construction**, (3rd Ed.), Vol. 1, p. 270, Section 1605.

The question of time is considered in Attorney General's Opinion No. 64-91, dated July 13, 1964, as yet unpublished. This opinion quotes from the case of **Garcia v. J.C. Penny Co.**, 52 N.M. 410, 200 P.2d 372 to the effect that, insofar as legislation is concerned it is the rule in this state that the day from which the lapse of time is to be computed is not counted and the day on which the event is to occur is to be counted in

computing the effective date of legislation. This follows the general rule. **Southerland, Statutory Construction**, (3rd Ed. Vol. 1, 279, Section 1612, and Section 1-2-2 (7), N.M.S.A., 1953 Compilation.

The first and second question then require a construction of Section 15-36-18, *supra*, particularly to harmonize the language concerning publication by printing and publication by posting. This may properly be done. The language concerning publication by printing states in substance that there shall be 2 successive publications, one each week prior to the meeting. The fifteen day requirement does not specifically appear in this portion of the statute.

The provisions concerning publication by posting require posting for a period of not less than 15 days prior to the meeting. Thus, although there is no date prior to the meeting when the last publication by printing must fall; publication by posting must have been maintained for at least 15 days before the meeting. It is the general rule that a requirement of a publication once a week for two consecutive weeks means that the first publication must be at least 14 days prior to the event and that seven days must elapse between publications. **King County v. State of Seattle**, 109 P.2d 530, 7 Wash. 2d 236; **In re Wright's Will**, 120 N.E. 725, 224 N.Y. 293, **City of Albany v. Goodman**, 197 N.Y. S 739, 203. App. Div. 530. Since the first day is not counted and since two publications are required seven days apart, and considering the language of the balance of the section, the first publication by printing would have to appear at least fifteen days prior to the date of the meeting at which the ordinance so published is to be considered. Likewise the publication by posting would have to have commenced at least sixteen days prior to the date of the meeting. Publication by either method must contain therein the date of the proposed meeting.

Following the meeting at which the ordinance is considered for final passage and passed, the ordinance must again be published under the provisions of Section 15-36-22, *supra*.

Following the rules above set forth one publication by printing could conceivably be had on the day following the passage of the ordinance and one the following week at least seven days later. Not counting the date of the last publication at least fifteen days must then elapse before the ordinance may become effective. **Southerland, Statutory Construction**, (3rd Ed.), Vol. 1 P 279, Sec. 1612. The publication by posting would be the same as that by printing. Assuming an ordinance was passed on June 17, 1964, the first publication by printing would have had to have been made, not later than June 2nd. Following passage and assuming a publication by printing or posting on June 18th, the second printing would fall on June 25th and the earliest date the ordinance could take effect would be fifteen days thereafter. Not counting the day of June 25th but counting the last day the ordinance could become effective on July 10, 1964.

The same time computations would apply if the publication was by posting commencing June 18th. Note, however, that **two** postings are to be made.

Your third question concerns itself with whether a failure to wait fifteen days after the last publication or posting of an ordinance duly passed affects the validity of the ordinance.

Section 15-36-22, *supra*, provides in substance that the last publication shall take place at least fifteen but not more than thirty days prior to the effective date of the ordinance. This language is emphasized by the language in the section which follows and which provides that no ordinance shall be effective in less than fifteen days after the last publication. This requirement goes to the question of enforcement of the ordinance and does not purport to affect the validity of the ordinance. It is conceivable that an ordinance could be passed which would contain requirements or language that would render the entire ordinance void if this time requirement was not met and this opinion does not purport to pass on such a question. It is apparent that a failure to correctly interpret the waiting period for the ordinance to become valid would not have the effect of rendering the entire ordinance void under ordinary circumstances. See Opinion of the Attorney General 64-91, *supra*. However **it could not be enforced** until the necessary period had elapsed.

Finally you raise the question of the validity of an ordinance passed if a part of the publication requirements have not been met. The assumption is here made that the presumption of regularity is or can be overcome.

It is stated in **McQuillan**, Vol. V, Section 16.28, p. 639 as follows:

"In any event, the ordinance must be passed by the vote presented, and it must be published, posted, or notice of it otherwise given as required by law."

In many cases it is required that ordinances must be adopted at a meeting subsequent to the one at which introduced. This requirement is to secure public notice and to prevent undue haste and is usually considered as mandatory. **McQuillan, Municipal Corporations**, Vol. V, Section 16.30, p. 213. The same compelling reasons appear to be present here under the publication requirements prior to passage of the ordinance. It is stated in **McQuillan, Municipal Corporations**, Vol. V, Section 16.78 et seq., as follows:

"While not always, provisions respecting publication and sufficient notice generally are mandatory and failure to publish or give notice, or to do so substantially in the manner prescribed, renders the ordinance or resolution void."

The text later states that the time, place and manner of publication must be substantially followed but that slight irregularities will not invalidate an ordinance. The language employed in Section 15-36-18, *supra*, contains mandatory language and is usually construed as mandatory. **Central Construction Co. v. Lexington**, 162 Ky. 286, 172 S.W. 648; **Morris v. City Council of Augusta**, 201 Ga. 960, 40 S.E. 2d 710; **Application of Sedillo**, 66 N.M. 267, 347 P.2d 162. The same mandatory language appearing in both Section 15-36-18 and Section 15-36-22 the publication requirements

of both sections must be observed in all substantial particulars including the times of publication. As shown above an omission of a publication of an ordinance would render the enactment of the ordinance void and it could not be enforced.