

## Opinion No. 64-87

June 24, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

**TO:** Mr. Eli Canady, Superintendent, Loving Municipal School District No. 10, Loving, New Mexico

### QUESTION

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Are purchasers of real property under a real estate contract which has been placed in escrow with instructions to the escrow agent to deliver the warranty deed to said property to the purchasers upon payment of the full contract price "owners of real estate" within the meaning of Article IX, Section 11 of the Constitution of New Mexico and therefore, entitled to vote in a municipal school bond election?

#### CONCLUSION

Yes.

### OPINION

#### ANALYSIS

Under Article IX, Section 11 of the New Mexico State Constitution the persons who may vote at a school bond election are described as follows:

"No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to a vote of such qualified electors of the district **as are owners of real estate within such school district**, and a majority of those voting in favor of creating such debt . . ." (Emphasis supplied).

In our opinion the term "owners of real estate within such school district" as used in the above quoted constitutional provision includes purchasers of real estate under a real estate contract which has created an escrow arrangement whereby a warranty deed to such realty will be delivered to the purchasers of the realty upon payment of the full contract price. The New Mexico Supreme Court in the case of **Mesich v. Board of County Commissioners of McKinley County**, 46 N.M. 412, 129 P2d 974, held that in connection with eminent domain proceedings the term "owners" included all persons who have an interest or estate in the property affected. The court further noted as follows:

"In law the effect of a contract whereby the owner agrees to sell and another agrees to purchase a designated tract of land, the vendor remains the owner of the legal title to the land: he holds the legal title, 1 Pomeroy's Equity Jurisprudence, § 367. **But, in equity the vendee is held to have acquired the property in the land and the vendor as having acquired the property in the price of it. The vendee is looked upon and treated as the owner of the land and the equitable estate thereof as having vested in him.** He may convey it or encumber it, devise it by will and on his death it descends to his heirs and not to his administrators. The legal title is held by the vendor as a naked trust for the vendee and any conveyance by him to one not a bona fide purchaser for value is ineffective to pass title. The vendee must bear all accidental injuries or losses done to the soil or appurtenances, by the operations of nature or third parties, and is entitled to recover all damages for injury thereto. The vendor, before payment, holds the title as trustee for security only." (Emphasis supplied).

In **Freidenbloom v. Pecos Valley Lumber Co.**, 35 N.M. 154, 290 P. 797, the New Mexico Supreme Court also recognized that the term "owner" included the conditional vendee in possession of real estate. The court there stated that the term "owner":

". . . does not necessarily refer to the holder of the legal title to the property improved. It may have reference to one whose interest is less than a fee -- simple estate, such as a lessee or a conditional vendee in possession."

In addition to being an "owner" of real estate in the school district wherein a school district bond election is to be held, it should be noted that a **qualified elector** in such bond election also necessitates that the person be over the age of twenty-one years, have resided in New Mexico twelve months, in the county ninety days and in the precinct in which he offers to vote thirty days, next preceding the election. Excepted from the list of qualified voters are "idiots, insane persons, persons convicted of a felonious or infamous crime unless restored to political rights." See Article VII, Section 1, New Mexico State Constitution. We are including herewith, also, for your information a recent opinion of this office on related problems involving school bond elections, No. 64-27 dated March 9, 1964.