

## Opinion No. 79-35

October 4, 1979

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Jill Z. Cooper, Deputy Attorney General

**TO:** Mr. Joe Diaz, County Attorney, County of Bernalillo, 620 Lomas, N.W.,  
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### COUNTIES

Absent specific constitutional or statutory authority, counties may not condition the adoption of an ordinance on the approval of the voters by referendum.

### QUESTIONS

Absent specific statutory authority, may a county condition the adoption of an ordinance intended to protect the health and welfare of the citizens on the approval of the voters by referendum?

### CONCLUSIONS

No.

### ANALYSIS

Referendum has been generally defined as the right of the people to have an act passed by a legislative body submitted for their approval or rejection. See 5 **McQuillin, Municipal Corporations** (3d Ed. 1969), Section 16.53; **Opinion of the Justices to the House of Representatives**, 370 Mass. 651, 352 N.E.2d 678 (1976). "The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." **Eastlake v. Forest City Enterprises, Inc.**, 426 U.S. 668, 673, 49 L. Ed 2d 132, 96 S. Ct. 2358 (1976).

### OPINION

It has been well-stated, however, that in no event can a municipality or a county submit an ordinance to a vote of electors without legal authorization from the constitution itself or from a provision of a charter or statute. **McQuillin, supra**, Section 16.49.

In establishing legislative bodies, the people may reserve for themselves the power to approve or reject legislative acts. Article IV Section 1 of the New Mexico Constitution operates as such a reservation of power to be exercised with respect to certain acts of

the state legislature. Although once reserved by the people, this power "is to be given a liberal construction to effectuate the policy thereby adopted," **City Commission of Albuquerque v. State**, 75 N.M. 438, 443, 405 P.2d 924 (1965), it is nevertheless limited. By its own terms, Article IV, Section 1 refers only to laws "enacted by the legislature." It does not, therefore, extend to ordinances enacted by a board of county commissioners. See **State ex rel. Snyder v. Board of Elections of Lucas County**, 78 Ohio App. 144, 69 N.E.2d 634 (1946). As county commissions are now established, no power of referendum has been reserved for the people to reject or approve county ordinances. Moreover, Article IV Section 1 does not, in any event, extend the power of referendum to "laws providing for the public peace, health or safety." See **State ex rel. Hughes v. Cleveland**, 47 N.M. 230, 141 P.2d 192 (1943).

{\*86} In addition to powers reserved for the people by constitution or charter, referendum may also be authorized where the legislature directs that a given act not take effect until or unless approved by a vote of the electorate. See **Ritchmount Partnership v. Board of Supervisors of Elections of Anne Arundel County**, 283 Md. 43, 388 A.2d 523 (1978). Legislatively directed referendum is, however, limited to those instances where there is an express grant of authority and it may not be broadened by implication. See **Prechel v. City of Monroe**, 40 Wis. 2d 231, 161 N.W.2d 373 (1968). This is consistent with the basic principle which holds that counties, like non-home rule municipalities, are creations of the legislature and may exercise only such powers as are expressly granted them by law or necessarily implied therefrom. See, e.g., **El Dorado at Santa Fe, Inc. v. Board of County Commissioners of Santa Fe County**, 89 N.M. 313, 551 P.2d 1360 (1976).

Sections 4-37-1 et seq. NMSA 1978, which generally govern the adoption of county ordinances, neither require nor prohibit the submission of a proposed ordinance for voter approval. Compare, e.g., Section 7-20A-3 NMSA 1978 [requiring the approval of the voters before an ordinance imposing county fire protection excise tax may go into effect]; Section 7-24A-6 NMSA 1978 [requiring the approval of the voters before an ordinance imposing a county gasoline tax may go into effect]; Section 7-21-4 NMSA 1978 [requiring the approval of the voters before an ordinance imposing a county sales tax may go into effect]; Section 72-4-11 NMSA 1978 [election for water revenue bonds specifically not required]. There is no specific statutory authority enabling a county commission to submit a proposed ordinance for the protection of the health and welfare of its citizens for the approval of the voters.

In a similar situation, where a city council, on its own initiative, attempted to submit a proposed ordinance for voter approval, an Arizona court held that the resolution calling for the referendum was void. **City of Scottsdale v. Superior Court in and for Maricopa County**, 103 Ariz. 204, 439 P.2d 290 (1968). The Court held that the council was not "authorized to voluntarily refer matters before it to the electorate" and that "the voluntary submission of the ordinance by the council to a special vote of the people . . . was wholly without authority and outside the delegated powers of the city council." 439 P.2d 290 at 292.

Accordingly, in the absence of a constitutional reservation of the right of the people to hold referendum on county ordinances, and in the absence of a specific statutory authority requiring a referendum on ordinances enacted for the public health and welfare, there is no authority for a county to call voluntary referendum. Should such a referendum be held, it would not, regardless of its outcome, affect the adoption or validity of the ordinance.

**ATTORNEY GENERAL**

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