

Opinion No. 100

Cities and Towns, Classification of—
Census—Enumeration.

Held: The classification of a city cannot be changed without a census having first been made in compliance with the provisions of Section 4960, Revised Codes of Montana, 1935, and "direct enumeration" as used in that section means an accurate count of the population by the direct counting of the individual inhabitants of the city.

January 28, 1948

Mr. W. A. Brown
State Examiner
State Capitol
Helena, Montana

Attention:

Mr. A. M. Johnson, First
Assistant State Examiner

Dear Mr. Brown:

You have asked my opinion on the legality of a resolution of the City of

Kalispell, raising it from a second class to a first class city. The particular point in question is the meaning of the term "direct enumeration" as used in Section 4960, Revised Codes of Montana, 1935.

Section 4960, Revised Codes of Montana, 1935, provides:

"Basis of classification. The census taken under the direction of Congress of the United States in the year eighteen hundred and ninety, and every ten years thereafter, shall be the basis upon which the respective populations of said municipal corporations shall be determined, unless a **direct enumeration** of the inhabitants thereof be made by the state or municipal corporation, in which case such **direct enumeration** constitutes such basis." (Emphasis mine).

Webster's International Dictionary gives the definition of "enumeration" as follows:

"1. Act of enumerating(as in counting up a number or specifying in a list.

"2. An itemised list or catalogue,, a census."

This would indicate that enumeration is more than guessing at a sum but is a listing of individual items to arrive at the total number.

Black's Law Dictionary, page 669, defines enumerated as follows:

"This term is often used in law as equivalent to 'mentioned specifically', 'designated', or 'expressly named or granted'; as in speaking of 'enumerated' governmental powers, items of property, or articles in a tariff schedule. See *Bloomer v. Todd*, 3 Wash. T. 599, 19 P. 135, 1 L.R.A. 111; . . . *San Francisco v. Pennie*, 93 Cal. 465, 29 P. 66. . . ."

The term "enumerate" is defined in *City and County of San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66, 67, as follows:

"The word 'enumerate' is very frequently used with the meaning of 'designate', or 'specifically mentioned'. Lexicographers give as definitions of the word, 'to mention

in detail', or 'reckon up singly'; 'to tell'; 'to recount'; 'to relate'."

In the statute in question, the Montana legislature went farther and required "direct enumeration." This is also significant. "Direct" is defined in Black's Law Dictionary, page 580, as:

"Immediate; proximate; by the shortest course; without circuitry; operating by an immediate connection or relation, instead of operating through a medium; the opposite of indirect."

Thus, taking the language of the statute in its usual and proper meaning, a census, to be the basis of classification of a city, must be a listing of the inhabitants and this must be done by going directly to the people for the county and cannot be made "through a medium" of some other list or source.

"When a power is conferred upon a municipal corporation and the mode in which it is to be exercised is prescribed, by the statute or an independent Act, such procedural method must be followed. (Carlson v. City of Helena, 39 Mont. 82, 17 Ann. Cas. 1233, 102 Pac. 39; Shepard v. City of Missoula, 49 Mont. 269, 270, 141 Pac. 544; Stadler v. City of Helena, 46 Mont. 128, 139, 127 Pac. 454, 458.)" State v. Dryburgh, 62 Mont. 36, 47.

Section 4960 provides a method of changing the classification of a city. That is the only manner in which the classification can be changed. The classification is to be based on a census and in order to qualify under the act, the census must be either the federal census or a "direct enumeration of the inhabitants thereof made by the state or municipal corporation." Figures arrived at in any other manner do not comply with the statutory requirements.

A city council does not have power to pass a resolution changing the classification of a city, based on population figures which do not comply with the statutory requirements set down by the legislature, and such resolutions is of no effect. The California Court, in a case almost identical on the facts, Cothran v. Cook,

146 Cal. 468, 80 Pac. 699, had this to say:

"... but we have not been cited to any statutory provision under which a board of supervisors may determine or declare by its ordinance the population of a township; and it is very clear that without such authority an ordinance of that nature is entitled to no more consideration as evidence of the population of such township than would be a similar declaration by any other body of individuals."

Therefore, it is my opinion the classification of a city cannot be changed without a census having first been made in compliance with the provisions of Section 4960, Revised Codes of Montana, 1935, and that "direct enumeration" as used in that section means an accurate count of the population by the direct counting of the individual inhabitants of the city.

Sincerely yours,
R. V. BOTTMLEY,
Attorney General