

Opinion No. 58-230

December 10, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
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TO: Stanley J. Leland, M.D., Director, New Mexico Department of Public Health, P. O.
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QUESTION

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Does the enabling legislation for the Department of Public Health authorize the promulgation and enforcement of regulations as concern the construction of swimming pools which will be used in conjunction with the operation of a motel?

CONCLUSION

Yes

OPINION

ANALYSIS

It appears from the letter of inquiry and from other correspondence received relative thereto that the Department of Public Health is attempting to enforce its regulations as concern the minimum depth of swimming pools. Specifically, we are informed that a motel owner has contracted for the construction of a swimming pool to be used as a facility of the motel and that during the progress of work, it has been determined to be impractical to comply with Department regulations establishing a minimum depth of 8 feet, 6 inches at the deepest part, or diving end of the pool. It is contended by the owner that the considered regulation, Regulation III-A, Regulations Governing the Sanitary Design, Construction and Operation of Swimming Pools, adopted December 19, 1953, are ultra vires and capricious.

Looking first to the law provided we find by Section 12-1-4, N.M.S.A., 1953 Compilation, that:

"The state department shall be responsible for the administration of the public health activities of the state as hereinafter provided, and in that respect shall:

...

(2) Investigate, control and abate the causes of diseases, especially epidemics, sources of mortality and effects of localities, employment and other conditions of public health.

...

(4) Regulate the sanitation and conduct insofar as it affects health of schools, hospitals and sanatoria, maternity homes, asylums, orphanages, hotels, restaurants, lodging-houses and tenements, factories, workshops, industrial and labor camps, recreational resorts and camps, barber shops, swimming pools and public baths, places of public amusement, and public conveyances and stations.

...

(7) Abate nuisances endangering the public health.

...

(19) Establish, maintain and enforce such rules and regulations as may be necessary to carry out the intent of this act and to publish same."

Section 12-1-13 additionally provides that:

"In addition to the powers and duties already delegated by law to the state board of public health, the said board shall have the power of regulation, insofar as **the protection of public health** is concerned, of plumbing, drainage, water supply, sewage and waste disposal, lighting, heating, ventilation and sanitation of public buildings, schools, hospitals, sanatoria, maternity homes, asylums, orphanages, hotels, apartment houses, tourist camps or tourist courts, restaurant, lodging-houses, tenements, factories, workshops, industrial and labor camps, recreational resorts, swimming pools and public baths, theaters, churches, places of public amusement, public conveyances and stations or any other place or buildings, public or private, which caters to the public or holds itself out as a place where rooming or eating accommodations are available for hire or for pay." (Emphasis ours).

And also by Section 12-1-14:

"The state board of public health is hereby authorized to adopt and enforce necessary rules and regulations to carry out the intent of this act (12-1-13 to 12-1-17) and to publish the same."

Generally speaking, statutes delegating "power to enact and enforce health regulations are to be liberally construed in order to effectuate the purpose of their enactment." 25 Am. Jur. 291.

With reference to the subject of regulating the construction of buildings and structures so as to prevent or remedy unhealthful or unsafe conditions, 39 C.J.S. 839 presents the following rule:

"The legislature may, either by direct provision or indirectly through local authorities, prescribe regulations to prevent or remedy unhealthful or unsafe conditions of buildings or structures, as for example, regulations as to the mode of construction; and it has been held that such regulations are not rendered invalid by showing that they are not based on health considerations. The regulations imposed must not be unreasonable; and regulations with which it is impossible safely to comply are unreasonable, as are regulations which single out a class of persons or things and arbitrarily impose burdens on them not applying to others within the same general class."

In keeping with the rules afore expressed, Attorney General's Opinion No. 1696, June 30, 1937, as concerned the Department's authority to close school buildings because they were not structurally safe pointed out that:

"True, Chapter 39, supra, does not **expressly** authorize the State Department to close a public building merely because it may be structurally unsafe. However, here we are dealing with a public school occupied by children and it would seem absurd to strictly construe the act as meaning that the State Department cannot close a school merely because the building is structurally unsafe, and so permit children to undergo the hazards of being either killed or crippled for life. In other words, it hardly seems possible that the legislature intended that all the State Department should do is to see that the children be physically sound when the walls of a dilapidated school fall on them.

Under subsection (7) above the State Department is given authority to abate nuisances endangering public health. Clearly, a school that is structurally unsafe is a nuisance and at least indirectly, I should think, endangers public health, at least you might have a health problem on your hands should the structure collapse."

Accordingly, it is our opinion that the regulation herein considered is fully within the intended area of responsibility imposed is fully within the intended area on the Department of Public Health, and further, we find no suggestion of unreasonableness or capriciousness in the promulgation thereof.