

Opinion No. 69-103

September 3, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III,
Assistant Attorney General

TO: Board of County Commissioners, Dona Ana County, Dona Ana County
Courthouse, Las Cruces, New Mexico 88001

QUESTIONS

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1. May the county road departments perform road work for:

- (a) Private persons;
- (b) Non-profit charitable institutions;
- (c) Municipal corporations;
- (e) United States government agencies?

CONCLUSIONS

- 1. (a) No;
- (b) Yes, under certain circumstances;
- (c) Yes;
- (d) Yes;
- (e) No, but see analysis.

OPINION

{*163} ANALYSIS

According to the overwhelming weight of authority, a county is merely a government unit of the state and possesses only such powers as are expressly or impliedly {*164} conferred upon it by the constitutional provisions or legislative enactments. See **Mountain States Tel. & Tel. Co. v. Town of Belen**, 56 N.M. 415, 420-24, 244 P.2d 1112 (1952); See generally, 20 CJS, Counties § 49, p. 802, 79.

With regard to all five situations listed above, it is clear that there is no grant of specific authority for the county to do road work other than for the maintenance of its own roads, highways and bridges. See Section 55-3-1, N.M.S.A., 1953 Compilation. If the power to do road work for other than county roads is to be implied it must be from an interpretation of the constitution, the general powers granted to the counties or other statutes. Section 15-36-1, provides that:

"Each organized county in this state shall be a body corporate and politic, and as such shall be empowered for the following purposes:

First. To sue and be sued.

Second. To purchase and hold real and personal property for the use of the county.

Third. To sell and convey any real or personal estate owned by the county and make such order respecting the same as may be deemed conducive to the interests of the inhabitants.

Fourth. To make all contracts and do all other acts in reference to the property and concerns necessary to the exercise of its corporate or administrative powers.

Fifth. To exercise such other additional powers as may be specially conferred by law."

Performing services with the use of county road equipment for private persons is clearly engaging in a private enterprise and is a proprietary rather than a governmental activity, and was so held by the Supreme Court of Arizona in litigation arising out of an accident involving a county road grader performing services for a private individual. **Hartford Accident and Indemnity Co. v. Wainscott**, 41 Ariz. 439, 19 P.2d 328 (1933). See also **Hayes v. Town of Cedar Grove**, 126 W.Va. 828, 30 S.E. 2d 726 (1944). Under the general rule, normally proprietary functions may not be implied under Section 15-36-1, supra, or any other statute. See **Hartford Accident and Indemnity Co. v. Wainscott**, supra; see generally, 20 CJS, Counties § 50. We, therefore, conclude that the county road departments may not perform services for private persons without specific statutory authority.

We are aware that Opinion of the Attorney General No. 5260, dated December 2, 1949 held that the counties did have authority to perform services for private persons with the use of county road equipment. That opinion based its conclusion primarily on the case of **Aqua Pura Co. v. Mayor and Board of Alderman**, 10 N.M. 6, 60 P. 208 (1900). On the basis of the **Aqua Pura** case the Attorney General opinion held that powers of the counties would be implied unless specifically prohibited. Insofar as **Aqua Pura** held that under § 15-36-1 the powers of counties are to be broadly construed, it was overruled by the case of **Mountain States Tel. and Tel. Co. v. Town of Belen**, supra. Consequently, we believe that Opinion of the Attorney General No. 5260 no longer accurately reflects the proper rule of law and it is hereby expressly overruled.

Neither the general powers of counties nor any other state statutes specifically allow the counties nor any other state statutes specifically allow the counties to perform road work for non-profit charitable organizations. But the Constitution of the State of New Mexico, in Article 9, Section 14, states that a county may not make any donation to or in aid of any person, association or public or private corporation except that it may make provision for the care and maintenance of sick and indigent persons. We believe, therefore, that it may be implied from {*165} the construction that the county would have the power to do road work for a charitable institution which was providing for the care of sick and indigent persons.

In a sense, a county doing road work for a municipality or a state educational institution is engaging in competition with private enterprise in the same manner as it would in doing work for a private person. We are unable to find any specific power of the county to do work for municipalities or educational institutions, but such may be implied from an exemption in the Purchasing Act. Section 6-5-34(A), N.M.S.A., 1953 Compilation 1969 Supp. provides that:

"The provisions of the Public Purchases Act shall not apply: to purchases of materials, services, or real property by a state agency or local public body from a state agency or local public body . . ."

For the purposes of this section, state agency includes an institution and local public body includes every political subdivision of the state. Section 6-5-18 (A) & (B), N.M.S.A., 1953 Compilation, 1967 Supp. It appears, therefore, that the Legislature contemplated that the municipalities and state educational institutions would purchase the services of the county, including the road department services. It is also permissible for the county to enter into a joint power agreement with either a municipality or institution to achieve the same result, so long as both parties have the power to do the work separately. See, § 4-22-1, et seq., N.M.S.A., 1953 Compilation.

Finally, you have asked whether the county road department may do work for a federal agency. We can find no specific or implied authority in any of the statutes pertaining to counties allowing the county to do such work. It is possible, however, that a county and a federal agency could, under the Joint Powers Agreement Act, combine to do certain types of road construction and maintenance. See Sections 4-22-1, et seq., N.M.S.A., 1953 Compilation.