

Opinion No. 69-143

December 8, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Gary O'Dowd, Deputy Attorney General

TO: Board of Regents, New Mexico State University, Las Cruces, New Mexico

QUESTIONS

1. Does the City of Las Cruces have the authority to annex the New Mexico State University campus and territory?
2. In the event of annexation by the City of Las Cruces, would city building codes apply to buildings and other structures constructed on University lands for University purposes?
3. In the event of annexation, to what extent does the zoning authority of the city interfere with or prohibit such building construction by the University or the use of its properties in the manner that the University desires?

CONCLUSIONS

1. Yes, but see analysis.
2. No.
3. The city zoning ordinances and zoning regulations have no effect on these matters.

OPINION

{*228} ANALYSIS

The answer to your first question is in the affirmative. Section 14-7-4, N.M.S.A., 1953 Comp., provides authority for such annexation upon the consent of the University. This statute in pertinent {*229} part is set forth for your examination as follows:

"Territory owned by the government of the United States, its instrumentalities, of the state of New Mexico or a political subdivision of New Mexico, may be annexed to a municipality **upon the consent** of the authorized agent of the government of the United States, its instrumentalities, **the state of New Mexico** or a political subdivision of New Mexico." (Emphasis added.)

As observed above, territory owned by the State may be annexed to a municipality, see Attorney General Opinion No. 67-61, issued April 13, 1967. The territory sought to be

annexed is owned by the State. New Mexico State University is a state educational institution established under Article XII, Section 11 of the Constitution by which the State was made the owner. And by Section 12 of the same article the lands granted for university purposes were accepted by the State for such purposes. **State v. Regents of University of New Mexico**, 32 N.M. 428, 430, 258 Pac. 571 (1927). Thus if the University and the city agree, annexation may be accomplished.

Turning to your second and third questions, in Attorney General Opinion No. 69-48, issued May 20, 1969, we said that with the exception of concurrent jurisdiction in some traffic matters, state university property is free from municipal regulations. In support, this office quoted the following general rule on the matter from 62 C.J.S. "Municipal Corporation" 319:

"Property of the state is exempt from municipal regulation in the absence of waiver on the part of the state of its right to regulate its own property; and such waiver will not be presumed. The municipality cannot regulate or control any property which the state has authorized another body or power to control."

The above quoted rule is applicable in this instance since the government and management of New Mexico State University, and expressly including adoption of plans and the construction of University buildings, is under the exclusive control of the New Mexico State University Board of Regents under Section 73-26-3 and Section 73-26-5, N.M.S.A., 1953 Compilation. And this power to control is not relinquished or waived by the University consenting to be annexed and made a part of the City of Las Cruces. In this connection we call your attention to **Board of Regents v. City of Tempe**, 88 Ariz. 299, 356 P.2d 399, 403, where the fact that the Board of Regents of Arizona State University accepted water, sewer and fire protection services from the City of Tempe and complied with the city's codes for several years did not mean that the University consented to such regulations. On the contrary the Arizona Supreme Court held that the municipal corporation could not apply its building codes and regulations to the construction and maintenance of the State University, even though the University was located within the city. In granting injunctive relief against the enforcement of such code as to a construction and remodeling program undertaken in the city by the University, the court stated:

"The state will not be presumed to have waived its right to regulate its own property, by ceding to the city the right generally to pass ordinances of a police nature regulating property within its bounds. . . . The principle is that the state, when creating municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control. The municipal government is but an agent of the {230} state -- not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the state. It is competent for the state to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities.

How can the city have ever a superior authority to the state over the latter's own property, or in its control and management? From the nature of things it cannot have."

Under the above cited authority the City of Las Cruces zoning ordinances and regulations are equally ineffective and cannot prohibit or interfere with the uses of University property as desired by the Board of Regents. Municipal zoning regulations or restrictions usually do not apply to the State or any of its subdivisions or agencies, unless the Legislature has clearly manifested a contrary intent. 8 **McQuillen Municipal Corporation** "Zoning"; 45 **Reber v. South Lakewood Sanitation Dist.**, 147 Colo. 70, 362 P.2d 877. And in our search of the state laws, nowhere do we find that the Legislature has authorized its municipalities to zone the properties of the State universities.