

Opinion No. 70-38

April 7, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. David McNeill Chief Administrator General Construction Board
Mr. Fred Gerber Chief Administrator Mechanical Board
Mr. Robert Thompson Chief Administrator Electrical Board

QUESTIONS

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1. Does a trade board created by the Construction Industries Licensing Act, (§§ 67-35-1 to 67-35-63, N.M.S.A., 1953 Comp. [1969 P.S.]), have the authority to perform inspections, issue permits and charge permit fees on buildings within a municipality?
2. Does a trade board have the authority to perform inspections, issue permits, and charge permit fees on a building of a political subdivision of the State?
3. Is a school district a political subdivision of the State for the purposes of the Construction Industries Licensing Act?
4. Does a trade board have the authority to perform inspections, issue permits and charge permit fees on State buildings?

CONCLUSIONS

1. See analysis.
2. See analysis.
3. Yes.
4. See analysis.

OPINION

{*67} ANALYSIS

The answer to your first question will depend on whether the municipality, through qualified municipal inspectors, is making inspections in accordance with the Construction Industries Licensing Act, the codes, and the rules and regulations adopted pursuant thereto.

Section 14-37-1, N.M.S.A., 1953 Compilation, authorizes municipalities to license and regulate businesses within the municipality in a manner conducive to the promotion of the health and general welfare of the people of the municipality, provided, it is not otherwise excluded from doing so by law. Section 67-35-53 (C.), N.M.S.A., 1953 Comp. (1969 P.S.), dealing with the power of a trade board to require permits and charge permit fees makes it clear that there was no legislative intent in enacting the Construction Industries Licensing Act to exclude municipalities from licensing and regulating building or construction and charging a fee for the license or permit. This section provides in part:

"Nothing in this section shall preclude municipalities from making inspections in accordance with the Construction Industries Licensing Act, or rules and regulations pursuant thereto, or from establishing a schedule of fees to be paid by an applicant for a permit."

{*68} If the municipality has adopted an ordinance or building code which uses the code adopted by a trade board and approved under the Construction Industries Licensing Act as a minimum requirement for the city code and has an inspector who is certified and approved by the trade board as required by Section 67-35-51, N.M.S.A., 1953 Comp. (1969 P.S.), the trade board would have no power to issue permits, conduct inspections or charge permit fees. The authority of a trade board to make rules and regulations pertaining to the issuance of permits and the charging of a fee for such permit is found in Section 67-35-53 (C.), N.M.S.A., 1953 Comp. (1969 P.S.), which provides in part:

"Trade boards shall make rules and regulations pertaining to the issuance of permits and the setting of reasonable fees to be paid by the applicant for a permit. Such regulations shall provide a procedure for the issuance of permits outside the corporate limits of a municipality where inspection is made by a state inspector or a municipal inspector serving as a part-time state inspector, and for inspections within a municipality where the inspection is done exclusively by a full-time state inspector."

Thus, unless the inspection within a municipality is being done exclusively by a full-time state inspector of the trade board, that board would have no power to provide for the issuance of permits or charging of fees. However, in those municipalities where there are no qualified municipal inspectors or where the code of the trade board, as adopted and approved under the Construction Industries Licensing Act, does not constitute the minimum requirements of the municipal code, then the trade board must require permits, charge permit fees and conduct inspections.

In answer to your second question, we rely on the following statutes. Section 67-35-52, N.M.S.A., 1953 Comp. (1969 P.S.), requires the trade boards to adopt minimum standards for their respective trades which substantially embody the applicable provisions of a nationally recognized code which is in general use in the United States. Section 67-35-52 (E.), supra, provides that the various political subdivisions of the State are subject to the code adopted by the trade boards. This section states in part:

"All political subdivisions of this state are subject to the provisions of the codes adopted and approved under the Construction Industries Licensing Act."

Since the three trade boards have each adopted a code setting forth the minimum standards applicable for each trade in this State, these codes are applicable to the various political subdivisions of this State. The codes adopted by each of the trade boards require permits, inspection, and provide for a permit fee. It is our opinion that political subdivisions must apply for a permit, pay the specified fee and be subject to inspection. However, it should be noted that the permit, permit fee and inspection may in certain instances be done by a municipality if the political subdivision is subject to the jurisdiction of the municipality. In determining whether the trade board or the municipality shall take the permit, permit fee and perform the inspection we refer to our answer to your first question.

In answer to question three, this office has held on numerous occasions that for certain purposes a school district is a political subdivision of the State. In construing Section 67-22-13, N.M.S.A., 1953 Compilation, (since repealed) which prohibited a municipal plumbing inspector from collecting an inspection fee from political subdivisions of the State, we held that a school district was a political subdivision of the State. Attorney General Opinion No. 61-15, issued February 6, 1961. For purposes of the Construction Industries Licensing Act, the rules and regulations and codes adopted pursuant thereto, we adhere to the opinion that a school district is a political subdivision of the State.

In answer to question four, it is noted that there is no statutory authority in the Construction Industries Licensing Act which indicates that the Act and the codes adopted pursuant thereto are applicable to the State. It is a well established rule of law that administrative agencies only have such ^{*69} power or jurisdiction as is granted to them by statute. **Vermejo Club v. French**, 43 N.M. 45, 85 P.2d 90 (1938). It is equally well settled that the power of a political subdivision of the State or a state agency to require a license or permit from the State or its political subdivisions is wholly dependent upon the statutory power granted to such agency and that the agency does not have the authority to require permits unless there is an expressed intent in the statute that such a permit be required from the State or its political subdivisions. **City of Milwaukee v. McGregor**, 140 Wis. 35, 121 N.W. 642 (1909); **Marin Municipal Water Dist. v. Chenu**, 188 Cal. 734, 207 Pac. 251 (1922).

Section 67-35-52 (E.), N.M.S.A., 1953 Comp. (1969 P.S.), only extends the provisions of the codes adopted pursuant to the Construction Industries Licensing Act to political subdivisions of the State, it does not include the State itself. Therefore we are of the opinion that a trade board cannot require a permit for a state building. Since no permit can be required, there can be no permit fee or inspection since they are incidental to the permit.

However, Section 6-2-29, N.M.S.A., 1953 Compilation (1969 P.S.) gives the Chief of the Property Control Division of the Department of Finance and Administration the authority "to do all acts necessary and proper" in the remodeling or erection of State buildings

including the authority to let the contract. Inherent in this authority is the power to include in the contract a provision that the contractor must obtain a permit from the proper trade board, pay the permit fee and submit to inspection to insure compliance with the codes. When such a provision is inserted by the Chief of the Property Control Division, then it will be the duty of the trade board to require permits, permit fees and to perform inspection.

By: Ray Shollenbarger

Assistant Attorney General