

Opinion No. 71-40

March 5, 1971

BY: Oliver E. Payne, Deputy Attorney General

TO: Mr. David McNeill Chief Administrator General Construction Board Post Office Box 5155 Santa Fe, New Mexico 87501

QUESTIONS

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1. Do counties in New Mexico currently have authority to adopt building codes?
2. If the answer to question one is yes -- do these counties have the authority to appoint building inspectors now employed by cities within such counties notwithstanding the provisions of Section 67-35-49 C, N.M.S.A., 1953 Comp. (P.S.)?
3. Will current or proposed local option laws alter either of the above answers?

CONCLUSIONS

1. A and H Class counties do have such authority. B and C Class counties probably have such authority in flood-plain areas.
2. Yes, by appropriate agreement between the two governmental bodies and so long as physical incompatibility does not exist.
3. See analysis.

OPINION

{*58} ANALYSIS

Section 15-36-26, N.M.S.A., 1953 Compilation provides as follows:

"Class A counties are granted the same powers to enact ordinances that are granted to municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties."

Since there is no specific statutory or constitutional limitation on county enactment of building codes, and since municipalities have been granted authority to adopt regulatory ordinances governing building standards (Sections 14-17-5 and 14-16-5, N.M.S.A., 1953 Comp.), Class A counties may adopt building codes. The same is true of counties of the H class. Section 15-36-13, N.M.S.A., 1953 Compilation.

Other classes of counties are governed by a different statute. Section 15-36-35, as amended in 1970, provides as follows:

"Class B and Class C counties -- Power to enact ordinances -- Class B and Class C counties are granted the same powers to enact ordinances that are granted to municipalities except for those powers that are inconsistent with statutory or constitutional limitation placed on counties, and provided that the enactment of ordinances **shall be limited to the following purposes:**

- A. prescribing safety regulations and speed limits for county roads;
- B. prescribing legal dump sites and sites for refuse disposal and providing penalties for dumping of refuse at sites other than those prescribed by the ordinances;
- C. providing for county park and recreation commissions, and prescribing their powers and duties; and
- D. providing for the **control and use** of lands in flood plains." (Emphasis added.)

The last provision quoted above (paragraph D) was enacted in 1970. Presumably it would give the B and C counties a limited amount of building-standard authority in flood plain areas. Therefore, only A and H class counties may adopt a building code that applies to all areas of the county over which the board of county commissioners has jurisdiction.

Section 64-35-49 C, N.M.S.A., 1953 Comp. (P.S.) to which you refer in your second question authorizes the appointment of a municipal inspector as a part-time **state** inspector with the approval of the municipality. In our {*59} opinion this would be true even in the absence of the statute. It is a matter of agreement between the state and the city. Likewise if a city inspector met all the necessary requirements for an inspector, we see no legal impediment to an agreement between the city and the county to use him as needed or at specified times so long as neither governmental body is paying for services not rendered. Accordingly, if there is no physical incompatibility between the two jobs, legislation on the subject appears unnecessary.

We do not know of any existing "local option" laws that alter either of these conclusions. Local option laws **broaden** the permissible scope of authority of local units of government; they do not narrow it. We think it relatively useless to envisage what legislation **might** be enacted on this general subject.