

Opinion No. 71-53

April 14, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Charles R. Holmes Secretary Weather Control and Cloud Modification
Commission New Mexico Institute of Mining and Technology Socorro, N.M. 87801

QUESTIONS

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May the Weather Control and Cloud Modification Commission refuse a license to conduct weather control and cloud modification activities in the State of New Mexico to an applicant who satisfies the requirements for a license specified in Section 75-37-7, N.M.S.A. 1953 Comp., but who proposes a weather modification project which in the scientific judgment of the Commission may be unsound, detrimental or undesirable?

CONCLUSION

Yes.

OPINION

{*75} ANALYSIS

An applicant for a license to conduct weather control and cloud modification activities in New Mexico is required to satisfy the standards established in Section 75-37-7, N.M.S.A., 1953 Comp. This provision specifies that:

"The commission **may** issue a license to any applicant who demonstrates sufficient financial responsibility, to the satisfaction of the board, necessary to meet obligations reasonably likely to be attached to or result from weather control or cloud modification activities, and skill and experience reasonably necessary to accomplishment of weather control without actionable injury to property or person." (Emphasis supplied.)

Accordingly, if an applicant for a license to conduct weather control activities satisfies, in the judgment of the Commission, the standards specified in Section 75-37-7, **supra**, the Commission is authorized to issue a license permitting the projects specified in the application to commence. The language of the provision is literally permissive rather than mandatory and serves to authorize the Commission to issue a license should the minimum standards be met, but it does not require that a license be issued should there be a reasonable basis on which to deny it.

The term "may" normally implies permissive, directory or discretionary rather than mandatory action or conduct on the part of an administrative agency. **Farmers Development Co. v. Rayado Land and Irrigation Co.**, 28 N.M. 357, 213 P. 202 (1923). It suggests a grant of authority to be exercised in the discretion of the agency as that agency reasonably perceives its purpose and the public interest. **Turnpike Amusement Park, Inc. v. Licensing Comm'n of Cambridge**, 179 N.E. 2d 322 (Mass. 1962). Nevertheless, whether a statute is mandatory or permissive does not depend alone upon its form. It is a question of legislative intention to be determined from a consideration of the nature, character, subject, and purpose sought to be accomplished by the legislation as well as the language used. **Ross v. State Racing Comm'n**, 64 N.M. 478, 330 P.2d 701 (1958); **Woodmansee v. Cockerill**, 185 N.E. 2d 439 (Ohio Ct. App. 1961).

Accordingly, permissive language may be construed as mandatory when it plainly appears that the legislature intended to impose a ministerial duty upon a public official or agency rather than entrust the agency with a judgmental function. A mandatory construction is normally suggested when the public or an individual has a claim de jure which demands that the power conferred upon the administrative agency be exercised for the benefit of that claim. **Catron v. Marron, Treasurer**, 19 N.M. 200, 142 P. {*76} 380 (1914); **City of Wauwatosa v. County of Milwaukee**, 22 Wis. 2d 84, 125 N.W. 2d 386 (1963); **John Deere Waterloo Tractor Works v. Derifield**, 110 N.E. 2d 560 (Iowa 1961). Clearly, this is the converse of the authority entrusted to the Weather Control and Cloud Modification Commission. There is no de jure right to engage in a commercial activity which is properly subject to governmental regulation free from the exercise of administrative discretion conferred upon a licensing agency. See **Ross v. State Racing Commission, supra**; **Belleville Chamber of Commerce v. Town of Belleville**, 51 N.J. 153, 238 A. 2d 181 (1968).

The language of Section 75-37-7, **supra**, closely warrants a permissive construction and, accordingly, suggests that the qualifications for a license therein specified are not exclusive. See **Shell Oil Company v. Farrington**, 19 App. Div. 2d 555, 241 N.Y.S.2d 152 (1963). Indeed, the subject matter of the Weather Control Act (Sections 75-37-1 to 75-37-15, N.M.S.A., 1953 Comp.) and the purpose it seeks to achieve suggest a responsibility on the part of the Commission to ascertain the suitability of the applicant and evaluate the merit of each proposed weather control project prior to the issuance of a license.

The Weather Control Act is a police regulation which, at the highest level of abstraction, seeks to protect the environment of the state, particularly with respect to the manipulation and control of precipitation, against unsuitable licensees and unscientific, ineffectual or detrimental weather control projects.

The Act seeks to provide this protection by limiting the conduct of weather control activities to financially responsible and professionally competent practitioners as the Commission may determine. Sections 75-37-6 and 75-37-7, N.M.S.A., 1953 Comp. It requires an applicant to describe the objective of the proposed operation, the methods

to be used, and the equipment and the meteorological services to be employed. Section 75-37-6 (E), **supra**. It requires periodic reports from licensees evaluating their activities according to criteria established by the Commission "in order to aid in research and development in weather modification and to aid in the protection of life and property," Section 75-37-9, N.M.S.A., 1953 Comp., and it provides for investigations and inspections on the part of the Commission. Section 75-37-14(B), N.M.S.A., 1953 Comp. The Act creates a Commission designed to embody a technical expertise, Section 75-37-13, N.M.S.A., 1953 Comp., and it empowers the Commission to promulgate rules and regulations necessary to serve the purposes of the Act. Section 75-37-14(A), N.M.S.A., 1953 Comp. Finally, a criminal sanction is imposed for a violation of its provisions. Section 75-37-15, N.M.S.A., 1953 Comp.

By fair implication, considering the nature of the Act, its purpose, its provisions and its language, a responsibility has been imposed upon the Commission to evaluate a proposed project, even from an otherwise qualified applicant, to determine its scientific validity, its effect on the environment, its compatibility with other weather modification experiments or projects, its risk of harm or hardship to person or property, and generally its relationship to the safety, good order, comfort and welfare of the State and its residents. See **Ross v. State Racing Comm'n, supra; Turnpike Amusement Park, Inc. v. Licensing Comm'n of Cambridge, supra; Barton Trucking Corp. v. O'Connell, 7 N.Y.2d 299, 165 N.E. 2d 163 [1959].**

The legislature has expressed the intention to commit to the judgment of the Weather Control and Cloud Modification Commission's determinations with respect to the scientific worth and desirability of proposed weather control projects. Accordingly, the decision to issue or refuse a license resides in the discretion of the Commission. In the exercise of its discretion, the Commission is limited only by the principle that its actions may not be unlawful, unreasonable, arbitrary or capricious. **Yarborough v. Montoya, 54 N.M. 91, 214 P. 2d 769 (1950).**

By: Thomas L. Dunigan

Assistant Attorney General