

Opinion No. 72-62

November 1, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Thomas Patrick Whelan, Jr.,
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TO: Mr. William Henry Mee, Attorney, New Mexico Legislative Council, 334 State
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QUESTIONS

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1 (a). Can the cities of Albuquerque, Clovis and Gallup, being all of the New Mexico municipalities having "home rule," adopt mechanical codes by ordinance which have standards lower than the minimum standards required by the state code in the same area?

(b). Is the legislative power of a home rule municipality to adopt a mechanical code by ordinance "expressly denied by general law" under any section of the Construction Industries Licensing Act?

2. If the answer to question 1(a) is no, may the City of Albuquerque adopt those portions of the Uniform Mechanical Code not covered by the state mechanical codes?

3. May the City of Albuquerque adopt the Uniform Mechanical Code as its gas, plumbing and mechanical code even though it differs from the state plumbing code?

4. If the City of Albuquerque adopts a plumbing code that has standards different from those of the state plumbing code, who has the authority to determine whether the municipal code meets the minimum requirements of the state code? How can the requirement of Section 62-35-52F., N.M.S.A., 1953 Comp. be enforced?

CONCLUSIONS

1 (a). No.

(b). See analysis.

2. Yes.

3. See analysis.

4. See analysis.

OPINION

{*101} ANALYSIS

The "home rule amendment," Article X, Section 6D of the New Mexico Constitution, provides in relevant part:

"A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter . . ."

Promulgation of a mechanical code is clearly a legislative power envisioned by Article X, Section 6D. The Legislature has qualified a home rule municipality's {*102} power to enact mechanical codes, however, it has expressly denied municipalities the power to enact codes which are less stringent than the statewide codes enacted by the Mechanical Board pursuant to the Construction Industries Licensing Act.

Section 67-35-52F, N.M.S.A., 1953 Comp. (P.S.) provides:

"All political subdivisions of this state are subject to the provisions of codes adopted and approved under the Construction Industries Licensing Act [67-35-1 to 67-35-63]. Such codes constitute a minimum requirement for the codes of political subdivisions."

The import of this section is to deny political subdivisions the power to enact codes with lower standards than those enacted pursuant to the Construction Industries Licensing Act. Municipalities are political subdivisions, **City of Albuquerque v. Campbell**, 68 N.M. 75, 358 P.2d 698 (1967); therefore, they are bound by the restrictions of Section 67-35-52F, **supra**. We conclude that no municipality, including home rule municipalities, can enact a mechanical code whose standards are lower than those provided in the state codes.

It should be noted, however, that this restriction on the power of municipalities does not preclude them from promulgating codes for areas not covered by state codes or codes whose standards are different from, but equal to or greater than, the standards provided in the state codes. Section 67-35-52F, **supra**, only provides that state codes shall constitute the minimum requirement for municipal codes. It does not expressly deny municipalities the power to pass codes with different standards which are equal to or greater than state standards. Nor does it expressly deny municipalities the power to enact codes for areas not covered by state codes. Home rule municipalities may, consequently, promulgate such codes pursuant to the power vested in them by Article X, Section 6 of the New Mexico Constitution.

The Construction Industries Licensing Act makes no direct provision for the enforcement of Section 67-35-52F, **supra**. Enforcement has been indirectly provided for, however, through those provisions regarding cooperative enforcement of codes between the state and municipalities. Each of the trade boards is charged with the duty to ". . . perform inspections of all occupations, trades and activities within their

jurisdiction . . ." Section 67-35-136C, N.M.S.A., 1953 Comp. (P.S.). The boards are obligated to inspect regardless of whether a municipality has its own code and inspectors. To economize enforcement efforts and to prevent unnecessary duplication, the boards are authorized to certify municipal inspectors to perform state inspections. Section 67-35-49C, N.M.S.A., 1953 Comp. (P.S.).

Since the trade boards are obligated to enforce state codes, they will only certify municipal inspectors if the municipal code is at least as stringent as the state code. If the municipality enacts a less stringent code, the state board will revoke the certifications of municipal inspectors and perform the inspections with its own personnel. This action makes the municipal code a nullity, for the citizens of the municipality are obligated to obey the state's codes. See Section 67-35-52F, **supra**. Thus, if Albuquerque, or any other municipality, enacts a mechanical code which in the judgment of the mechanical board is less stringent than the state code, the mechanical board can revoke the state certificates of the Albuquerque inspectors. Albuquerque citizens will then be subject to the standards and sanctions of the state code regardless of the code enacted by the city.