Opinion No. 73-17

February 5, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Senator Tibo J. Chavez Senate Majority Leader New Mexico Legislature Legislative Executive Building Santa Fe, New Mexico 87501

QUESTIONS

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Do the principles of statutory construction suggest that the term "may" as it is used in subsections 1 B. and 1 C. of Senate Bill 112 should be construed to impose a mandatory duty upon the public officers and boards to which it relates?

CONCLUSION

No.

OPINION

*{*28}* **ANALYSIS**

Senate Bill 112 proposes to repeal Section 6-1-4, N.M.S.A., 1953 Comp., being Laws 1963, Chapter 257, Section 1, as amended, and to enact a new Section 6-1-4, N.M.S.A., 1953 Comp. which would provide in pertinent part:

"A. All officers and boards charged with the custody and control of public *{*29}* buildings belonging to the state . . . **shall** keep such public buildings insured for the benefit of the state . . . against loss or damage by fire and the perils insured against under the extended coverage endorsement. The insurance **may** be taken for such amounts and with deductible provisions as desired, but the insurance coverage obtained **shall** be at least in the amount of eighty percent of value on the risk or building being insured . . . .

B. All officers and boards charged with the custody and control of public buildings belonging to the state . . . **may** keep the buildings or their contents insured for the benefit of the state . . . against any other peril for which the providing of insurance is deemed necessary . . . .

C. The officers and boards of the state . . . **may** establish a reserve fund in an amount up to the uninsured value of such public buildings to protect against loss or damage of public buildings under their custody and control.

D. The insurance required in subsection A of this section **shall** only be written by such insurance company or companies as have fully complied with the laws of this state with reference to carrying on business therein." (Emphasis added)

The term "may" normally implies a grant of authority which is permissive, directory or discretionary. **Farmers Development Company v. Rayado Land and Irrigation Company,** 28 N.M. 357, 213 P. 202 (1923). Section 1-2-2 (I), N.M.S.A., 1953 Comp. Thus, as a general rule, authority granted to an administrative agency in permissive terms need be exercised only as the agency deems advisable. **Turnpike Amusement Park, Inc. v. Licensing Commission of Cambridge,** 179 N.E. 2d 322 (Mass. 1962). The term "shall," on the other hand, normally implies a grant of authority which is peremptory or mandatory. **Application of Sedillo,** 66 N.M. 267, 347 P.2d 162 (1959). Section 1-2-2 (I), **supra.** Thus, as a general rule, authority granted to an administrative agency in peremptory terms imposes a mandatory duty upon the agency to act as directed. **Farmers Development Company v. Rayado Land and Irrigation Company, supra.** Nevertheless, whether the terms of a statute are mandatory or discretionary is ultimately a question of legislative intent to be determined from a consideration of the context of the statute and the purpose sought to be accomplished by the legislation. **Ross v. State Racing Commission,** 64 N.M. 478, 330 P.2d 701 (1958); **Farmers Development Company v. Rayado Land and Irrigation Company, supra; Woodmansee v. Cockerill,** 185 N.E. 2d 439 (Ohio Ct. App. 1961).

Thus permissive language may be construed as mandatory when it plainly appears from the context or purpose of the legislation that the legislature intended to impose an obligation upon a public agency rather than entrust the agency with the authority to act according to its own judgment. A mandatory construction is normally suggested, for example, when the public or an individual has a right or claim de jure which may be jeopardized or prejudiced if the power conferred upon the administrative agency is not exercised for the benefit of that right or claim. **United States ex rel. Siegel v. Thoman,** 156 U.S. 353, 15 S. Ct. 378, 39 L. Ed. 450 (1895); **Reese v. Dempsey,** 48 N.M. 417, 152 P.2d 157 (1944); **Catron v. Marron,** 19 N.M. 200, 142 P. 380 (1914); **John Deere Waterloo Tractor Works v. Derifield,** 110 N.W.2d 560 (Iowa 1961); **City of Wauwatosa v. County of Milwaukee,** 22 Wis.2d 84, 125 N.W.2d 386 (1963).

Senate Bill 112 does not relate in any way to a public or private right or claim de jure nor does the purpose or language of the proposed legislation otherwise suggest that its permissive grants of authority are intended by the legislature to impose mandatory obligations on public officers and boards. On the contrary, it would seem evident that the word "may" is used in the proposed legislation in special contradistinction to the term "shall" and, accordingly, a departure from the ordinary construction of the language used would be wholly without warrant. **United States ex rel. Siegel v. Thoman, supra; Farmers Development Company v. Rayado Land and Irrigation Company, supra.** As the Supreme Court of the State of New Mexico has warned:

"There is nothing in the context from which it could be fairly inferred that *{*30}* the legislature intended the statute to be mandatory. The power to construe such statutes

as mandatory is established by authority, and should be applied in proper cases; but it is dangerous power and leads to abuse, and should be exercised with reluctance and only in cases coming clearly within the recognized rules, or when the clear intent of the statute, as shown by the context, demands the application of such rule." **Farmers Development Company v. Rayado Land and Irrigation Company, supra,** 28 N.M. at 365-366.

In subsection A of the proposed legislation the term "shall" is used for the apparent purpose of imposing an obligation on officers and boards charged with the custody and control of public buildings to insure such facilities against loss or damage by fire and the risks insurable under the extended coverage endorsement. The terms "may" and "shall" are also used in subsection A of the proposed legislation for the apparent purpose of granting to the responsible officer or board the discretion to decide upon the terms of such insurance so long as the amount of coverage is not less than eighty percent of the value of the building being insured.

In contrast to the mandatory terms of subsection A of the proposed legislation, subsection B employs the term "may" in granting to officers and boards charged with the custody and control of public buildings the authority to insure such facilities ". . . against any other peril for which the providing of insurance is deemed necessary . . ." Likewise, subsection C of the proposed legislation employs the term "may" to authorize the officers and boards of the state charged with the custody and control of public buildings to establish a reserve fund in an amount up to the uninsured value of the facilities in order to protect against loss or damage to them. Finally, subsection D of the proposed legislation clearly indicates that the insurance described in subsection A is "required," but there is no such indication with respect to the insurance described in subsection B or the reserve fund described in subsection C of the proposed legislation. Subsection D also uses the term "shall" in providing that the insurance described in subsection A is to be written only by such insurance companies ". . . as have fully complied with the laws of this state with reference to carrying on business therein."

It would seem evident that the diligent juxtaposition of the peremptory term "shall" and the permissive term "may" in Senate Bill 112 is intended to insure that these terms receive their customary construction. As the Supreme Court of the United States has explained:

"The legislature first imposes an imperative duty . . . and then makes provision for the case of an excess of revenue over expenses. In the first the word "shall," and in the latter provision the word "may," is used, indicating command in the one and permission in the other." **United States ex rel. Siegel v. Thoman, supra,** 15 S. Ct. at 380.

It would clearly appear that Senate Bill 112 imposes an obligation in subsection A on all officers and boards charged with the custody and control of public buildings, and it grants authority to such officers and boards in subsections B and C to act as they deem warranted.

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