

Opinion No. 74-13

April 8, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Thomas O. Trotter Executive Director Construction Industries Commission
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QUESTIONS

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1. Under what circumstances, if any, do municipalities have sole and exclusive power to promulgate and enforce construction codes?
2. What authority have the Construction Industries Commission and its trade boards to ensure that municipalities having their own codes comply with the Construction Industries Licensing Act?

CONCLUSIONS

1. See analysis.
2. See Analysis.

OPINION

{*23} ANALYSIS

The Construction Industries Licensing Act, Section 67-35-1, et seq., NMSA, 1953 Comp. (P.S.) does not expressly delineate the relative powers of the Construction Industries Commission and of municipalities. Such a delineation is suggested by a number of statutes, however.

The first of these is Section 67-35-53C, **supra**. This section limits the trade boards' power to require permits and inspections within municipalities. The section provides in relevant 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. . . . 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."

Section 67-35-53C, **supra**. This language indicates that the trade boards have authority to require permits within municipalities only when those municipalities have no inspectors of their own.

Considerations of administrative efficiency and common sense require us to interpret this limitation to include the boards' power to make inspections as well. Permits and inspections are inseparable {**24*} parts of the same code enforcement process. It would be unreasonable to place upon Section 67-35-53C an interpretation which would allow only municipalities to issue permits but would allow both municipalities and the trade boards to make inspections. The courts reject interpretations of statutes which produce unreasonable results. See **Trujillo v. Romero**, 82 N.M. 116, 481 P.2d 89 (1971).

It would be equally unreasonable to interpret Section 67-35-53C as giving municipalities and trade boards coextensive authority to require permits and inspections within municipalities. The interpretation produces the possibility that citizens of a municipality might have to obtain two permits and submit to double inspections for their construction work. This result is contrary to the purposes of the Construction Industries Licensing Act, one of which is to eliminate duplication of inspections. Section 67-35-4, **supra**.

Our interpretation of Section 67-35-53C is reinforced by a statute in the municipal code which is also addressed to the allocation of building inspection responsibilities. Section 14-17-5A (4), NMSA, 1953 (P.S.) provides:

"Within its planning and platting jurisdiction, a municipality may by ordinance: . . . have exclusive enforcement over permits by the municipality when enforced by an approved inspector."

Since they concern the same subject, we must read Sections 14-17-5A (4) and 67-35-53C together. **Romero v. Sanchez** 83 N.M. 358, 492 P.2d 140 (1971). When we do, it is clear that they complement one another. Section 67-35-53C expressly vests exclusive jurisdiction of permits in municipalities having approved inspectors, as well as implicitly vesting exclusive jurisdiction of inspections in them. Section 14-17-5A (4) expressly vests exclusive jurisdiction of inspections in these same municipalities.

These considerations lead us to conclude that, with one exception, a municipality's authority to regulate construction is sole and exclusive when the municipality exercises it. That exception is public buildings, whose regulation is the responsibility of the General Construction Board. See Section 67-35-52F, **supra**, and Opinion of the Attorney General No. 74-10.

Other statutes support this interpretation. These impose conditions on municipal regulation of construction which guarantee that state standards, or better, are being enforced by qualified personnel. Section 14-16-5, NMSA, 1953 empowers municipalities

to enact construction codes provided the codes' minimum standards are at least equal to those of the corresponding state codes. Section 67-35-52G, **supra**, requires all municipal construction codes to meet the minimum standards of corresponding state codes. Section 67-35-51, **supra** requires all municipal inspectors to be certified as to their competence by the appropriate trade board. Section 14-17-5A (4) conditions municipalities' exercise of exclusive enforcement powers over their permits upon the existence of an approved inspector. Home rule municipalities are subject to the same limitations since they may only exercise those powers "not expressly denied by general law or charter." Article X, Section 6D, New Mexico Constitution. These guarantees add weight to the conclusion that municipalities have sole and exclusive power to regulate construction when they exercise it.

We emphasize that this grant of exclusive power to municipalities, whether its source be Section 14-16-5 or Article X, Section 6D, is qualified. The municipality only has power to promulgate and enforce codes which comply with state codes as a minimum. Section 14-16-5, **supra**, and Section 67-35-52G, **supra**. Municipalities are creatures of the state and have only those powers expressly conferred by statute without resort to implication. **Sanchez v. City of Santa Fe**, 82 N.M. 322, 481 P.2d 401 (1971). {25} Any ordinance promulgating a code not in compliance with the state code would violate Sections 14-16-5 and 67-35-52G and would, therefore, be invalid. See **State ex rel. Blake V. Aztec Ditch Co.**, 25 N.M. 590, 185 P. 549 (1919).

This qualification of municipalities' power extends to the failure to enforce all or part of a valid municipal code. A municipality cannot as a matter of policy selectively enforce its code. Examples of selective enforcement are the issuance of building permits to contractors not licensed to perform the work required or the failure to require permits and inspection for construction regulated by the code. These kinds of acts, when done consistently or as a matter of policy, are in reality amendments to the code. A municipality cannot, however, lower its codes' standards below those of the state codes by simply refusing to enforce the standards on the books. The manifest purpose of Sections 14-6-5 and 67-55-52G is to provide statewide minimum standards for construction, and the courts will interpret the sections to achieve that purpose. **Martinez v. Research Park, Inc.**, 75 N.M. 672, 410 P.2d 200 (1965).). When a municipality lowers construction standards through selective code enforcement, it violates the Construction Industries Licensing Act as much as if it had actually amended its code.

The Construction Industries Commission, in conjunction with its trade boards, has the primary responsibility for the enforcement of the Construction Industries Licensing Act and the codes adopted pursuant to the act. See Sections 67-35-13, 14, 34 and 36, **supra**. It is the commission and its boards, consequently, which must enforce the act against municipalities which are violating it. The commission has considerable discretion in the selection of means to enforce the act, for it has "all powers, incidental, convenient, or necessary to enable it to carry out the intent of that act." Section 67-35-14F, **supra**.

This grant of power suggests an administrative measure which the commission can utilize to ensure municipal compliance with the act. The commission can order the trade boards to require municipalities to prove they have legal codes before the trade board will accept any applications for certification as a municipal inspector. The commission can also order the trade boards to condition the validity of all municipal inspector certificates upon the continued existence and enforcement of legal codes.

Some might object that Section 67-35-51, **supra**, conditions the issuance of such a certificate only upon the competence of the applicant and that the board cannot consider anything else. This interpretation is too narrow, however; and it produces an absurd result. The boards could be in the position of certifying inspectors to enforce a code which violates the Construction Industries Licensing Act. It is hardly reasonable to require the commission and boards to give this kind of approval to municipalities which violate the state act.

Once municipal inspectors' certificates are revoked, the trade boards are obligated to set up a system of permits and inspections for the municipality. If a **municipality has no inspectors, it falls** within the jurisdiction of the trade boards. See Section 67-35-53C, **supra** and the discussion of this section in the preceding paragraphs. The boards are duty bound to perform inspections of all trades and activities within their jurisdiction. Section 67-35-36C, **supra**.

The act provides an additional means of enforcement. Section 67-35-60, **supra** empowers the commission to enforce the act by "injunction, mandamus or any proper legal proceeding." The commission can request the district court of the county in which the municipality is located to order the municipality to cease its violations of the act.

We conclude, then, that where municipalities have legal codes properly enforced {²⁶} by certified inspectors the commission and the trade boards have no authority to regulate construction in those municipalities except for public buildings. Where municipalities do not have legal codes or where they consistently refuse to enforce legal codes, the commission and boards can revoke the municipal inspectors' certificates, require permits and inspections, or enforce the act in the appropriate district court.

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