

Opinion No. 75-02

January 28, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Honorable Alvino E. Castillo State Representative Drawer 68 Raton, New Mexico 87740
Joan T. Ellis Attorney at Law New Mexico Legislative Council 334 State Capitol Santa Fe, New Mexico 87503

QUESTIONS

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May a county use its equipment to clear or blade a snowpacked private road if it charges a fee for such service?

CONCLUSION

Not unless specifically authorized to do so by statute.

OPINION

{*33} ANALYSIS

Opinion of the Attorney General No. 69-103, dated September 3, 1969, ruled that a county road department may not perform road work for private persons. We quote approvingly from that opinion:

"According to the overwhelming weight of authority, a county is merely a government unit of the state and possesses only such powers as are expressly or impliedly conferred upon it by the constitutional provisions or legislative enactments. See **Mountain States Tel. & Tel. Co. v. Town of Belen**, 56 N.M. 415, 420-24, 244 P.2d 1112 (1952); See generally, 20 CJS, Counties § 49, p. 802, 79.

". . . it is clear that there is no grant of specific authority for the county to do road work other than for the maintenance of its own roads, highways and bridges. See Section 55-3-1, N.M.S.A., 1953 Compilation. If the power to do road work for other than county roads is to be implied it must be from an interpretation of the constitution, the general powers granted to counties or other statutes. Section 15-36-1, provides that:

'Each organized county in this state shall be a body corporate and politic, and as such shall be empowered for the following purposes:

First. To sue and be sued.

Second. To purchase and hold real and personal property for the use of the county.

Third. To sell and convey any real or personal estate owned by the county and make such order respecting the same as may be deemed conducive to the interests of the inhabitants.

Fourth. To make all contracts and do all other acts in reference to the property and concerns necessary to the exercise of its corporate or administrative powers.

Fifth. To exercise such other additional powers as may be specially conferred by law.'

"Performing services with the use of county road equipment for private persons is clearly engaging in a private enterprise and is a proprietary rather than a governmental activity, and was so held by the Supreme Court of Arizona in litigation {34} arising out of an accident involving a county road grader performing services for a private individual. **Hartford Accident and Indemnity Co. v. Wainscott**, 41 Ariz. 439, 19 P. 2d 328 (1933). See also **Hayes v. Town of Cedar Grove**, 126 W. Va. 828, 30 S.E. 2d 726 (1944). Under the general rule, normally proprietary functions may not be implied under Section 15-36-1, **supra**, or any other statute. See **Hartford Accident and Indemnity Co. v. Waintcott**, *supra*; see generally, 20 CJS, Counties § 50. We therefore, conclude that the county road department may not perform services for private persons without specific statutory authority.

We believe that both the conclusion and reasoning of the 1969 opinion are valid and we adopt them insofar as they are dispositive of the question presented here.

Section 55-3-24, NMSA, 1953 Comp. (1973 P.S.) authorizes a county to maintain roads or streets entirely within an approved subdivision area not within the corporate limits of a municipality. A county resolution and public hearing is required and property owners may be assessed for the work done. Section 55-3-24, **supra**, constitutes a statutory exception to the general rule that a county may not provide road work for private persons. A county **may** provide private road work when authorized by statute, as Section 55-3-24, **supra**, so authorizes, but only within the express limits of the statute.

Finally, Section 55-2-11.1, NMSA, 1953 Comp. (1973 P.S.) deserves mention. That section authorizes snow removal by the State Highway Commission from parking areas which serve skiing areas. Section 55-2-11.1 **supra**, does not, however, confer any authority upon a county road department.

By: Ralph W. Muxlow II

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