

Opinion No. 76-30

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BY: OPINION OF TONEY ANAYA, Attorney General Robert A. Engel, Assistant Attorney General

TO: Albert Romero, Chief, Local Government Division, Department of Finance and Administration, Executive-Legislative Building, Santa Fe, New Mexico 87503

QUESTIONS

Question

Are Council of Governments (COGs) local public bodies as defined in Section 11-2-56, NMSA, 1953 Comp., and therefore subject to budget review by the Department of Finance and Administration under Section 11-2-57, NMSA, 1953 Comp.?

Conclusion

No.

OPINION

{*106} Analysis

Local public bodies are defined in Section 11-2-56, NMSA, 1953 Comp. as:

"11-2-56. 'Local public body' defined. -- 'Local public body' means **every political subdivision of the state** which expends public money from whatever source derived, including but not limited to counties, county institutions, boards, bureaus or commissions; incorporated cities, towns or villages; drainage, conservancy, irrigation or their [other] districts; charitable institutions for which an appropriation is made by the legislature and every office or officer of any of the above. 'Local public body' does not include county, municipal, consolidated, union or rural school districts and their officers, or irrigation districts organized under sections 75-23-1 through 75-23-45, New Mexico Statutes Annotated, 1953 Compilation."

(Emphasis added.)

Under the statutory definition, an entity must be a "political subdivision of the state" for it to be considered a local public body. For the reasons to be discussed in this opinion, COGs are not political subdivisions of the state and are therefore not local public bodies under Section 11-2-56, **supra**.

While numerous court decisions have dealt with the problem of what is and what is not a political subdivision, the problem of applying the criteria established in those decisions to the COGs is yet troublesome. Some of the factors which must be considered include: (1) What is the particular language used by the legislature in creating or authorizing the creation of the particular entity? (2) Has the entity a prescribed area, the authority for self government and a delegation to carry out a portion of government which can be said to be a function of local government? See **Gibbany v. Ford**, 29 N.M. 621 (1924); **Dugas v. Beauregard**, 155 Conn. 573, 236 A. 2d 87 (1967); **Commander v. Board of Commissioners of Buras Levee District**, 202 La. 325, 11 So.2d 605 (1942); **Standard Oil Co. v. National Surety Co.**, 143 Miss. 841, 107 So. 559; 1 McQuillen, **Municipal Corporations** (3rd Ed.) § {*107} 2.07; Opinions of the Attorney General Nos. 73-61 (August 23, 1973) and 74-14 (April 23, 1974).

COGs exist throughout the state to perform a variety of tasks. However, they essentially are planning entities which serve local units of government in the areas of economic development, human resource development, law enforcement, manpower development and comprehensive planning. The COGs also serve as regional clearinghouses for the state under Federal OMB Circular A-95. Because COGs receive Comprehensive Planning Assistance funding from the U.S. Department of Housing and Urban Development as areawide planning organizations, the COGs must be governed by boards which have two-thirds (2/3) of its membership composed of locally elected public officials. The COGs do not assume any of the functions of local, county or municipal governments. The function performed by the COGs can be best described as that of an advisory or planning body for the local units of government. They are funded by federal, state and local governments specifically for the purpose of performing this limited planning task.

COGs receive their statutory authority under the Regional Planning Act, Sections 14-57-1 to 14-57-9, NMSA, 1953 Comp. This Act does not grant the requisite power of local government to the COGs.

The Regional Planning Act contemplates a voluntary association of local government entities for the purpose of collecting data and planning. Section 14-57-1, **supra**, outlines the methods for creating a regional planning commission, and Section 14-57-5, **supra**, designates the powers and duties of regional planning commissions. These statutes clearly limit the delegated scope of authority to planning and to making recommendations to the participating local units of government. And, finally, Section 14-57-8, **supra**, specifically states that:

". . . The sole power to adopt proposed plans, ordinances, regulations or projects remains with the local governing body or special district proposing them."

Section 4-22-3, **supra**, of the Joint Powers Agreements Act specifically empowers public agencies, including units of local government to "by agreement . . . jointly exercise any power common to the contracting parties . . ." Thus, COGs may be created through joint powers agreements between municipalities and counties, pursuant to

Section 14-57-2, **supra**. Nevertheless, the COGs, once created, are not local public bodies for purposes of budget review by Department of Finance and Administration.

Thus, it must be concluded that to be considered a "local public body" under Section 11-2-56, **supra**, an entity must be a political subdivision of the state. Council of Governments were neither designated as local subdivisions under any enabling legislation, nor were they delegated the powers of a political subdivision by any act of the legislature. COGs are then to be seen as voluntary associations comprised of individual political subdivisions which perform the function of planning for the area.

It should be noted, however, that the budgets of various local public bodies which are members of COGs are subject to budget review by Department of Finance and Administration. Thus, the contributions to COGs by local public bodies will be scrutinized by Department {**108*} of Finance and Administration pursuant to Section 11-2-57.