

Opinion 11-06

OPINION OF: GARY K. KING Attorney General

November 21, 2011

BY: Mona Valicenti, Assistant Attorney General

TO: The Honorable Bernadette M. Sanchez, New Mexico State Senator, State Capitol,
Santa Fe, New Mexico 87501

QUESTIONS:

(1) Does the Construction Industries Division (“CID”) of the New Mexico Regulation and Licensing Department have the authority to place requirements on a local jurisdiction’s approval of construction permits or inspection of construction projects?

(2) Does CID have the authority to refuse inspection services to a local jurisdiction because that local jurisdiction failed to adopt temporary or permanent CID program requirements?

(3) Does CID have the authority to refuse inspection services or to certify local inspectors in a local jurisdiction because that local jurisdiction adopted building codes that, while the codes meet minimum standards set by CID, differ from those adopted by CID?

(4) Does CID have the authority to issue a stop work or similar order on a construction project for which there is a valid building permit from a local jurisdiction that has adopted building codes that, while these codes meet minimum standards set by CID, differ from those adopted by CID?

(5) Does CID have the authority to require employment with a local jurisdiction as a condition to certify a local inspector?

(6) Does CID have the authority to approve or deny certification of a certified inspector solely because that inspector relocates to a different local jurisdiction?

(7) Does CID have the authority to restrict the inspection activities of a certified inspector to a specified local jurisdiction?

(8) Does CID have the authority to prohibit or restrict a local jurisdiction from using the inspection services of a certified inspector who is employed by a different local jurisdiction?

(9) Does CID have the authority to prohibit or restrict a local jurisdiction from using the inspection services of a certified inspector who is an independent contractor?

(10) Does CID have the authority to inspect the activities of a certified inspector employed by a local jurisdiction?

(11) Does CID have the authority to revoke or suspend the certification of a local inspector?

(12) Does CID have the authority to require a certified local inspector to renew the certification?

(13) Does CID have the authority to create different categories of certification with different certification standards based on an inspector's status as a state or local inspector?

CONCLUSION:

The questions posed raise a number of interrelated and complex issues regarding the scope of CID's authority to regulate inspectors and enforce building codes throughout the state. To properly address the questions, we will begin with a general discussion of CID's statutory authority and jurisdiction over local jurisdictions, followed by a specific discussion of each question.

BACKGROUND:

Overview of CID Authority

The legislature enacted the Constructions Industries Licensing Act ("CILA"), NMSA 1978, §§ 60-13-1 through -59 (1989, as amended through 2011) in order "to promote the general welfare of the people of New Mexico by providing for the protection of life and property by adopting and enforcing codes and standards for construction, alteration, installation, connection, demolition and repair work." *Id.* § 60-13-1.1. CILA created CID within the Regulation and Licensing Department and its duties include, in pertinent part:

(A) approve and adopt examinations on codes and standards, business knowledge, division rules and regulations and on [CILA] recommended by the construction industries commission for all classifications of contractor's licenses;

(B) issue ... contractor's licenses and certificates of qualification in accordance with the provisions of [CILA]; ...

(F) adopt all building codes and minimum standards as recommended by the trade bureaus and approved by the [construction industries] commission so that the public welfare is protected, uniformity is promoted and conflicting provisions are avoided; [and] ...

(K) adopt, subject to [construction industries] commission approval, rules and regulations necessary to carry out the provisions of [CILA]....

Id. § 60-13-9.

CILA also created the Construction Industries Commission (“Commission”). See NMSA 1978, § 60-13-6(A). According to CILA,

The commission shall establish policy for the division. It shall advise on, review, coordinate and approve or disapprove all rules, regulations, standards, codes and licensing requirements which are subject to [its] approval under the provisions of the [CILA] ... so as to insure that uniform codes and standards are promulgated and conflicting provisions are avoided.

Id. § 60-13-6(E).

CILA authorizes CID or the Commission to “compel minimum code compliance in all certified code jurisdictions and political subdivisions” and “investigate code violations in any code jurisdictions in New Mexico.” Id. § 60-13-11(D), (E).

A canon of statutory construction is that statutes are to be read in accord with common sense, and in such a way as to determine and give effect to the legislature’s intent. See, e.g., State v. Romero, 119 N.M. 195, 198, 889 P.2d 230, 233 (Ct. App. 1994). The common sense reading of these statutes is that CID’s jurisdiction covers the entire field of construction industries. See N.M. Att’y Gen. Op. No. 69-72 (1969).[1] CID’s role is to ensure “that uniform codes and standards are promulgated” throughout New Mexico and that “conflicting provisions are avoided.” Id. § 60-13-6(E). “All political subdivisions of the state are subject to the provisions of codes adopted” under CILA and CID’s codes “constitute a minimum requirement for the codes of political subdivisions.” Id. § 60-13-44(F).

CID’s Authority Over Municipalities

The request refers to the general authority of municipalities to enact ordinances pursuant to NMSA 1978, § 3-17-6 and NMSA 1978, § 3-18-6, as well as the home rule provision of the New Mexico Constitution, Article X, § 6. In general, CILA applies to municipalities, including home rule municipalities, and will prevail over any conflicting provision in a municipal ordinance or charter.

Article X, § 6(D) states: “[a] municipality which adopts a charter may exercise all legislative powers and perform all functions **not expressly denied by general law or charter...**” (emphasis added). The New Mexico Court of Appeals has defined a “general law” as one “that applies generally throughout the state, relates to a matter of statewide concern and impacts inhabitants across the entire state.” Protection and Advocacy System v. City of Albuquerque, 2008-NMCA-149, ¶ 44, 145 N.M. 156, 171. As can be seen from the discussion above, CILA clearly meets the definition of a

“general law” given its wide reaching effect and express application to all political subdivisions of the state. Therefore, when a municipality exercises its home rule powers, it must do so in a way that does not conflict with CILA. See N.M. Att’y Gen. Op. No. 74-13 (1974) (“AG Op. No. 74-13”) (home rule municipalities are subject to the same limitations for building codes that apply to municipalities generally).

Municipalities are authorized to enact building codes and construction standards by ordinance pursuant to Sections 3-17-6 and 3-18-6. That authority is expressly conditioned under Section 3-17-1, which states that a municipality may adopt ordinances or resolutions not inconsistent with the laws of New Mexico...” (emphasis added). See also *Stennis v. City of Santa Fe*, 2008 NMSC 8, ¶ 21, 143 N.M. 320, 326. This provision makes it clear that municipal ordinances cannot overrule state law. Therefore, municipalities may enact construction code ordinances but such ordinances are subject to and cannot conflict with CILA. See also NMSA 1978, § 3-17-6(A) (providing that codes, including building codes, adopted by municipalities may not conflict with New Mexico laws or valid regulations issued by a state agency and must provide for “minimum requirements at least equal to the state requirements on the same subject”).

ANALYSIS:

Authority Over Local Building Codes

(1) Does CID have the authority to place requirements on a local jurisdiction’s approval of construction permits or inspection of construction projects?

CILA provides that the trade bureaus created under CID are responsible for “perform[ing] inspections of all occupations, trades and activities within their jurisdictions.” NMSA 1978, § 60-13-33(B). The trade bureaus “may require a permit to be secured and conspicuously posted prior to any construction, installation, alteration, repair or addition to or within any building, structure or premises.” *Id.* § 60-13-45(A).

CID is charged with making “rules and regulations pertaining to the issuance of permits and the setting of reasonable fees to be paid by the applicant for a permit.” *Id.* § 60-13-45(D). However, CID’s procedures for the issuance of permits do not extend to municipalities where inspections are conducted by municipal inspectors:

The 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 [Section 60-13-45] shall preclude municipalities from making inspections in accordance with [CILA] or rules and regulations pursuant to that act or from establishing a schedule of fees to be paid by an applicant for a permit.

Id.

Under these provisions, CID's procedures for the issuance of permits apply only to local jurisdictions where inspection is made by a state inspector. A municipality retains authority under CILA to establish procedures for the issuance of permits for inspections made by a municipal inspector within the municipality. See also NMSA 1978, § 3-18-6(A)(4) (authorizing a municipality, "within its planning and platting jurisdiction," to "have exclusive enforcement over permits issued by the municipality when enforced by an approved inspector"). As quoted above, Section 60-13-45(D) affirmatively authorizes municipalities to establish permit fees and to make inspections "in accordance with" CILA and CID's rules implementing CILA. We do not interpret the statute's directive for inspections "in accordance with" CILA and CID rules to allow CID to impose special requirements for municipal inspections. We believe the legislature intended only that inspections conducted by municipalities comport with the same statutory and regulatory requirements that apply to inspections made by state inspectors.

(2) Does CID have the authority to refuse inspection services to a local jurisdiction because that local jurisdiction failed to adopt temporary or permanent CID program requirements?

For purpose of this opinion, we assume that the "CID program requirements" referred to in the question are the requirements for the approval of construction permits or inspection of construction projects. As discussed above under Question 1, CILA permits a municipality to establish procedures for the issuance of permits and to conduct inspections. CID's requirements for permits and inspections apply within a municipality when inspections are performed exclusively by a full-time state inspector. See NMSA 1978, § 60-13-45(D). Because a municipality is not required to adopt temporary or permanent CID program requirements for permits issued or inspections conducted by the municipality, CID has no authority to refuse inspection services if a municipality does not adopt those requirements. See AG Op. No. 74-13 (concluding that, under a substantively identical predecessor to Section 60-13-45, trade boards have authority to require permits within municipalities only when those municipalities have no inspectors of their own).

(3) Does CID have the authority to refuse inspection services or to refuse to certify local inspectors in a local jurisdiction because that local jurisdiction adopted building codes that, while the codes meet minimum standards set by CID, differ from those adopted by CID?

As discussed above, CID is responsible for insuring that "uniform codes and standards are promulgated and conflicting provisions are avoided." NMSA 1978, § 60-13-6(E). See also id. § 60-13-9(F) (CID shall "adopt all building codes and minimum standards as recommended by the trade bureaus ... so that the public welfare is protected, uniformity is promoted and conflicting provisions are avoided"). "All political subdivisions of the state are subject to the provisions of codes adopted" under CILA, which "constitute a minimum requirement for the codes of political subdivisions." Id. § 60-13-

44(F). See also NMSA 1978, § 3-17-6(A) (providing that codes, including building codes, adopted by municipalities may not conflict with New Mexico laws or valid regulations issued by a state agency and must provide for “minimum requirements at least equal to the state requirements on the same subject”).

These statutory provisions make clear that CID is charged with adopting uniform building codes that constitute the minimum requirements for codes adopted by political subdivisions in the state. Although a local jurisdiction can adopt building codes that exceed the minimum standards specified by CID, they cannot adopt minimum standards that differ from those in the codes promulgated by CID.

In light of CILA’s limitations on local building codes, a code adopted by a local jurisdiction that did not conform to the uniform state code would be invalid. See AG Op. No. 74-13. CILA confers authority on CID to “compel minimum code compliance in all certified code jurisdictions and political subdivisions,” and “investigate code violations in any code jurisdictions in New Mexico.” NMSA 1978, § 60-13-11 (D), (E). We believe that these provisions empower CID to deny inspection services or certification of local inspectors for a local jurisdiction that fails to adopt a code that provides for minimum requirements “at least equal to the state’s requirements.” See also AG Op. No. 74-13 (Construction Industries Commission authorized to require a municipality to have a legal code as a condition to the certification of municipal inspectors and the validity of municipal inspector certificates).

(4) Does CID have the authority to issue a stop work or similar order on a construction project for which there is a valid building permit from a local jurisdiction that has adopted building codes that, while these codes meet minimum standards set by CID, differ from those adopted by CID?

As discussed above, a local jurisdiction may adopt building codes that exceed the minimum standards specified by CID but they cannot adopt minimum standards that differ from those in the codes promulgated by CID. A local building code that does not contain the minimum requirements specified in the codes adopted by CID violates CILA and is not a valid code. A building permit issued by a local jurisdiction for construction and other activities under an invalid code would necessarily be invalid as well. Under its authority to compel minimum code compliance, NMSA 1978, § 60-13-11, we believe CID could issue a stop work or similar order on a construction project authorized by a local jurisdiction with an invalid building code. CILA also authorizes CID to enforce CILA “in the district court of the county in which the offense was committed ... by injunction, mandamus or any proper legal proceeding.” Id. § 60-13-53.

Authority Over Inspectors for Local Jurisdictions

(5) Does CID have the authority to require employment with a local jurisdiction as a condition to certify a local inspector?

CID shall “adopt, subject to commission approval, rules and regulations necessary to carry out the provisions of the [CILA].” NMSA 1978, § 60-13-9(K). The Commission is charged with prescribing the qualifications and job descriptions for inspectors for the state, municipalities and all other political subdivisions. Id. § 60-13-41(B). A person must secure approval of his or her competence from CID prior to employment by any municipality or county as an inspector. Id. § 60-13-43(A).

CID’s statutory authority to regulate local inspectors is broad. Nevertheless, as an administrative agency, CID may not promulgate regulations that are “arbitrary, capricious, ... an abuse of discretion... or ... not in accordance with law.” Rio Grande Chapter of the Sierra Club v. New Mexico Mining Comm’n, 2003 NMSC 5, ¶ 17, 61 P.3d 806, 813. [2] A regulation “is arbitrary and capricious if it is unreasonable or without a rational basis.” Id. (citations omitted).

As noted above, Section 60-13-43(A) requires an inspector to obtain the approval of CID before he or she is “employed” by a local jurisdiction. The purpose of Section 60-13-43(A) is to prevent municipalities from using inspectors who have not been certified by CID. Despite the provision’s use of the word “employed,” when read in the context of CILA as a whole, we do not believe Section 60-13-43(A) requires an employer-employee relationship between a local jurisdiction and a local inspector.

Until recently, CILA provided that a municipal inspector’s powers “may be exercised by him only in the localities where he is authorized to make inspections.” NMSA 1978, Section 60-13-42(E). Even if a broad interpretation of this provision might have supported a regulation requiring local inspectors to be employees of the local jurisdictions where they make inspections, the provision is no longer available. Section 60-13-42(E) was repealed during the 2011 regular legislative session. See 2011 N.M. Laws, ch. 129, § 2. See also Fiscal Impact Statement for SB 262, as amended (last updated on Mar. 8, 2011), p. 3 (N.M. Municipal League stated that the repealed language allowed CID to argue that “it can control the location in which a person performs his/her labor, and this has become potential constitutional issues [sic]”). Consequently, although CILA still requires that local inspectors be certified by CID, there is no statutory basis for limiting the localities where a local inspector can conduct inspections.

In addition to lack of statutory authority, requiring employment with a local jurisdiction appears contrary to the authority CILA confers on municipalities. CILA authorizes municipalities to adopt their own building codes, subject to the limitations discussed above, issue permits and conduct inspections within their boundaries. Requiring a municipality to employ a municipal inspector as opposed to other arrangements, such as a contract, might be perceived as an unreasonable imposition on the municipality’s authority to conduct its business.

In short, we believe it unlikely that a regulation conditioning certification on a local inspector’s employment with a locality would survive judicial challenge. Specifically, it does not appear that CID would be able to show that the requirement was consistent

with CILA or that there was a reasonable and logical connection between the requirement and the qualifications and competence necessary to conduct local inspections.

(6) Does CID have the authority to approve or deny certification of a certified inspector solely because that inspector relocates to a different local jurisdiction?

As discussed in our response to Question 5, CILA provides CID with authority to establish the qualifications of and certify local inspectors. However, as we also discussed, that authority does not appear to provide CID with control over the localities in which an otherwise qualified and certified inspector may conduct inspections. Aside from the absence of statutory authority, there appears to be no other basis reasonably related to the inspector's competence or qualifications for conditioning certification on whether an inspector relocates to a different local jurisdiction.

(7) Does CID have the authority to restrict the inspection activities of a certified inspector to a specified local jurisdiction?

For the reasons discussed above in our responses to Questions 5 and 6, we do not believe CID has the authority to restrict the activities of a certified inspector to a specified local jurisdiction.

(8) Does CID have the authority to prohibit or restrict a local jurisdiction from using the inspection services of a certified inspector who is employed by a different local jurisdiction?

Section 60-13-43(A) of CILA provides: "No person shall be employed by any municipality or county as an inspector unless he has first secured approval from [CID] of his competence as an inspector." This prohibits a local jurisdiction from using the inspection services of a local inspector who has not been certified by CID. Neither Section 60-13-43(A) nor any other provision of CILA appears to provide CID with authority to prohibit one local jurisdiction from using the inspection services of a certified inspector who is employed by another local jurisdiction.

(9) Does CID have the authority to prohibit or restrict a local jurisdiction from using the inspection services of a certified inspector who is an independent contractor?

For the reasons stated in response to the previous questions, we do not believe CILA authorizes CID to prohibit or restrict a local jurisdiction from using the inspection services of a certified inspector who is an independent contractor.

(10) Does CID have the authority to inspect the activities of a certified inspector employed by a local jurisdiction?

Under CILA, CID prescribes the qualifications and job descriptions for inspectors for the state, municipalities and other political subdivisions. NMSA 1978, § 60-13-41(B). A person may not be employed by a municipality or county as an inspector absent CID approval and certification. Id. § 60-13-43(A), (B). Certification “remain[s] in effect unless rescinded by action of the commission.” Id. § 60-13-43(C). CILA provides that a “complaint brought against a certified municipal or county inspector shall cause [CID] to assign an investigator to investigate the merits of the complaint and report to the commission within thirty days.” Id. § 60-13-43(D).

We believe these provisions, which require CID to qualify and regulate local inspectors, provide sufficient authority for CID to inspect the activities of certified inspectors employed by a local jurisdiction.

Regulation of Inspectors

(11) Does CID have the authority to revoke or suspend the certification of a local inspector?

The provisions of CILA set forth in our response to the previous question authorize CID to investigate complaints brought against certified municipal and county inspectors and to “rescind” an inspector’s certification. We believe this authorizes CID to revoke or suspend the certification of a local inspector, provided it acts fairly.[3]

(12) Does CID have the authority to require a certified local inspector to renew the certification?

We believe CID’s general authority to regulate inspectors, as discussed above, provides CID with implied authority to require a certified local inspector to renew the certification. See Wimberly v. New Mexico State Police Bd., 83 N.M. 757, 758, 497 P.2d 968 (1972) (an agency’s statutory authority includes that expressly granted and that which can be fairly implied from its express authority). While Section 60-13-43(C) provides that “certification ... shall remain in effect unless rescinded by action of the commission,” this does not necessarily preclude CID from establishing a reasonable process for the renewal of inspector certificates.[4]

(13) Does CID have the authority to create different categories of certification with different certification standards based on an inspector’s status as a state or local inspector?

CID has express authority to prescribe “[q]ualifications and job descriptions for inspectors for the state, municipalities and all other political subdivisions...” NMSA 1978, § 60-13-41(B). This provision gives CID authority to create different categories of certification with different certification standards based on an inspector’s status as a state or local inspector. Consistent with our discussion above under Question 5, certification categories and standards promulgated by CID must be based on

reasonable distinctions between state and local inspectors and may not be arbitrary, capricious or contrary to law.

GARY K. KING
Attorney General

MONA VALICENTI
Assistant Attorney General

[1] Unless otherwise indicated, the term “CID” will be used throughout this opinion to refer to CID or the Commission with the understanding that CID and the Commission work together to carry out CILA’s provisions.

[2] CID is covered by the Uniform Licensing Act (“ULA”), which permits an appeal to the Court of Appeals by “[a]ny person who is or may be affected by a regulation adopted by the board....” NMSA 1978, § 61-1-31(A). Upon appeal, the Court of Appeals will set aside a regulation if it is found “arbitrary, capricious or an abuse of discretion; ... contrary to law; or ... against the clear weight of substantial evidence of [sic] the record.” *Id.* § 61-1-31(C).

[3] The ULA would govern proceedings conducted by CID to revoke or suspend an inspector’s certification. See supra note 2.

[4] Although we conclude CID has sufficient implied authority to require certification renewal, CID may not impose a fee for issuing or renewing an inspector’s certification unless it has express statutory authority. See, e.g., N.M. Att’y Gen. Op. No. 88-78 (1988) (board administering the State Supreme Court Library had no statutory authority to impose a fee on library patrons); N.M. Att’y Gen. Op. No. 66-44 (1966) (registration fee imposed by Board of Examiners for Architects was null and void because the fee was not authorized by law).