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PHOENIX, ARIZONA

September 8, 1965

DEPARTMENT OF LAW LETTER OPINION NO. 65-34-L (R-131)

REQUESTED BY: Honorable Richard J. Riley
Cochise County Attorney

QUESTION: Does a County Board of Supervisors have authority to make and enforce regulations abolishing, prohibiting or restricting the use of above-ground gasoline tanks?

ANSWER: See body of opinion.

The lawmaking power of the board of supervisors of any county within the state is entirely derivative. The board has only those powers which are expressly or by necessary implication, delegated to it. Implied powers do not exist independently of the grant of express powers as the only function of an implied power is to aid in carrying into effect a power expressly granted. In the absence of an express grant of power to the board by the Legislature to pursue a course of action in the subject area here involved, the board has no authority to act. See Hart v. Bayless Investment, 86 Ariz. 379, 346 P.2d 1101; Assoc. Dairy Prod. v. Page, 68 Ariz. 393, 206 P.2d 1041.

The improper storage of large quantities of a highly combustible liquid, such as gasoline, may constitute a threat to the public safety. A regulation adopted to protect the public from such improper storage may find its validity from the enacting authority's power to provide for public safety.

General powers and duties are delegated to the board of supervisors by A.R.S. § 11-251. A careful examination of this statute does not disclose that the board has been therein granted authority to pass ordinances relating to public safety. It appears that a county board of supervisors does not have authority per se to make and enforce regulations abolishing, prohibiting or restricting the use of above-ground gasoline storage tanks.

It is possible, however, that the county supervisors could, by following proper procedures therefor, control the location of gasoline storage facilities to some extent under the zoning authority contained in A.R.S. § 11-801, et seq. A.R.S. § 11-802 provides as follows:

"The board of supervisors of a county, in order to conserve and promote the public health, safety and general welfare, and in accordance with the provisions of this chapter, may plan and provide for the future growth and improvement of the area under its jurisdiction, and coordinate all public improvements in accordance therewith...and in the manner provided in this chapter, adopt and enforce such rules, regulations, ordinances and plans as may apply to the development of the area under its jurisdiction." (emphasis supplied)

However, by way of limitation, A.R.S. § 11-821(C) provides that: "Nothing in this chapter shall be construed as a delegation of authority to regulate in any manner the quality or type of materials, workmanship and other structural details commonly found in building codes."

Furthermore, A.R.S. § 11-830(A) provides:

"Nothing contained in any ordinance authorized by this chapter shall:

"(1) Affect existing uses of property or the right to its continued use or the reasonable repair or alteration thereof for the purpose for which used at the time the ordinance affecting the property takes effect."

Thus, it appears that county boards of supervisors may regulate the future placement and use of gasoline storage tanks under authority of the planning and zoning statutes. However, it does not appear that such regulation could operate retroactively or that the board could necessarily regulate the manner, quality or workmanship of the storage tanks themselves.

There exists an additional possibility that the existing method of storage of gasoline constitutes a public nuisance which could be abated as such. A.R.S. § 13-601 defines a public nuisance as:

"Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons...."

Not knowing the precise facts surrounding the particular storage facility, the cause of the explosion, or the number of persons affected, it can only be suggested that depending upon the circumstances, the storage facility might constitute a public nuisance if the construction is faulty or not in accordance with the usual mode or custom. In 66 C.J.S., page 803, it is said:

"The storage of gasoline is not a nuisance per se....It has been held that a storage tank elevated above the ground, even though near a residence, is not a nuisance per seThe keeping or storage of gasoline may constitute a nuisance, either private or public. Whether or not it becomes a nuisance depends on the location, the quantity, and other surrounding circumstances. While it would not necessarily depend on the

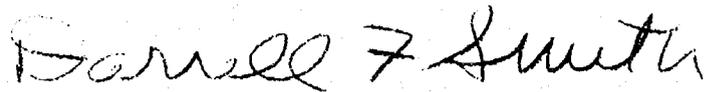
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degree of care used in the storage,
the manner in which the tanks are
constructed and operated may be
considered." (emphasis supplied)

To the extent that it is a public nuisance, the county attorney could bring abatement, although it is possible that the activity would have to come within the statutory definition of public nuisance as hereinabove set forth. (66 C.J.S., page 803)

It is, therefore, our opinion that the board of supervisors does not have the specific power to regulate gasoline storage, except through its zoning power or if the surrounding circumstances are found by the court to constitute a public nuisance.

Respectfully submitted,



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The Attorney General

DFS/cah