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STATE CAPITOL
PHOENIX, ARIZONA

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DEPARTMENT OF LAW LETTER OPINION NO. 67-2-L (R-27)

REQUESTED BY: Honorable Jerry L. Smith
 County Attorney
 Coconino County

QUESTION: When the State Department of Health has given its approval to the construction of a sewage treatment facility and the County Health Department of the county in which such facility is to be constructed, disapproves it, which department's decision is controlling?

ANSWER: See body of opinion

At the outset of this opinion it is necessary to inspect the various statutes relative to the subject at hand. The statutory enactments herein involved are as follows:

Arizona Revised Statutes, Section 36-132(B)(12) State Department of Health; functions; contracts:

"The Department shall, in addition to other powers and duties vested in it by law: . . . supervise sanitary engineering facilities and projects within the state, authority for which is vested in the state department of health. In the exercise of such provision, the department shall make and enforce regulations concerning plans or specifications for construction, improvement, alteration or operation of public water supplies, public bathing places, and sewage systems and disposal plants for treatment of sewage, industrial

Opinion No. 67-2-L
(R-27)
November 29, 1966
Page Two

wastes and other deleterious matter, gaseous, liquid, or solid, and require that all such plans or specifications first approved by the department before any work thereunder is commenced, and inspect all such projects during the progress thereof and enforce compliance with the approved plans and specifications."

As to applicable statutes pertaining to local boards of health, A.R.S. Section 36-162(B) Powers and Duties of County Boards of Health provides:

"The boards shall have such powers within their respective counties and outside the corporate limits of cities having a city board of health as are granted the state board of health and the state department of health, subject to supervisory control by the state board."

Also A.R.S., Section 36-184 provides, in part, as follows:

"Boards of health of local health departments; organization; meetings; powers and duties: . . . (B) . . . the board shall . . . (4) make rules and regulations not inconsistent with the rules and regulations of the state department of health, for the protection and preservation of public health."

First, if a county health department does not have valid rules and regulations on the subject, the state statutes in regard to public health and the rules and regulations of the State Health Department are the only health laws of the state, and county health department health officials may not substitute their interpretation of state regulations for that of State Department of Health officials.

Opinion No. 67-2-L
(R-27)
November 29, 1966
Page Three

This necessarily poses a question of what authority a county board of health has to enact rules and regulations pertaining to sanitary engineering facilities and projects. In answering this question, a brief review of the judicial history of the public health laws is considered essential. The first reported Arizona case to deal with local health board regulations was Globe School District No. 1 v. Board of Health, 20 Ariz. 208, 179 Pac. 55. In that case a City Board of Health adopted certain rules and regulations pursuant to then existing statutory authority as follows:

"Each local board of health, within its jurisdiction, shall examine into all nuisances, sources of filth and causes of sickness and make such regulations regarding the same as it may judge necessary before the public health and safety of the inhabitants, and any person who shall violate any published order or regulation, made by any board of health, shall be guilty of a misdemeanor punished by" (Ch. 1, Title 41, par. 4386, Rev. Stats. Ariz. 1913).

The court upheld an emergency order of the local board of health closing public schools during an epidemic of Spanish influenza, but found that other regulations of the board defining public nuisances were invalid. The court said the powers of the local boards:

". . . extend to matters administrative in their nature and which pertain to the execution and enforcement of the health laws of the state for the protection of the public health and safety . . . such boards have no authority conferred upon them to legislate. They are granted power within their jurisdiction to make rules and regulations to facilitate enforcement of the health laws. . . ."

November 29, 1966

Page Four

It should be noted how similar to the statutory authority in the matter of local health board regulations Arizona Revised Statutes, Section 36-184 is. The court subsequently considered in Loftus v. Russell, 69 Ariz. 245, 212 P.2d 91, the statutory provisions giving the county boards of health in counties which do not have local full-time public health services:

"Such powers within their respective counties . . . as are granted to the state board of health."

The case arose in Coconino County where the county board of health adopted a regulation governing the processing, handling and distribution of milk and milk products. The court found the regulations invalid due to occupation of the field by state legislation in the dairy code. In addition to its holding as to occupation of the field, the court also reaffirmed the Globe School District case and said:

". . . The county board of health was without power to enact the regulation . . . These powers of the state and local boards, both city and county, are limited to the making of regulations or rules implementing existing statutes . . . Their powers extend to matters administrative in nature and which pertain to the execution and enforcement of the health laws of the state for the protection of the public health and safety."

We are cognizant of Arizona Revised Statute, Section 36-105(E) as amended, 1966, which provides as follows:

"The provisions of regulations adopted by the board under the authority conferred by this section shall be observed throughout the state and shall be enforced by

each local board of health, but nothing herein shall be deemed to limit the right of any local board of health or county board of supervisors to adopt such ordinances, rules and regulations as authorized by law within its jurisdiction, provided that such ordinances, rules and regulations do not conflict with the state law and are equal to or more restrictive than the provisions of the regulations of the State Board of Health."

That provision is applicable only to rules and regulations adopted by the State Board of Health pursuant to Title 36, Chapter 1, Article 1 (A.R.S., Section 36-105) and as previously noted exclusive jurisdiction to supervise sanitary engineering facilities and projects within the State has been granted to the State Department of Health by another article, i.e., Article 2 of Chapter 1 of Chapter 36 (A.R.S., Section 36-132(D)(12)).

There is one remaining provision yet to be noted. Arizona Revised Statutes, Section 36-105(B)(8) provides as follows:

"The Board shall by regulation: . . . prescribe reasonable regulations with regard to sewage collection, treatment, disposal and reclamation systems to prevent sewage contamination or pollution of all underground and surface waters, and to prevent the transmission of sewage born or insect born diseases. The regulations shall prescribe minimum standards for the design of sewage collection systems, treatment, disposal and reclamation systems and for operation of the collection system, treatment, disposal and reclamation, and shall provide for inspection of such premises, systems and

Opinion No. 67-2-L
(R-27)
November 29, 1966
Page Six

installations and for abatement as public nuisances of any collection system, process, treatment plant, disposal system or reclamation system which does not comply with the minimum standards. The regulations shall provide that the plans and specifications for all sewage collection systems, sewage collection system extensions, treatment plants, processes, devices, equipment, disposal systems and reclamation systems be submitted for review to the State Department of Health. The regulations shall provide that no sewage collection system, sewage collection system extension, treatment plant, process, device, equipment, disposal system or reclamation system be constructed, reconstructed, installed or initiated before compliance with the standards and regulations has been demonstrated by the approval of the plans and specifications by the State Department of Health."

It is conceivable, therefore, that a county board of health could, pursuant to the authority granted it under A.R.S. Section 36-105(E), enact rules and regulations on subjects enumerated in A.R.S. Section 36-105(D)(8) provided they are not in conflict with state law and are equal to or more restrictive than provisions of the State Board of Health.

It is the understanding of this Department that your County Health Department does not have rules and regulations on the subject at hand. Therefore, it is the opinion of this office that while a county board of health has certain authority to enact more restrictive

Opinion No. 67-2-L

(R-27)

November 29, 1966

Page Seven

rules and regulations, the lack of such rules and regulations at the present necessitates our decision that at the present time the decision of the State Department of Health in approving a sewage treatment facility in your county, is controlling.

Respectfully submitted,

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The Attorney General

DFS:cah