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ARIZONA ATTORNEY GENERAL

Opinion No. 63-17
R-146
March 25, 1963

REQUESTED BY: HONORABLE ROBERT E. MORROW
State Senator

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTION: Do cities and towns have the power to build air
raid shelters under our present law?

ANSWER: Yes, as limited in body of opinion.

Title 9 of the Arizona Revised Statutes contains, for the most part, the statutory provisions pertaining to cities and towns. The general and taxing powers of a board of trustees government after disincorporation are set forth in A.R.S. §§ 9-219 and 9-220. Provisions within these two sections allow the board of trustees to guard against the introduction or spread of contagious diseases, to protect the public health by ordinance and to tax property for the purpose of purchasing land and erecting buildings thereon for use of the corporation.

The general powers of a town incorporated under the common council form of government are designated in A.R.S. §§ 9-240 and 9-241. Among its powers are the power to purchase or lease property for corporate purposes, to erect necessary buildings for corporate purposes and to provide regulations to prevent the introduction or spread of contagious diseases within the town. A.R.S. § 9-276 provides powers of cities in addition to those already vested in cities by their respective charters and by general law. When a city adopts a charter form of government, its powers are largely dependent upon the provisions of its charter. The charter must be consistent with and subject to the state constitution, and not in conflict with the constitution and general laws of the state relating to cities. Chapter 4 of Title 9 sets forth general powers of cities and towns, none of which appears to be applicable to the question at hand.

It is a settled principle of law in Arizona that municipalities, regardless of how organized, have only such legislative powers as have been expressly, or by necessary implication, delegated to them by the constitution or by the legislature and that such powers will be strictly construed. City of Phoenix v. Arizona Sash, Door & Glass Co., 80 Ariz. 100, 293 P.2d 438, and cases

cited. Implied powers do not exist independently of the grant of express powers. The statutory provisions mentioned, supra, do not appear to delegate any express power to cities and towns to build air raid shelters. However, in the case of Gardenhire v. State, 26 Ariz. 14. 221 Pac. 228, the court had to consider the validity of an ordinance of an unincorporated town denouncing the adulteration of milk. The ordinance was adopted pursuant to a statutory provision authorizing the towns to prescribe regulations necessary and expedient for the prevention or suspension of disease. The court said:

"It seems to have been a common practice for legislatures, in providing what powers municipal corporations should be allowed to exercise to enumerate specifically most of such powers, concluding, however, with what courts have called 'a general welfare clause,' the evident purpose of which was to supply the corporation, in the event such power may have been overlooked in specific grants, power of self-protection or self-defense. The form of such welfare clause is usually much broader than subsection 28, and instead of being a grant of power 'to do all other acts, etc., for the prevention or suppression of disease,' the grant is in some such words as these: 'To make all regulations which may be necessary or expedient for the preservation of the public health.' Whichever wording is adopted, the purpose is the same and must necessarily be accomplished by the same means."

The court then went on to cite cases from other jurisdictions stating that ordinances relating to the comfort, health and general welfare of inhabitants are regarded as the exercise of police regulations; that the regulation of police power is hardly susceptible to exact definition; and that when the city council considers some thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. In view of the language of the Gardenhire case, supra, it might well be that cities and towns have the power to build air raid shelters as a measure of self-defense pursuant to the general provisions of Title 9 of the A.R.S. Assuming, however, that such a grant of

power is not clearly established by these provisions, we are of the opinion that other statutory provisions grant such a power to cities and towns.

A.R.S. §§ 26-301 et seq. provide for civil defense organization and preparation in the state. A.R.S. § 26-351 reads as follows:

"26-351. Local civil defense agencies; establishment; organization

A. Each county and incorporated city and town of the state shall establish a local organization for civil defense plan and program. Each unincorporated community may establish such an organization.

B. The chief executive officer or governing body of the political subdivision or community organization may appoint a director who shall be responsible for the organization, administration and operation of the local civil defense organization, subject to the direction and control of such executive officer, governing body or community organization.

C. Each local organization for civil defense shall perform civil defense functions within the territorial limits of the political subdivision in which it is organized, and shall conduct such functions outside its territorial limits as required pursuant to provisions of this chapter."

A.R.S. § 26-352 reads in part:

"26-352. Powers of local organization

Each political subdivision included within the provision of § 26-351 may:

1. Appropriate and expend funds, make contracts, obtain and distribute equipment, materials and supplies for civil defense purposes, provide for the health and safety of persons and property, including emergency assistance to victims of any disaster

resulting from enemy attack, and direct and coordinate development of civil defense plans and programs in accordance with the policies and plans of the federal and state civil defense agencies.

* * *

3. Establish a primary and one or more secondary control centers to serve as command posts during an emergency." (Emphasis supplied)

A.R.S. § 26-302(C) reads as follows:

"C. In order to attain uniformity so far as practicable throughout the country in measures taken to aid civil defense, all action taken under this chapter, and all orders, rules and regulations made pursuant thereto, shall be taken or made with consideration to the orders, rules, regulations, actions, recommendations and requests of federal authorities relevant thereto and, to the extent permitted by law, shall be consistent with such orders, rules, regulations, actions, recommendations and requests."

From a perusal of the provisions of A.R.S. pertaining to civil defense, supra, it appears that the legislature intended civil defense to be a matter of both statewide and local concern. The general powers conferred on cities and towns by the provisions of Title 9 of A.R.S. are those concerning primarily municipal or local affairs. Where the legislature enacts a law of statewide concern and when it is apparent that the legislature has appropriated the field, its declarations are binding throughout the state, and all cities and municipalities are precluded from legislation upon the same subject matter though they are not precluded from enacting provisions on the same subject matter which go beyond those provided for in the state statutes. City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330, 195 P. 2d 562. The question of public health is clearly one of statewide concern. Associated Dairy Products Co. v. Page, 68 Ariz. 393, 206 P.2d 1041. Furthermore, the police power inheres in the state and not in its municipalities, the latter exercising police and other powers only by grant given directly or by necessary implication. Clayton v. State, 38 Ariz. 135, 297 Pac. 1037.

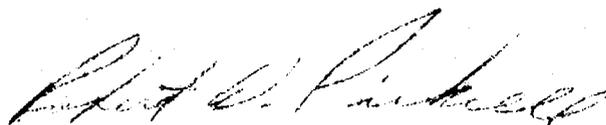
Opinion No. 63-17

R-146

March 25, 1963

Page 5

However, where legislation confers on a municipality express power to legislate thereon, even though not of local concern, both jurisdictions may legislate on the same subject. Clayton v. State (on rehearing), 38 Ariz. 466, 300 Pac. 1010. Regardless of whether you approach the propounded question from a state appropriation of the field - police power delegation aspect or from a concurrent jurisdiction aspect, the answer in both instances is in the affirmative by virtue of the provisions of A.R.S. § 26-352, supra. This provision allows cities and towns to expend funds and to provide for the health and safety of persons, from which the power to build air raid shelters can be necessarily and reasonably implied. We feel that such a power must be exercised in accordance with the civil defense policies and plans of the federal authorities and the state civil defense act and agencies.



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