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Police Power and the Design of Buildings

William C. Bowers

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NOTES

POLICE POWER AND THE DESIGN OF BUILDINGS

In New Mexico, the design of buildings is included in the practice of professional engineering and in the practice of architecture. The practice of either of these professions by a person not duly registered or exempt from registration is prohibited. In Albuquerque, permissible materials and methods of construction are specified in detail, and with some exceptions subject to the discretion of the City Manager, drawings and specifications must be prepared, signed, and sealed by a registered architect or professional engineer.

Prior to the latter part of 1962, city officials interpreted their building code as requiring certification of drawings by either an


   'Practice of engineering' means . . . application of special knowledge . . . to . . . planning, design, and supervision of construction . . . [of] buildings, works, or utilities, or any combination or aggregation thereof . . . .


   'Practice of architecture' includes the design, . . . and the general administration of the construction of one or more buildings. Provided . . . shall not . . . include . . . persons specifically exempted under . . . sections 67-12-7 and 67-12-8 . . . .

Section 67-12-7 exempts architects from other states who are affiliated with resident New Mexico architects, federal or railway employees, and draftsmen or other subprofessionals employed by architects. Section 67-12-8 exempts anyone designing commercial, industrial, or semi-public buildings, provided public safety or health is not involved and the construction cost does not exceed twenty-five thousand dollars.


   'It shall be unlawful for any person to practice or offer to practice in the state, or to use . . . any title . . . to convey the impression that he is a professional engineer . . . unless . . . duly registered . . . under . . . the Engineering Practice Act.


   'It shall be unlawful for any person to practice architecture in this state unless . . . duly registered under the provisions of this act . . . .

4. Albuquerque, N.M., Uniform Building Code § 214 (1959), requires the following of an applicant for a building permit:

   Copy of drawings, specifications and a plot plan . . . shall be filed . . . except that the City Manager shall have authority to waive the submission . . . .

   Drawings and specifications shall be prepared by a registered architect or a registered professional engineer and shall be signed by him and stamped with his seal IN ACCORDANCE WITH LAWS OF THE STATE OF NEW MEXICO.
architect or an engineer. In December of 1962, a ruling was issued by the Superintendent of the Division of Building and Inspection, setting forth a policy under which building permits would henceforth be issued for certain types of buildings only when the plans and specifications submitted were certified by a registered architect.5

5. City of Albuquerque, Division of Building and Inspection, December 31, 1962; Subject: Acceptance of Plans and Specifications by the CITY OF ALBUQUERQUE—EFFECTIVE January 9, 1963. The introductory policy statement, preceding this ruling, provides:

There has existed for sometime a misunderstanding relating to plans and specifications submitted to the Division of Building and Inspection, whether such plans and specifications should bear the seal of a State of New Mexico Registered Architect or Registered Professional Engineer.

The Official Uniform Building Code of the City of Albuquerque, Ch. 2, § 214, 3 reads as follows... [see note 4 supra.]

This is not intended as an interpretation of the registration act regulating architects and engineers; through the joint cooperation of both professions there was submitted... recommendations that are considered compatible to the registration acts of the two professions (the referenced recommendations are attached herewith).

The policy statement continues to the effect that the recommendations of the joint committee will be followed with noted exceptions. The “joint committee” was composed of three architects representing the American Institute of Architects and three engineers representing the New Mexico Society of Professional Engineers. The Society of Professional Engineers includes architectural, aeronautical, civil, agricultural, electrical, ceramic, geologic, chemical, industrial, highway, hydraulic, mechanical, mining, metallurgical, municipal, petroleum, sanitary, and structural engineers, all registered as professional engineers. Of these classes of engineers, generally only architectural, civil, and possibly structural engineers would claim interest and competence in the design of buildings.

The joint committee whose recommendations are now the law consisted of three architects, two electrical engineers, and one civil engineer (also qualified as structural) employed in government service. Architectural engineers and civil engineers in private practice (those directly concerned) were not represented. The accepted recommendations are:

1. One-two-three-and four-family residential structures, at the discretion of the Superintendent of the Building and Inspection Division, should not require professional certification. Structures other than residential structures and less than 2,000 sq. ft. in floor area, may or may not require professional certification at the discretion of the Superintendent of the Building and Inspection Division.

2. Buildings that should bear engineer's or architect's certification, but not necessarily architect's certification, are those buildings that house engineering or industrial processes and do not create strictly an environment for human habitation. Typical examples include the following:

   Electrical Generating Plants
   Gas Works
   Water Works
   Sewage Treatment
   Processing Plants
   All forms of Milling Operations
   Manufacturing Processes
Under the new ruling, no professional certification is required for one- two- three- and four-family residential structures, at the discretion of the Building and Inspection Division. Any architect may certify any type of design. Regulation of architects and engineers, 

3. Drawings for all other buildings not covered in the above should bear the stamp of a registered architect.

The one recommendation not accepted is:

4. We further recommend that the Building and Inspection Division establish a regulation requiring the multiple stamping of plans. The responsibility of professional engineers and architects should be demonstrated on each sheet of the drawings by the appearance of their seal and signature and should include the following:

   a. Architect or Engineer (depending on the category of building)
   b. Structural Engineer
   c. Electrical Engineer
   d. Mechanical Engineer
   e. Civil Engineer
   f. Where an additional specific technical consideration is required, this should also be acknowledged by seal and signature.

We feel that these actions would more adequately satisfy the basic desire of safeguarding life, health, safety, and property, and to promote all public welfare in our city, as well as to improve the quality of work and the ethics of architects and engineers.

6. "Joint Committee" recommendation (1), note 5 supra.

7. See note 5 supra. Recommendation (1) provides that no certification is required; i.e., a non-registered person with no proved qualifications may do whatever design is required.

Recommendation (2) provides that either an architect or an engineer may certify electrical generating plants, gas works, water works, sewage treatment, processing plants, all forms of milling operations, and manufacturing processes.

And, by recommendation (3), all other buildings must be designed by an architect.

Comment on N.M. Stat. Ann. § 67-12-1.1 (Supp. 1963) is apropos. This statute provides:

'Practice of architecture' includes the design, the preparation of working drawings ... and the general administration of the construction of one or more buildings.

'Building' includes structures intended for human habitation, shelter or environment.

Webster's Third New International Dictionary (1965) defines "environment" as:

1: something that environs; SURROUNDINGS: 'relaxed in a cozy environment of apple-green furniture and art linoleum'—Punch; 'sat at the mahogany table surrounded by the environments of his wealth,' E. S. Gardner. 2: the surrounding conditions, influences, or forces that influence or modify; as a: the whole complex of climatic, edaphic, and biotic factors that act upon an organism or an ecological community and ultimately determine its form and survival—compare HABITAT b: the aggregate of social and cultural conditions (as customs, laws, language, religion, and economic and political organization) that influence the life of an individual or community.

Thus, a "building" is any kind of a structure and everything connected therewith. There can be little doubt but that this is intended. "Building," therefore, includes an
and the adoption of city building codes, is justified by the necessity of protecting the general public through use of the police power.

If the City of Albuquerque's new ruling can be sustained at all, it can only be sustained by showing that the exclusion of engineers from the design of certain buildings is a reasonable application of the police power.

The purpose of this Note is to question the use of the police power in furthering the interests of a self-regulated monopoly, to the detriment of the general public whose health, safety, and welfare that power is invoked to protect. This Note will show that

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The legislature declares that it is a matter of safety, interest and concern that the practice of engineering ... merit and receive the confidence of the public and that only qualified persons be permitted to engage in the practice of engineering ... and in order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity practicing or offering to practice engineering ... shall be required to submit evidence that he is qualified to so practice and shall be registered as provided . . . .


In order to safeguard life, health, and property, and to promote public welfare, any person practicing architecture in this state shall be required to submit evidence that he or she is qualified to practice, and shall be registered as herein provided . . . .


This Code is hereby declared to be remedial, and shall be construed to secure the beneficial interests and purposes thereof, which are public safety, health, and welfare, through structural strength and stability, means of egress, adequate light and ventilation and safety to life, limb and property from fire and other hazards incident to the design, construction, alteration, repair, removal, demolition, use or occupancy of buildings or structures and their appurtenant equipment.

9. Restricting the right of qualified persons to practice their chosen profession necessarily injures the public indirectly by restricting personal freedom, and directly through unjust restriction of the consumer's freedom of choice. See note 80 infra.

Professor Gelhorn says that many of the self-regulated licensed groups are using a "prophylactic measure" as an economic weapon. The first goal of such a group is to restrict the use of the title; the next is to exclude everyone else from the field: "The architects have largely succeeded in monopolizing not only the title but the activity as well." Gelhorn, Individual Freedom and Governmental Restraints 148 (1956) [hereinafter cited as Gelhorn].

As noted by Burrus, Administrative Law and Local Government 39 (1963) [hereinafter cited as Burrus]:
limiting the design of buildings to the field of architecture, and thereby forbidding engineers to practice in the field, is an unreasonable application of the police power bearing no reasonable relation to the professed objectives of the statutes; that the current interpretation of the Albuquerque Building Code is erroneous and ultra vires; that the ruling is arbitrary and capricious; that the ruling violates federal and state constitutions; and that only a small minority of states has used such an interpretation and with few exceptions all such states have abandoned the position.

I
ARCHITECTURE AND ENGINEERING OVERLAP

Comparison of statutory and judge-made definitions of the practice of architecture with those for the practice of engineering provides no valid basis for the exclusion of engineers from the design of buildings; likewise, the similarity and consequent potentially equal competence of the two professions can be demonstrated by reference to substantially equal education, training, and experience requirements for licensing.

A. The Practice of Engineering

The New Mexico Engineering Practice Act\textsuperscript{10} adopted the Model Law\textsuperscript{11} definition:

\begin{quote}
'[P]ractice of engineering' . . . means the performance of any professional service or creative work requiring engineering education, training and experience, and the application of special knowl-
\end{quote}

\begin{flushright}
In the words of the Kansas court, 'It has twice been said that the tyranny of the American system of government very largely consists in the action of municipal authorities.' Smith v. Hosford, 106 Kan. 365, 366, 187 Pac. 685, 686 (1920). And, of course, from the viewpoint of direct effect, the action of local authorities in allowing or disallowing a permit . . . or a license to engage in a lawful business . . . is much more likely to impinge upon the free choice and activity of individual citizens than are the more distant activities of the federal agencies, or even those in the state capital.


11. The Model Law has been approved and endorsed by the National Council of State Boards and by twelve other nationwide engineering organizations, and has been adopted in a large majority of the states. Fourteenth Annual Report of the State Board of Registration for Professional Engineers and Land Surveyors for the Year Ending June 30, 1948, p. 8.
\end{flushright}
...edge of the mathematical, physical, and engineering sciences to such professional services or creative work, such as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with the utilization of the forces, energies, and the materials of nature in the development, production and functioning of engineering processes, apparatus, machines, equipment, facilities, structures, buildings, works or utilities, or any combination or aggregation thereof employed in or devoted to public or private enterprise or uses and wherein the public welfare, or the safeguarding of life, health or property is concerned or involved. Such practice includes the performance of architectural work incidental to the practice of engineering.  

While there have been no reported cases of prosecutions for practice of engineering in New Mexico without a license, the Supreme Court of New Mexico has upheld the statute and the authority of the Board to revoke licenses for incompetence. Other jurisdictions have held that unlicensed persons cannot recover under contracts for engineering services, but have held that licensing is not required where the public would be protected from incompetence by intervening architects or engineers supervising the work of sub-professionals.

13. Letter from John H. Bliss, Consultant to the State Board of Registration for Professional Engineers and Land Surveyors to William C. Bowers, Feb. 18, 1965, and telephone conversation of Feb. 23, 1965. Mr. Bliss said that, when necessary to employ it, threat of court action has usually been sufficient to bring about compliance.

We believe that his contract was for engineering services within the meaning of the statute [the Model Law] and that since he was not a registered professional engineer he cannot recover on a contract for such services.
223 S.W.2d at 59.

In the Minnesota case of Dick Weatherston’s Assoc. Mech. Servs., Inc. v. Minnesota Mut. Life Ins. Co., 257 Minn. 184, 100 N.W.2d 819 (1960), an air-conditioning contractor who drew plans and specifications which he submitted with his proposal for furnishing air-conditioning equipment for an office building, was held not to be practicing professional engineering since his plans and specifications were subject to the
In New Mexico, state officials responsible for performance of professional engineering and land surveying work must be registered and plans and specifications for public works involving professional engineering and land surveying must be prepared by personnel with the proper qualifications and registration.\footnote{17}

Restrictions on the practice of professional engineering are limited to those necessary for the protection of the public. As the Minnesota court said in \textit{Dick Weatherston's Assoc. Mech. Servs., Inc. v. Minnesota Mut. Life Ins. Co.},\footnote{18} “the prohibitions of the statute . . . are no broader than its purpose in protecting the public from misrepresentation and deceit. The scope of the statute coincides with the reason for its existence.” It is obvious that design of buildings or other structures by persons untrained or incompetent in the field of structural design should be prohibited in the interests of public safety; and it is not difficult to imagine the consequences of faulty design of mechanical equipment such as furnaces, boilers, and other fired and unfired pressure vessels. Likewise, the results of faulty electrical or sanitary design are easily visualized.

\footnote{17} N.M. Stat. Ann. \S\S 67-21-52 (Repl. 1961):
[I]t shall be unlawful for the state, or for any of its political subdivisions, for any county, city or town, to engage in the construction of any public work involving professional engineering, or land surveying, unless the plans and specifications and estimates have been prepared by, and the construction executed under the direct supervision of a registered professional engineer . . . .

\footnote{18} 257 Minn. 184, 192, 100 N.W.2d 819, 825 (1960). See note 16 supra.
B. The Practice of Architecture

In common with those of many other states, the New Mexico Architectural Law does not define the practice of architecture. A 1963 amendment provides:

'Practice of architecture' includes the design, the preparation of working drawings and specifications for, and the general administration of the construction of one or more buildings. . . .

'General administration of construction' includes the interpretation of the drawings and specifications, the establishment of standards of acceptable materials and workmanship, and periodic inspection at the building site.

'Building' includes structures intended for human habitation, occupancy, shelter or environment.

The statutes of the State of Maine provide that the practice of architecture consists of:

[T]he rendering of or offering to render services to clients by consultation, investigation, preliminary studies, plans, specifications, contract documents and a coordination of structural factors concerning the aesthetic or structural design and supervision of construction of buildings or any other service in connection with the designing or supervision of construction of buildings.

Ohio statutes do not define architecture, but in a much cited case, *McGill v. Carlos*, the court defined an architect as


Webster's Third New International Dictionary (1965) says an "architect" is a "chief artificer, master builder . . . workman, carpenter":

1: a person skilled in the art of building: a professional student of architecture or one who makes it his occupation to form plans and designs of and to draw up specifications for buildings and to superintend their execution—compare LANDSCAPE ARCHITECT, MARINE ARCHITECT . . . .

"Architectural engineering" is the art and science of engineering and construction as practiced in regard to buildings as distinguished from architecture as an art of design.

An "engineer" is a person who is trained in or follows as a calling or profession a branch of engineering (as civil, military, electrical, mining, structural, or sanitary engi-
a person who plans, sketches and presents the complete details for the erection, enlargement, or alteration of a building or other structure for the use of the contractor or builder when expert knowledge and skill are required in such preparation. The practice of architecture may also include the supervision of construction under such plans and specifications. See Webster’s New International Dictionary; the New Century Dictionary . . . .

New Mexico has no reported cases of prosecutions for practicing architecture without a license, but other jurisdictions have uniformly held it unlawful to use the title “architect” unless duly registered. Doubtless the New Mexico courts would hold that an unregistered person who held himself out as an “architect” could not...

neering)—in some jurisdictions legally restricted in technical use to a person who has completed a prescribed course of study and complied with requirements concerning registration or licensing.

“Civil Engineering” is a branch of engineering concerned primarily with public works (as land surveying, the building of highways, bridges, waterways, or harbors, or the provision of artificial water supply, sewage disposal, irrigation) but also embracing private enterprises (as railroad and airport building, private building construction, farm drainage).

McGill is not authority for limiting the definition given to the practice of architecture. The plaintiffs in McGill were general contractors who prepared plans and specifications for a dwelling defendants wanted built. When the defendants decided not to build, the plaintiffs sued for five per cent of the estimated cost, which was the amount agreed on as the value of the services rendered. The plaintiffs were neither registered as architects nor engineers. When the court said that a builder who is not a registered architect may not prepare plans and specifications requiring expert knowledge and skill, it was not ruling on the question of whether an engineer, or more specifically a civil, architectural, or structural engineer, would have the requisite expert knowledge to prepare the plans and specifications. Had the defendants raised a plea of “practicing engineering without a license” they would have undoubtedly won on that count as well. The court was not even considering the definition of engineering and was not distinguishing the registration statutes of the two professions.

23. Letter from George S. Wright, Secretary New Mexico Board of Examiners for Architects to William C. Bowers, Feb. 12, 1965, and telephone conversation of Feb. 24, 1965. Mr. Wright stated that his board’s experience has been similar to that of the Board of Engineers. Investigation, a letter of inquiry, a letter of warning threatening court action, and if this fails a follow-up warning from the Attorney General has always been sufficient to bring about compliance. See note 14 supra.

recover under a contract for architectural services. Since our statute also prohibits the practice of architecture without a license, there can be little doubt that our courts would also hold, as did the Ohio courts in *McGill*, that an unregistered person cannot collect for architectural services, even though not holding himself out as an architect.\(^{25}\)

C. Overlap

New Mexico, in common with most states, exempts each profession from the provisions of the statute controlling the other.\(^{26}\) New Mexico courts have not spoken on the subject, but in the only case reported, a professional engineer recovered on a contract for architectural services.\(^{27}\) Under the definition of "practice of engineering," without defining "architecture," the New Mexico Engineering Practice Act provides, "such practice includes the performance of architectural work incidental to the practice of engineering."\(^{28}\)

Where the issue has been squarely presented, a number of courts have held that the two professions are indistinguishable in disputed areas.\(^{29}\) In *Rabinowitz v. Hurwitz-Mintz Furniture Co.*,\(^{30}\) the

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26. The Engineering Practice Act provides that performance of “such engineering work . . . as is incidental to architectural work” by a person registered as an architect is exempt. N.M. Stat. Ann. § 67-21-47 (Repl. 1961).
27. The Architectural Law provides that “nothing in this act shall be construed to affect or prevent a registered engineer from practicing engineering as defined in the Engineering Practice Act.” N.M. Laws 1963, ch. 279, § 3.
30. In California, a professional engineer recovered for the design of a bowling alley establishment when the client attempted to avoid payment by pleading “practice of engineering without a license.” The court held that a registered professional engineer, not holding himself out as an architect, is qualified, competent, and entitled to prepare plans and specifications for the construction of public structures and buildings, and awarded a judgment for services rendered. Lehmann v. Dalis, 119 Cal. App. 2d 152, 259 P.2d 727 (1st Dist. Ct. App. 1953).

New York, in *D'Luhosch v. Andros*, 200 Misc. 400, 10 N.Y.S.2d 491 (Dutchess County Ct. 1951), permitted a professional engineer to recover on a contract for plans and specifications, saying the definitions of architect and engineer are substantially the same:

However, both definitions specifically provide that both an engineer and an architect may plan, design and supervise the construction of buildings both private and public. Both articles are similar with respect to the educational qualifications required of licensees . . . . I cannot find that there is any statutory distinction between the services which may be legally rendered by a licensed engineer and that by an architect . . . .

It must also be remembered that neither statute prohibits the practice of
Louisiana court, after reviewing various definitions of architect and engineer, concluded:

[I]t is not at all clear whether plaintiff's undertaking under the con-

the other's profession . . . . Fundamentally as stated in the statutes, the
purpose of licensing both engineers and architects is to protect and safeguard
life, health and property.

*Id.* at 402-03, 109 N.Y.S.2d at 492-93. *D'Luhosch* corrects the erroneous impression of
the New York position as given by the frequently cited case of Goldschlag v. Deegan,
which refused to overthrow a multi-dwelling statute requiring the seal of an architect
on apartment building plans, and thus denied a professional engineer a declaratory
judgment to the effect that he was entitled to prepare such plans. That multi-dwelling
statute has now been repealed, and New York, as set forth by *D'Luhosch*, holds that
architecture and engineering are coextensive.

In *Fonde v. Dougherty*, No. 70184, Ch. Ct. Tenn. (1952), *Fonde*, a registered
professional engineer, sought a declaratory judgment interpreting the engineer and
architect registration statutes of Tennessee. *Fonde* had been designing structures, includ-
ing residential dwellings, as a professional engineer. The State Board for Registration
of Architects threatened legal action and *Fonde* brought his suit for declaratory judg-
ment. Chancellor Thomas A. Shriver, in holding that a licensed professional engineer
may engage in the design of buildings and structures, said:

[I]t is the judgment of this Court that it cannot define and delineate the
functions of architects and engineers in such a way as to draw a line of
demarcation between them which could be successfully applied in practice.
. . . It appears as a fact that cannot be seriously questioned that the functions
of these two professions, viz., architecture and engineering, so overlap that
there is no practical way to draw a clear line of demarcation between the two.
The Board of Registration did not appeal, so the case is not reported.

permitted a registered professional engineer to recover his fee for preparing plans for
an addition to a market building, against a plea of "practice of architecture," saying:

Concededly the two fields overlap to a point where at times the function of
each becomes almost indistinguishable from the other. The legislature recog-
nized this as fact when, in the licensing acts, permission was given to each
to do work belonging to the other which is incidental to the actor's function.

85 Pa. D. & C. at 564.

Utah, in *Smith v. American Packing & Provision Co.*, 102 Utah 351, 130 P.2d 951
(1942), held a licensed professional engineer entitled to recover for services which
included work common to the field of architecture. The court stated that the statutes
did not contemplate that a professional engineer making plans in connection with his
engineering work should have to be licensed as an architect because some of the
elements of work were also included in the field of architecture. And, further, that
unreasonable boundaries or barriers between professions or occupations are not the
objective of licensing statutes, but rather the safeguarding of the public against persons
not qualified to render successfully and efficiently the service they offer to perform
for compensation.

In 1955, the Wisconsin Legislature amended the engineering and architectural law
to acknowledge the right of professional engineers to design all types of buildings.
Previously the law had limited engineers to the design and construction of "industrial"
builtings and the "structural members" of other than industrial buildings. *Purcell*, a
tract was within the field of architecture or engineering or partook of both. It would appear that these two professions overlap, and that in some instances, particularly where structural work is contemplated, it might as well be undertaken by an engineer as an architect.\textsuperscript{31}

However, it is uniformly held that a person not registered as an architect cannot hold himself out as such.\textsuperscript{32}

registered architect, sought a judgment declaring the amendment invalid, and an injunction restraining the Board from issuing certificates to professional engineers. In Purcell v. Lemke (Cir. Ct., Dane County, Wis. 1957), the court dismissed the complaint saying that the law does not recognize any right to be free from competition. The court said:

The amendment did increase and enlarge the activities of the professional engineer, but a very important distinction still remained. That distinction is one of title and not of ability to perform. It is probable that the legislature considered the professions equally qualified to design buildings, insofar as the health, safety and welfare of the public is concerned.

There was no appeal, and the case is not reported.

\textsuperscript{30} 19 La. App. 811, 133 So. 498 (1931). A Louisiana professional engineer recovered on a contract to make sketches, drawings, plans, and specifications for alterations to the defendant's store. Though not holding himself out as an architect, the plaintiff executed the contract on a printed architectural contract form. In permitting recovery for services rendered, the court said:

We are of the opinion that plaintiff's use of the printed architectural form would not amount to a holding out as an architect or a professing to practice that occupation. The determining factor of the case on this point is whether, as a matter of fact, the work which the plaintiff undertook to do was within the sphere of the architect and without that of the engineer.

133 So. at 499.

31. 133 So. at 499.

D. Exclusion of Engineers

Cases stating that design of certain types of structures and buildings is the practice of architecture, and that professional engineers are excluded therefrom, demand close scrutiny. For example, in a recent Ohio case, *Fanning v. College of Steubenville*, the court said:

In the instant case the contract calls for the building and construction of college buildings which primarily and predominantly call for the services of an architect and not such as are incidental to engineering. The court finds that the contract primarily calls for the services of an architect, although there may be some incidental engineering work involved. Therefore, the plaintiff, an engineer, would be precluded by virtue of the said sections of the statutes from entering into such a contract. The labelling of the contract 'Agreement Between Owner and Engineer' would not alter this situation since the primary purposes of the contract call for the services of an architect and not an engineer. It is therefore the Opinion of this Court that the plaintiff cannot maintain his action against the defendant and therefore the demurrer of the defendant to the amended petition of the plaintiff should be sustained.

The demurrer of the defendant was on the ground that the complaint did not state a cause of action in that "the plaintiff claims the he is an engineer and as such is permitted to enter into a contract to render the services of an architect." *Fanning* cited *McGill* for the definition of architecture. As noted previously, the definition of architecture given in *McGill* is just as good a definition of the work of an engineer as of that of an architect.

*Fanning* could well be listed with those cases holding that a person not registered as an architect cannot hold himself out to be such.

In a very similar case, *Design Eng'r Corp. v. Jenkins*, the courts

34. Id. at 149, 197 N.E.2d at 427.
35. Id. at 147, 197 N.E.2d at 424.
36. Id. at 148, 197 N.E.2d at 425; McGill v. Carlos, 39 Ohio Op. 502, 52 Ohio L. Abs.
38. 81 N.E.2d 726 (C.P. 1947). See note 22 *supra* and note 53 *infra*.
37. See note 22 *supra* and accompanying text.
38. See note 32 *supra* and accompanying text.
of New Mexico permitted a registered professional engineer to recover on a contract for engineering and architectural services. Design Eng'r commenced with arbitration resulting in summary judgment for the plaintiff,\(^{40}\) while Fanning began with a refusal of the plaintiff's request for arbitration and resulted in the sustaining of the defendant's demurrer.\(^{41}\) In neither case was there any real complaint that services were unsatisfactory; no reasons were given in the reports for the breaches of the contracts.\(^{42}\)

Were it not for the fact that Colorado is a home rule state, and thus the City and County of Denver can overrule a state law conflicting with a Denver ordinance concerning local matters,\(^{43}\) a decision of the courts of that state in *Heron v. City of Denver\(^{44}\) would be very much in point. There, a professional engineer sought mandamus to force issuance of a building permit on his plans for a nursing home, in the face of a building code providing that only a licensed architect may prepare plans and specifications for a "building or structure of a public or semi-public nature."\(^{45}\) The court said:

Tersely stated, engineers are confined to the industrial and structural field, while architects only are committed to the field of public or semi-public buildings.\(^{46}\)

It is pertinent that the court was ruling only on the lower court's refusal of a writ of mandamus against the Chief Building Inspector of Denver. The *holding* was that the defendant should have had a summary judgment since the plaintiff had not exhausted his administrative remedies before appealing to the courts.\(^{47}\) When the same

\(^{40}\) Ibid.

\(^{41}\) Fanning v. College of Steubenville, 94 Ohio L. Abs. 145, 197 N.E.2d 422 (C.P. 1961).

\(^{42}\) Ibid.; Design Eng'r Corp. v. Jenkins, 396 P.2d 590 (N.M. 1964).

\(^{43}\) Colo. Const. art. 20, § 6:

The people of each city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with . . . power to make, amend, add to or replace the charter . . . which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

\(^{44}\) 131 Colo. 501, 283 P.2d 647 (1955).

\(^{45}\) Id. at 502, 283 P.2d at 648, quoting from Denver, Colo., Building Code Ch. 3, § 301(e).

\(^{46}\) Id. at 507, 283 P.2d at 650.

\(^{47}\) Ibid.
case was brought in the federal courts, the Colorado decision was held to be res judicata, and the court announced:

'The power of the state to protect its citizens against imposition by those purporting to practice the learned professions has been sustained without dissent for many generations.'

It should now be apparent that we are arguing semantics rather than the safeguarding of life, health, and property, or the promotion of the public welfare.

Gellhorn notes:

The thrust of occupational licensing, like that of the guilds, is toward decreasing competition by restricting access to the occupation; toward a definition of occupational prerogatives that will debar others from sharing in them; toward attaching legal consequences to essentially private determinations of what are ethically or economically permissible practices.

E. Qualifications Compared

The difficulties encountered by courts in attempting to differentiate between engineering and architecture have been discussed. It makes little sense to refer to dictionary and encyclopedia definitions in order to decide who should be permitted to provide a service, or practice a profession, requiring education in mathematics and the physical sciences, and experience in their application to design and construction problems, in order competently to perform the service without endangering the public safety, health, or general welfare.

49. Id. at 122, quoting from Brinkley v. Hassig, 83 F.2d 351, 354 (1936).
50. See, e.g., notes 22 and 37 supra and accompanying text.
51. Gellhorn 114. See note 5 supra and accompanying text.
52. See notes 29 to 32 supra and accompanying text.
53. E.g., the Maine court, in State v. Beck, 156 Me. 403, 165 A.2d 433, 435-36 (1960), although deciding only that the lower court was correct in convicting Beck of holding himself out as an architect by erecting a sign "Engineer & Architect," cites Rabinowitz v. Hurwitz-Mintz Furniture Co., 19 La. App. 811, 133 So. 498, 499 (1931), although that court was unable to distinguish between engineers and architects and permitted an engineer to recover against a plea of "practice of architecture," for an Encyclopedia Britannica definition of engineering and architecture, neglecting to mention the holding of the case. This same court cites Goldschlag v. Deegan, 135 Misc. 535, 238 N.Y. Supp. 3 (Sup. Ct. 1929) (note 29 supra); People v. Babcock, 343 Mich. 671, 73 N.W.2d 521 (1955) (note 52 supra); and McGill v. Carlos, 39 Ohio Op. 502, 52 Ohio L. Abs. 28, 81 N.E.2d 726 (C.P. 1947) (notes 22 and 25 supra and accompanying text) for dicta definitions without mentioning the unrelated holdings of the cases.
Both New Mexico licensing acts invoke the police power, require evidence of qualification to practice, and require registration.\footnote{N.M. Stat. Ann. §§67-12-1, 67-21-30 (Repl. 1961). See note 8 supra and accompanying text.} It makes more sense to compare the qualifications likely to be possessed by duly licensed engineers and architects. Such a comparison clearly demonstrates that there exists no difference between these qualifications of the two professions such as would justify the exclusion of engineers from the design of buildings.

1. Registration Requirements

New Mexico, in common with most of the other states, requires, as prerequisites to registration, an examination in addition to a specified number of years of experience in the profession. Substitution of formal education for some of the experience is permitted. Architects are required to have thirteen years of experience which can be reduced to a minimum of three by the substitution of one year of accredited architectural school for each two years of experience.\footnote{New Mexico Board of Examiners for Architects, Architectural Law and Rules and Regulations, Jan., 1964, Rules and Regulations, Section III, Applications.} Examinations are extensive and thorough unless the applicant is exempt.\footnote{Ibid.}

Professional engineer requirements are similar, but are set forth in the statute.\footnote{N.M. Stat. Ann. § 67-21-41 (Repl. 1961).} The normal requirement is eight years of “progressive experience in engineering work of a character satisfactory to the board” and the passing of required examinations. A degree in engineering may be substituted for four years of experience.\footnote{Ibid.} Obviously, no substantial difference exists between the licensing requirements for the two professions.

2. Formal Education

The University of New Mexico offers typical engineering and architecture courses. Civil engineering,\footnote{University of New Mexico Bulletin, Catalog Issue 169, 175, 274 (1964-65) [hereinafter cited as Bulletin].} except for architectural engineering, which has been discontinued at most colleges including...
the University of New Mexico, is the most comparable to architecture, and is the basis for this comparison.

Both prospective engineers and architects are required to study several identical mathematical, scientific, and engineering courses. In addition to these basic courses, the engineering program includes more mathematical, scientific, and engineering courses; the architectural program requires additional courses relating to art and architecture, and both have numerous electives. From the standpoint of soundness and safety of structural design, it is clear that architects are not better qualified than engineers to design buildings on the basis of education.

3. Experience

To gain experience one must practice; since neither prospective architects nor prospective engineers can practice without a license, they must of necessity be employed by engineers or architects who are licensed. The Board of Examiners for Architects specifically requires that the experience be gained in an architect's office.

60. Bulletin 181, 184, 231.
61. Both take algebra, trigonometry, calculus, analytical geometry, engineering statics, general physics, mechanical drawing and drafting, a minimum of English writing, and several courses in mechanics of materials, and materials of construction. Both study some structural analysis, and reinforced concrete. Bulletin 174, 185, 231, 274.
62. Bulletin 175, 274; it can be seen that the engineering course includes additional calculus, chemistry, engineering measurement and surveying, engineering geology, engineering graphics, thermodynamics, and economics. Advanced courses in structural analysis, structural design in metals, transportation engineering, water supply and waste disposal, hydrology and engineering hydraulics, fluid mechanics, soil mechanics, electrical engineering, professional problems in engineering, and civil engineering projects, are required.
63. Prospective architects must study art appreciation, history of ancient, medieval, renaissance, and modern architecture, landscapes, specifications and estimating, and office practice. The architectural course, in addition, includes a special civil engineering course in structural design, a mechanical equipment of buildings course, program writing, a seminar, and several courses labelled architectural design. Bulletin 185, 231, 276.
64. Both are required to select from a number of elective courses including some from the humanities, social sciences, mathematics, building construction, mechanics of materials, construction management, fluid mechanics, traffic engineering, concrete technology, structural design, sanitary sciences, municipal engineering, highway and airport pavement design, digital computers, and mechanical vibration. Bulletin 174, 185, 231, 271.
65. New Mexico Board of Examiners for Architects, Architectural Law and Rules and Regulations, Jan., 1964, Rules and Regulations, Section III, Applications: Experience other than in Architects' offices, such as work with government
The training acquired through three or four years of experience will be determined largely by chance. If the firm where the engineer or architect in training is employed happens to have office buildings under design and construction, he may get considerable experience in the design and construction of office buildings. The same, of course, holds true for residential or housing developments, shopping centers, hospitals, airports, harbor facilities, or highway work. It should be obvious that, on the basis of experience, architects are not necessarily better qualified to design buildings than are engineers.

4. Qualifications Interpreted by Others

One of the most famous and controversial architects of the twentieth century, the late Frank Lloyd Wright, was formally educated only as a civil engineer at the University of Wisconsin. His Imperial Hotel in Tokyo, Japan, one of his controversial buildings, was one of the major buildings to withstand the earthquake of 1923, which levelled Tokyo.

Pier Luigi Nervi, a world famous Italian civil engineer, awarded the Gold Medal of Architecture by Queen Elizabeth, is famed for the scalloped roof of the New York Port Authority Terminal, the Municipal Stadium in Florence, Italy, the Exhibition Hall, Turin, Italy, and the UNESCO Headquarters in Paris, France. He is responsible for the design of a new Dartmouth College auditorium and a fifty-one-story, three-tower office building in Montreal, Canada. Mr. Nervi says:

By education and choice, I am an engineer. However, I see no separation between an architect and an engineer. We have a common

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66. 29 Encyclopedia Americana 569 (1941):
Wright, Frank Lloyd, American architect; born Richland Center, Wis., 8 June, 1889. In America, the architectural work of Wright has been characterized as 'The New School of the Middle West,' and in Europe it has been described as 'The American Expression in Architecture.' After studying civil engineering at the University of Wisconsin in 1884-88, he began practice at Chicago, Ill., in 1893, and thereafter won distinction as architect of the Imperial Hotel in Tokyo, Japan, and many notable buildings in Europe and America. He was awarded honorary membership in architectural societies in the United States, France, Germany, and Brazil.
area of responsibility; we both strive for the same results—that is: a structure with strength, utility, and grace, constructed in sincere collaboration from concept to final realization.67

George M. White, of the American Institute of Architects, has said that the term “architect” is interchangeable with “engineer,” since they both plan and design buildings and supervise their construction.68 The distinguished educator and Fellow of the American Institute of Architects, P. N. Youtz, Dean of the College of Architecture and Design at the University of Michigan, made some revealing remarks in his article, Architectural Education for a Scientific Age,69 saying:

The voluntary abandonment of the structural and mechanical fields by engineers... offers the architect an opportunity to take over the control of structural and mechanical design, thus strengthening his competitive position in the building industry.70

Other comments made by Dean Youtz in this informative article are worthy of note:

[F]ew architects have education or the desire to design complete buildings. . . .

* * * *

The image of the architect as master builder has been preserved by . . . structural and mechanical engineers. These well-trained, often anonymous men, have worked out most of the problems of modern steel or . . . concrete construction as well as those of air conditioning, sanitation, lighting and acoustics. . . .

* * * *

The second field . . . is structural design. The aim . . . is to

68. White, The Fall of the House of Privity, 10 W. Res. L. Rev. 563, 567 (1959): [T]he term architect and engineer will be used interchangeably.

* * * *

An architect may design not only the exterior of the building but the structural members, the heating, ventilation, air-conditioning, electrical equipment, and general mechanical design as well; in addition he may assist in the letting of building contracts; he may supervise the construction; he may issue certificates of payment, including a final certificate declaring the building complete according to plans and specifications . . . .

See notes 22 and 37 supra and accompanying text.
70. Ibid.
... figure the stresses in structures as competently as any engineer.
... With a good background in college mathematics and physics, this goal would be an attainable one.71

The Defense Department does not distinguish between architects and engineers as such. In negotiating contracts for architect-engineer services, the experience of the firms considered is evaluated with regard to the requirements of each particular assignment.72

II
POSITION OF ALBUQUERQUE UNTENABLE

A. Unreasonable Application of Police Power

Assuming, arguendo, that a correct interpretation of the Building Code requires city officials to determine the meaning of the phrase "IN ACCORDANCE WITH LAWS OF THE STATE OF NEW MEXICO,"73 and adding the equally imaginative assumption that those laws74 prohibit an engineer from designing certain buildings and structures, the validity of such a prohibition comes

71. Ibid.
   (a) Title I Architect-Engineer Service means any services . . . by an architect-engineer in . . . preparation, coordination, and approval of preliminary and final designs, drawings, specifications, estimates of cost, and other technical documents and data essential to the development of master plans, military construction projects . . . and . . . repair of constructed facilities . . .
   (b) Title II Architect-Engineer Service means any services . . . furnished by an architect-engineer in . . . general supervision and detailed field inspection of the construction project . . . and such other technical services . . . as may be required and specified.

It is interesting to note that the Navy Civil Engineer Corps is responsible for the design and construction, and for the maintenance of the Navy's shore establishment, including all buildings as well as all other structures and public works. The Army Corps of Engineers is similarly charged with Army Bases. The Air Force has a similar organization of Base Civil Engineers, although most Air Force construction is still done by army and navy forces. None of the services has a "corps of architects."


The Office of the Attorney General has advised that these laws are separate and distinct, are for the purpose of regulating separate professions in which similar acts are done in actual practice, and that neither should be applied to the other profession. N.M. Att'y Gen. Op. No. 3126 (1939); see letter from Office of Attorney General to Mr. Lawrence A. Garcia, Secretary, New Mexico Board of Examiners for Architects, Jan. 30, 1962; see letter from B. C. Smith, Chairman Albuquerque Chapter, National Society of Professional Engineers, to Mr. Archie Westfall, Chairman, Albuquerque City Commission, Nov. 12, 1962.
into question. Since it cannot be shown that engineers are less qualified to design buildings than are architects,\textsuperscript{76} such a prohibition would be an unreasonable exercise of the police power, because it fails to support the express purpose to safeguard life, health, and property, and to promote the general welfare.\textsuperscript{76} The United States Supreme Court, in \textit{Dent v. West Virginia},\textsuperscript{77} recognized the authority of a state to protect the general welfare of its citizens against ignorance and incompetence of tradesmen and practitioners by the promulgation of reasonable regulations and restrictions; the principle has been uniformly followed.\textsuperscript{78} It is also uniformly held that such restrictions and regulations are justified only if they relate directly to the promotion of public health, safety, and morals.\textsuperscript{79} It has been suggested, however, that although advocates argue grounds of public interest, licensing regulations may "sometimes be designed to give monopoly powers to members of the occupation."\textsuperscript{80}

\textsuperscript{76} See notes 52 to 72 supra and accompanying text. Nowhere, in any of the numerous cases, has it been stated that engineers are not qualified and capable of doing the design work. See, \textit{e.g.}, McGill v. Carlos, 39 Ohio Op. 502, 52 Ohio L. Abs. 28, 81 N.E.2d 726 (C.P. 1947), note 22 supra and accompanying text.\textsuperscript{76}


\textsuperscript{78} 129 U.S. 114, 122 (1889).\textsuperscript{78}

\textsuperscript{79} The New Mexico Supreme Court, in New Mexico Bd. of Examiners in Optometry v. Roberts, 70 N.M. 90, 98, 370 P.2d 811, 816 (1962), reiterated that property and property rights are held subject to the fair exercise of the police power and that reasonable regulation for the benefit of public health, convenience, safety, or general welfare, is not an unconstitutional taking of property in violation of due process or equal protection clauses of federal and state constitutions. Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1942); Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41 (1941); accord, Rosenblatt v. State Bd. of Pharmacy, 69 Cal. App. 2d 72, 73, 158 P.2d 199, 202 (3d Dist. Ct. App. 1945); Note, \textit{Entrance and Disciplinary Requirements for Occupational Licenses in California}, 14 Stan. L. Rev. 533 (1962); Burrus 43.\textsuperscript{79}

\textsuperscript{80} 17 N.C.L. Rev. 1, 10, 13 (1938); Buekman v. Bechtel, 57 Ariz. 363, 367, 114 P.2d 227, 228 (1941); Kaiser v. Thomson, 55 N.M. 270, 232 P.2d 142 (1951); State \textit{ex rel. N.M. Dry Cleaning Bd. v. Cauthen}, 48 N.M. 436, 152 P.2d 255 (1943).\textsuperscript{80} 14 Stan. L. Rev. 533, 534 (1962); Burrus 46 & nn.227 & 228; Gellhorn 115-18.\textsuperscript{80}

\textsuperscript{81} Moore, \textit{The Purpose of Licensing}, 4 J. L. & Economics 93 passim (1961); Gellhorn 109 says:

In the main, those already within the occupational group clamor for licensing, always, of course, upon the stated ground that thus the public will receive protection against the incompetent or unscrupulous but always, also, with other less emphasized purposes. One of these is to achieve a competitive advantage or an enlarged income.

Except that the number of licensing boards has more than tripled, the problems in connection therewith seem to have changed little in the last fifteen years. See Irion, A Survey of Licensing in New Mexico. (Dep't of Gov't, Univ. of N.M., Albuquerque, No. 22, Oct. 1949) [hereinafter cited as Irion]. Professor Nathaniel Wollman (then Assoc. Prof. of Economics, University of New Mexico) in his \textit{foreword} said:
It has been well said that "the law does not recognize a right to be immune from competition." An application of the police power which prohibits engineers from designing buildings is unreasonable, whether it be a result of city interpretation of current licensing statutes, or an actual restriction imposed by such statutes.

B. Unconstitutional

The Supreme Court has said that the liberty of which one may not be deprived without due process includes "the right of the citizen to be free in the enjoyment of all his faculties; to be free to

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Each year sees some loss in . . . competitive market economy . . . the heart of the capitalistic system. This deterioration . . . is not an inevitable law of nature. It is a deliberate policy fostered by minority groups who stand to gain at the expense of the purchaser. . . . It is more in keeping with our tradition to throw the weight of government in the opposite direction.

Wollman, Foreword to Irion at iii-v.

Irion suggests that there is a lack of adequate coordination with regard to licensing activities. He proposes that the legislature create a department of licensing and equip it with such powers . . . as seems necessary to achieve the purpose of balancing public and private interests.

Irion at 37; See also 14 Stan. L. Rev. 533, 536 (1962).

81. Purcell v. Lemke (Cir. Ct., Dane County, Wis. 1957). See note 29 supra. See also Rocky Mountain Wholesale Co. v. Ponca Wholesale Mercantile Co., 68 N.M. 228, 360 P.2d 643 (1961), and the discussion thereof in Comment, 4 Natural Resources J. 189, 191-92 (1964). But see Note, 25 Can. B. Rev. 1146 (1947), noting that a 1947 King's Bench decision "marks another incident in the long standing feud between architects and engineers . . . and provokes reflection on the relationship of professional monopolies to the public interest." The court had held that a professional engineer who prepared plans and specifications and supervised construction of an addition to a machine shop (the majority of the work concerned mechanical vibration, temperature control, lighting and electrical service) was in violation of the Architects Act. The Note indicates that there was no criticism of the work performed, merely an interpretation that the enclosing building was not "incidental to the machine shop" and as such "fell within the exclusive jurisdiction of the architects." And the case was:

[A] battle in the campaign for power between two professional monopolies each claiming jurisdiction over an important and lucrative sphere of activity.

. . . What then of the position of the public which it is the function of the professions to serve?


82. More than a decade ago, the Council of State Governments was concerned with the monopolistic trend of licensing and reported:

This . . . has aroused concern over potential monopoly, over further restriction in consumer choice and over barriers to the right of an individual to select his own vocation.

use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling.  

The city ruling requires an owner to engage a registered architect to design his building if it falls within the category described as "all other buildings not covered in the above," where "the above" would permit either engineers or architects to design industrial facilities. There is no doubt that laissez faire is a thing of the past; it has long been recognized that social interest takes precedence over the individual interest in making a living or pursuing an occupation of one's choice, but the city ruling does not protect a legitimate social interest. A person may not be deprived of property without due process of law (this is forbidden by both the fourteenth amendment and the New Mexico constitution) and it has been held that the pursuit of a lawful occupation or business is protected by this provision. The city ruling deprives engineers of their right to design buildings.

83. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897); Gellhorn 119, n.36.

The Supreme Court has also said that a state cannot, "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." Comment made by Mr. Justice Butler in Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924), quoted approvingly by Mr. Justice Sutherland in Ligget Co. v. Baldridge, 278 U.S. 105, 113 (1928); Gellhorn 119.

Abdication of this area to the states is indicated by the Supreme Court in Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949), when, although the trial court and the Supreme Court of South Carolina had found that a statute prohibiting undertakers from being life insurance agents was obtained by the insurance lobby in order to eliminate an undesirable competitor, Mr. Justice Murphy (for a unanimous court) said the Supreme Court could not decide desirability and could not say that South Carolina is not entitled to call the funeral insurance business an evil. See Gellhorn 119, 120 & n.39.

84. See note 5 supra and accompanying text.

85. N.M. Const. art. 2, § 18:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws.

The New Mexico Supreme Court has held:

That the legislature may enact laws in the exercise of its police powers is fully recognized, except that it may not be so unreasonably or arbitrarily exercised as to amount to confiscation of property or a denial of the right to engage in a particular trade, occupation or profession.


Engineers are authorized by law to design buildings. There has been no showing that engineers are not qualified to design every type of building. Since, therefore, there is no justification in relation to the protection of the public health, safety, or welfare, exclusion of engineers from the design of buildings is a deprivation of due process and violates both the federal and state constitutions.

C. Erroneous, Ultra Vires, Arbitrary, and Capricious

A uniformly accepted rule of statutory construction holds that “where two meanings are possible and one would make the statute void, the one is taken that would save the statute on the presumption that the legislature did not intend to legislate unconstitutionally.” Since, as has been shown, the ruling of the City of Albuquerque results in an unconstitutional prohibition, the ruling must be erroneous. The proper interpretation of any New Mexico statute is constitutional.

Municipalities are corporations formed by authority of the state of which they are a part. They are creatures of the law of the state, and their powers are derived from the state. New Mexico municipalities have been granted general authority to pass ordinances, and the power to regulate specific activities, including specific authorization to adopt building codes.

Due process, by which the individual may be deprived of his liberty without doing violence to our constitutions, does not have regard only to the enforcement of law, but searches also the authority for making the law. A fundamental step in due process is the enactment of a statute within legislative capacity. By “Dillon's

88. Ibid.
89. Purcell v. City of Carlsbad, 126 F.2d 748 (10th Cir. 1942); Munro v. City of Albuquerque, 48 N.M. 306, 150 P.2d 733 (1943). Powers granted must be strictly construed. City of Clovis v. Crain, 68 N.M. 10, 357 P.2d 667 (1960); Fancher v. Board of Comm'rs, 28 N.M. 179, 210 Pac. 237 (1922).
90. N.M. Laws 1965, ch. 300 § 14-16-1:
The governing body of a municipality may adopt ordinances or resolutions not inconsistent with the laws of New Mexico for the purpose of:
   A. effecting or discharging the powers and duties conferred by law upon the municipality;
   B. providing for the safety, preserving the health, promoting the prosperity, improving the morals, order, comfort and convenience of the municipality and its inhabitants...
91. N.M. Laws 1965, ch. 300, § 14-6-5.
Rule," a municipal corporation possesses and can exercise only those powers which are:

(a) expressly granted,
(b) implied in the express grant, and
(c) essential to the declared purpose and objects of the corporation; these must be indispensable—not just for convenience.93

There are two grounds on which the city's ruling is ultra vires. First, the determination of licensing requirements and qualifications has not been delegated to the City of Albuquerque. Mention of the qualifications of architects and engineers is conspicuous by its absence from the detailed listing in the New Municipal Code.94 This act is specific with regard to powers granted to the City to regulate and control building, and, therefore, governs,95 even though, absent the special act, the authority might have been conveyed in the general police powers authorization.96 Second, the State has completely occupied the field of regulating engineers and architects, has established boards for that purpose, and has specified detailed appeal procedures.97 The Engineering Practice Act98 and the Architec-

94. N.M. Laws 1965, ch. 300, §§ 14-6-5, 14-17-5. See also N.M. Laws 1965, ch. 300, § 14-17-18. Although the Code authorizes the city to regulate construction standards, distances of buildings from street lines, plumbing facilities, etc., no mention is made of the qualifications of architects or engineers. See note 93 supra and accompanying text.
95. When a special statute covers a specific part of an area covered by a general statute, the special statute governs. State v. Spahr, 64 N.M. 395, 398, 328 P.2d 1093, 1096 (1958).
96. N.M. Laws 1965, ch. 300, § 14-16-1. See notes 90, 92 supra.
97. N.M. Stat. Ann. §§ 67-12-1 to 9; 67-21-29 to -53 (Repl. 1961, Supp. 1963) control licensing of architects and engineers and provide boards for the administration of the programs. N.M. Stat. Ann. §§ 67-26-1 to -28 (Repl. 1961), the Uniform Licensing Act, sets forth procedures which must be followed by listed boards, including those for architects and engineers, in processing license applications, suspending or revoking licenses, and in permitting appeals from decisions. This act requires the board to make findings of fact and conclusions of law, to inform concerned persons of the right to judicial review and the time within which such review must be sought. This act provides in § 67-26-24 for review by a district court and also provides that the board may apply to the district court for injunctions to prevent violations of statutes . . . and of rules and regulations issued pursuant to those statutes and such courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations.

The act further provides in § 67-26-25:

The validity of any rule adopted by a board may be determined upon petition for a declaratory judgment thereon addressed to the district court of Santa Fe County when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal
tural Law do not authorize imposition of additional restrictions by municipalities. Some of our licensing statutes, e.g., that providing for plumbing permits, allow partial administration by municipalities; but the New Mexico Attorney General has advised that a city ordinance attempting to license plumbers or gas fitters and to regulate such business within the municipality was illegal, since the state has occupied the entire field for purpose of regulation, to the exclusion of municipalities. It is difficult to conceive of a field more completely occupied than is that for the regulation and control of engineers and architects. Further, when the legislature did mention a limited amount of city control of plumbers, the Attorney General quite correctly advised the city it was excluded from that area of legislation.

In § 67-26-26, the Act states that:

The provisions of the Uniform Licensing Act providing a uniform method of judicial review . . . shall constitute an exclusive method of court review . . . and shall be in lieu of any other . . . procedures available under statute or otherwise. Nothing herein, however, shall be construed to bar the use of any available remedies to test the legality of any type of board action not specified in section three . . .

We are not concerned here, however, with an unconstitutional board action, but rather with an unconstitutional private committee action, adopted and enforced ultra vires by the officials of a municipality. The Uniform Licensing Act makes no provision for this situation.


A local municipal ordinance that is in conflict with a general law adopted by the Legislature is invalid if it attempts to impose additional requirements in a field that is preempted by the general law . . .

* * * *

It clearly appears . . . that the state has occupied the field of licensing of electrical contractors and that therefore the ordinances . . . are invalid. . . .

* * * *

[T]he state has preempted the field here involved and . . . defendant city's ordinances are therefore invalid.


Applicants for certificates of registration may be required to be examined, however, any examination shall be limited to those matters wherein the plumbing and/or gas standards of the City . . . are higher than those established by the State of New Mexico.

A change of policy of many years standing, brought about by the demands of a pressure group, to the detriment of qualified engineers and the general public, can hardly be described as anything but arbitrary and capricious.

III
RECOMMENDATIONS

The City of Albuquerque should abandon its untenable, unconstitutional position. The Building Code should be revised by the deletion of the troublesome phrase "IN ACCORDANCE WITH LAWS OF THE STATE OF NEW MEXICO," and building permits should again be issued on all plans certified either by registered engineers or by registered architects.

WILLIAM C. BOWERS

\[^{103}\text{See notes 4 and 5 supra and accompanying text.}\]