

Opinion No. 53-5679

February 18, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. O. Erwin Chief Highway Engineer State Capitol Santa Fe, New Mexico

{*73} You have requested the opinion of this office as to whether the State Highway Commission can require counties to secure rights of way through municipalities for State Highways.

Section 58-228 New Mexico Statutes Annotated 1941, provides:

"The rights of way deemed necessary by the State Highway Commission for highways constructed under the supervision of said Commission shall be acquired by the County by donation by the owners of the land through which such highways shall pass, or by agreement between such owners and the Board of County Commissioners of the County, or through the exercise of the power of eminent domain in the manner provided by the law for acquiring property for public uses."

This has been the law in New Mexico since 1917 and since that date, it has been the practice for the counties to acquire the rights of way necessary for State Highways. Attorney General Opinion No. 2413, October 25, 1919.

On two occasions, at least, our Supreme Court has held the county liable for property taken in connection with the State Highway where the land involved was within municipalities.

In the case of Summerford vs. Board of Commissioners of Dona Ana County, 35 N.M. 374, where viaduct was constructed along Picacho in the City of Las Cruces, on a part of the Las Cruces-Deming State Highway, the Court held:

"As we understand this decision, it was considered that the present complaint states no cause of action against any defendant, but that in a proper proceeding liability may be brought home to the defendant board of county commissioners, under the 1929 Comp. Section 64-313, (now 58-228 New Mexico Statutes Annotated 1941), which provides that {*74} the several counties which obtain and pay for rights of ways for state highways. * * * * It was the clear duty of the legislature to designate some source of recovery of the damages which the Constitution says the citizen is to have. No good reason has been suggested why, if liability for compensation for the taking of property for highways is imposed upon the county, liability for damaging property for the same reason should be placed elsewhere. **No other paymaster than the county is pointed out.**"

In the case of *Mesich vs. Board of County Commissioners of McKinley County*, 46 N.M. 412, the Supreme Court again bases its decision upon an assumption that the statute designates the county as the authority to acquire rights of ways for State Highways purposes through municipalities. The *Mesich* case involved land in Ford's Highway 66 Addition to the City of Gallup and the Court after quoting the statute above set forth, and the *Summerford* case, *supra*, held:

"We now hold that counties are liable under said statute to damages for lands taken for highway purposes by them or with their acquiescence."

In *Springer Transfer Company vs. City of Albuquerque*, 44 N.M. 407, the Court stated that although the city retains jurisdiction over its streets:

"We held in the *Summerford* case, and also in the *Dougherty vs. Videl*, 37 N.M. 256, 21 P 2nd 90, that the legislature or the State Highway Commission could extend a state highway through a city, town or village;"

As stated in *Gallegos vs. Conroy*, 38 N.M. 154:

"A contrary construction would permit the state to build main truck lines, and arteries through which flows the life blood in intercity, intercounty and interstate traffic, either to the limits of a town then skip to the other end of the village and begin the work again, leaving the space through the village and the mode of travel to be determined by the city fathers who may or may not improve its streets, and who may insist that the travel be over and upon a street where dangerous curves and railroad crossings are located, or the highway commission could adopt the other alternative and bypass the community in order to have uniform connecting highways."

We think it clear, therefore, that based upon Section 58-228 New Mexico Statutes Annotated 1941, the long continued practice and the necessity for having one recognized paymaster and one authority responsible for securing of rights of way are deemed necessary by the State Highway Commission within municipalities as well as outside of them for highway purposes, the County Commissioners are responsible for obtaining rights of way within the municipalities and such can be required by the Highway Commission under our present laws.

By: Spec. Assist. Attorney General