Opinion No. 53-5778

July 10, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. C. Chase, Jr. District Attorney Third Judicial District Court House Building Las Cruces, New Mexico

*{*180}* By your letter of June 11 you request our opinion as to whether the Board of County Commissioners of Lincoln County could lend money to the Village of Ruidoso for the purpose of obtaining rights-of-way along the state road which passes through that village. It is proposed that the county borrow money from the State Highway Commission which it in turn lends the village and that after acquiring the rights-of-way the village repay the loan from the county.

In Opinion No. 5679, dated February, 1953, to the Chief Highway Engineer, we concluded that it was the county's duty to secure rights-of-way through municipalities for state highways. Section 58-228 N.M.S.A., 1941, provides that the counties may secure these rights-of-way by donation by the owners, by agreement between such owners, or through the exercise of the power of eminent domain. It would seem, therefore, that if the county can spend its funds outright for acquiring rights-of-way through municipalities that it would have authority to lend funds for this purpose, for even if they were not repaid it would have suffered no loss.

You state that a similar proposition was presented in Bernalillo County and that the City Attorney there rendered an opinion that such a loan would be in violation of the Bateman Act and of the Constitution. We have secured a copy of the opinion of Vance Mauney, Albuquerque City Attorney, dated June 4, 1953, rendered to Mr. Engel, City Manager of Albuquerque. Mr. Mauney states in his opinion that the contract proposed to be entered into by the City with the county for repayment of the loan of funds to purchase rights-of-way violated both the Bateman Act (Sec. 7-607 N.M.S.A., 1941 (and Sec. 12, Art. 9 of the Constitution of New Mexico.

The proposed Albuquerque contract created a debt requiring unconditional payment which Mr. Mauney felt would fall within the constitutional prohibition. He cites the definition of a debt as used by our Supreme Court in **Stewart vs. Bowers, 37 N.M. 385.** He also recognizes the opinion of the Supreme Court in **State vs. Board of County Commissioners, 33 N.M. 340** to the effect that the Bateman Act had no application to debts owed the State of New Mexico, and concluded that the county was a quasi-municipal corporation and could not be deemed to be the same as the state, citing **Asplund vs. Hannett, et al. 31 N.M. 641.**

You ask could we suggest any other feasible plan by which the Village of Ruidoso could acquire the necessary funds to obtain the right-of-way *{*181}* without calling for an optional bond election, and after reading Mr. Mauney's opinion one might conclude that

if the indebtedness was payable out of a fixed fund and not an unconditional obligation of the city, and if the indebtedness ran direct to the State of New Mexico, that perhaps both the constitutional prohibition and the prohibition by virtue of the Bateman Act might be avoided. We are unable to discover, however, any clear statutory authority for a city to incur such an indebtedness except by virtue of Secs. 14-3335 and 14-2101 N.M.S.A., 1941, in towns of over 1000 population, both of which require an election unless the recent Parking Meter Law, Ch. 105 Laws of 1953 is applicable, in cities of over 5000 population. (See also Attorney General Opinion No. 4855, February 13, 1946.)

The general rule that municipal corporations may incur indebtedness only when the power to do so is expressly conferred by statute or is necessarily implied from the powers expressly granted, is well recognized, **64 CJS, Page 325,** and we do not feel that the fact that municipal corporation has been given general authority to widen streets (14-1805, 14-1907 and 14-2006, N.M.S.A., 1941) would necessarily imply authority to borrow money for this purpose. This principal is set forth in **Lanigan v. Gallup 17 N.M. 627** which held that Article 9, Secs. 12 and 13 of the Constitution gave no authority for borrowing money, and in this respect were not self-executing. (See also **Henning v. Hot Springs 44 N.M. 321).**

Our Supreme Court has been reluctant to extend the power of municipalities beyond those clearly specified in the statutes. **Bachechi v. City of Albuquerque 29 N.M. 572, Gordon v. Hammel 38 N.M. 93, Munro v. City of Albuquerque 48 N.M. 306.**

that general power in a city to erect

In **Varney v. City of Albuquerque 40 N.M. 90** the Supreme Court held public buildings (14-1803 N.M.S.A., 1941) was limited by the passage of a specific statute on auditoriums (6-301) which applied to municipalities of a population of 5000 or over. Judge Brice asked this question at the close of his opinion:

"Did the Legislature intend that municipalities with less than 5000 inhabitants could build auditoriums by a majority vote of their inhabitants and refuse that privilege to those of over 5000 inhabitants; * * *"

Although the question was not answered by the Court, it was answered in the affirmative by this office by Opinion No. 3037 to the Chairman of the Auditorium Committee in Springer in February 24, 1939. The Attorney General there held that municipalities under 5000 could not issue bonds and construct a municipal auditorium.

It is our understanding that the 1950 census found Ruidoso to have a population of 806. In line with the reasoning in Opinion No. 3037 it would seem that no general statute could provide the authority for Ruidoso to borrow money for this purpose, and unless its population now exceeds 1000 no special statutory is available, even if an election is held.

Since there is no authority for borrowing the money for this purpose in the Village of Ruidoso, we doubt the propriety of the county in making an alleged loan.

By: John T. Watson

Sp. Assist. Attorney Gen.