

Opinion No. 50-5293

April 28, 1950

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Burton G. Dwyre State Highway Engineer State Highway Department Santa Fe, New Mexico. Attention: L. D. Wilson Administrative Engineer

{*145} You have requested the opinion of this office upon certain questions regarding the validity of Chapter 123 of the Laws of 1929, and highway department regulations adopted pursuant thereto regulating signboards along public highways in New Mexico. Your attention has previously been called to Attorney General's Opinion No. 3195 dealing with many of the same questions.

You ask whether or not the prohibition of Section 58-711 of the 1941 Compilation against the placing of any signboards "within 100 feet of any state highway" relates to a distance of 100 feet from the center line of the highway, the edge of the traveled portion, or from the highway right-of-way line. Section 58-709 of the 1941 Compilation provides as follows:

"No person shall place, erect or maintain any advertising sign, signboard or device of any character upon the right-of-way or right of way fences of any public highway within this state outside of the limits of any incorporated city, town or village.

In Section 58-709 there is a prohibition against placing a sign on the right-of-way. Section 58-711, however, uses the term "highway" which, it is believed, is a narrower word than "right-of-way." The two prohibitions in the opinion of this office, supported by considerable law, are: (1) No signboard can be erected on the right-of-way; and (2) It is further restricted to within 100 feet of the edge of the highway.

You further refer to Section 58-710 of the 1941 Compilation prohibiting the placing of any signboards so as to obstruct or impair the vision of persons using the highway at "corners, curves, angles or turns of such highway" and prohibiting signs within 300 feet of any "corner or turn of any highway." This section has been construed by your department to apply to curves of 45 [degrees] angle or greater and you ask whether it could apply to curves of 25 [degrees] or greater.

The entire subject of billboard regulation along the highways is bottomed upon the police power of the state, and is valid only where it can be construed as a prohibition in aid of the public peace, health or safety. Any regulation which cannot meet this test would be invalid. It is felt {*146} that your department is in a far better position to decide whether or not signboards in the vicinity of curves of 25 [degrees] angle or greater are dangerous to the public safety than is this office. If the Highway Commission should so determine and if a regulation were adopted to that effect, the same would be upheld if it could be determined to be a reasonable exercise of the police power.

You further ask whether signboards may be prohibited entirely adjacent to the right-of-way in areas where the maximum speed permitted is in excess of 25 miles per hour. The test to be used is the same as that in the preceding paragraph and the question is essentially one of an administrative determination based upon the fact available to the Highway Commission rather than a clear-cut legal problem.

You further ask whether signs designated as "chain signs" such as the well known Burma Shave advertisements within the 100 feet area, may be subject to regulation by your department. If such signs, because of the necessity of a motorist's eyes leaving the road for large periods of time in order to read their messages, may be said to be inherently dangerous, regardless of where they are placed, they may, under the police power of the state, be prohibited from areas adjacent to the highway right-of-way. This again is a matter of administrative determination by your department.

In passing, I would like to call your attention to the case of the Lewellyn Co. v. State Highway Commission et al, § 17750, District Court of Santa Fe County. Insofar as is known, this is the only case in which any construction of Chapter 123 of the Laws of 1929 was attempted. There the law was attempted to be declared unconstitutional and the present regulations of the Highway Department were attempted to be declared arbitrary.

Although there was not a final decision reached because the plaintiff removed its signboard, according to correspondence from counsel in this office's file on the case, the Court indicated that it felt that the law was constitutional and that the regulations adopted by the highway department were not arbitrary or capricious and should be upheld.

Trusting the foregoing will be of assistance to you, I remain