

## **Opinion No. 55-6082**

January 21, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Nils T. Kjellstrom Assistant District Attorney Truth or Consequences, New Mexico

Your letter of December 30th raises the question of the constitutionality of certain portions of Chapter 92, Session Laws of 1953, known as the Bill Board Law, as follows:

1. Can the state prohibit the use of signs on private property or require a permit for the erection of a sign within 100 feet of the center line of a highway?
2. Does the fact that the law permits certain signs on buildings within 100 feet of the center of a highway, or the fact that the statute only applies outside the limits of incorporated cities, towns and villages render it unconstitutional, as class legislation?

There is abundant authority, in our opinion, which would require an affirmative answer to your first question. Generally the state can regulate or prohibit signboards from property abutting the highway as a valid exercise of the police power. Of course, the law must be reasonable and bear a substantial relation to the welfare and safety of the public.

We call your attention to *Hava-Tampa Cigar Co. v. Johnson* (Fla.), 5 S. 2d 433, and *John H. Swisher and Son, Inc. v. Johnson*, 5 S. 2d 411, *Murphy, Inc. v. Westport* (Conn.), 40 A. 2d 178, *Perlmutter v. Green* (N.Y.), 182 N.E. 5, *Kelbro, Inc. v. Myrick* (Vt.), 30 A. 2d 527. In *General Outdoor Advertising Co. v. Department of Public Works*, 193, N.E. 788, the Massachusetts court in a very searching opinion on the subject states:

"Rules and regulations of advertising devices, even to the extent of prohibition, having a reasonable tendency to prevent obstructions to traffic or to facilitate safety of travel are permissible."

Unless Chapter 92, Laws of 1953, conflicts with Article 5, Section 14, of the Constitution, we believe the subject is one within the powers of the legislature. Probably this question will not be raised as the Highway Commission has, with one exception, adopted the term of the laws as its regulations.

In *Hutcheson v. Atherton*, 44 N.M. 144, our Supreme Court said that the voice of the legislature

"is supreme upon the subject of classification for purposes of legislation so long as there is to be found any reasonable basis for the distinction employed. The fact that it appears unreasonable to the court is not decisive."

Only if the law "is so wholly devoid of any semblance of reason to support it, as to amount to mere caprice, depending on the legislative fiat alone for support" will it be stricken down. *Hutcheson v. Atherton*, supra, and *Crostwait v. White*, 55 N.M. 71, *Fowler v. Corlett*, 56 N.M. 430, *State v. Spears*, 57 N.M. 400. In *State v. Thompson*, 57 N.M. 459, the court quotes *Cooley on Constitutional Limitations* and Mr. Justice Holmes as follows:

"It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. The state may direct its law against what it deem the evil as it actually exists without covering the whole field of possible abuses."

In view of the above we would be most hesitant to answer your second question in the affirmative and hold that the exclusion of areas within incorporated municipalities from the operation of the law and the permitting of signs on buildings, where they would otherwise be prohibited, makes the law unconstitutional.

The relative importance of the structure blocking the line of sight can certainly be considered by the legislature, and if the view is to be blocked without the sign and the sign does not otherwise violate the statute, why should it be prohibited? With reference to subsection (c), it can hardly be said that a sign attached to a house is as likely to be deluged onto the highway or under a bridge as a sign standing alone. These provisions do not seem "wholly devoid of any semblance of reason."

Nor does the fact that the legislature has chosen to leave the regulation of signboards within incorporated municipalities to those bodies, prohibit it from otherwise regulating those outside. Certainly there are considerations to the regulation of signboards in a municipality, which would not be involved in the country. If a city has less stringent rules or has no ordinance at all on the subject it would not invalidate the state law. *State v. Thompson*, supra. As to different regulations in municipalities, see 72 A.L.R. 465.

By

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