

Opinion No. 57-329

December 30, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
Assistant Attorney General

TO: Marshall S. Hester, Superintendent, New Mexico School for the Deaf, 1060
Corrillos Road, Santa Fe, New Mexico

QUESTION

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"Can a public agency (for example the Highway Department or the City of Santa Fe) by process of eminent domain or legal procedure, take land owned by a state agency (in this case the New Mexico School for the Deaf) for the purpose of constructing a highway?"

CONCLUSION

No.

OPINION

ANALYSIS

It is believed that Attorney General's Opinion No. 5848, furnished you November 23, 1953, covers the area of your stated inquiry. However, as the result of searching existing law, the following is presented as a further response to your question.

The statutory authority for condemning property for public use or purpose is found as § 22-9-15, N.M.S.A., 1953 Compilation, as follows:

"In addition to the purposes hereinbefore specifically mentioned for which property may be condemned under the provisions of this chapter, said property may also be condemned by the state, any county, municipality or school district, for the use of said state, county, municipality or school district for public buildings and grounds, for canals, aqueducts, reservoirs, tunnels, flumes, ditches, conduits for conducting or storing water for drainage, the raising of banks or streams the removing of obstructions therefrom, for roads, streets, alleys, thoroughfares, for public parks, playgrounds, for ferries, bridges, electric railroads or other thoroughfares or passways for vehicles, for canals, ditches, flumes, aqueducts and conduits for irrigation, for electric lines, for the production of sand, gravel, caliche and rock used or needed for building, surfacing and/or maintaining streets, alleys, highways and/or other public grounds or thoroughfares and for public airports or landing fields incident to the operation of aircraft, Provided, nevertheless that

no land shall be condemned for the production of sand, gravel, caliche or rock, which is in the possession or ownership of a person, firm or corporation engaged at the time said proceeding is brought in the actual production of such material from such land sought to be condemned. Nor shall any land be condemned for municipal purposes which may be shown by the owner or lessee thereof to have a content of precious metal sufficient to make said land of value as mineral producing property."

Giving consideration to property which is subject to appropriation, as afore contemplated by the statute, it is generally held that:

"In the absence of authority conferred expressly or by necessary implication, an agency of the state cannot take land devoted to a public use by a political or governmental agency." 18 Am. Jur. 713.

This seems to be readily followed in *City of Albuquerque v. Garcia*, 17 N.M. 445 at page 450, where the Court said:

"The Legislature, as the supreme and sovereign power of the state, may doubtless interfere with property devoted to a public use for one purpose, and apply it to another; but the Legislative intent to do so must be stated in clear and express terms, or must appear from necessary implication."

and further, at page 453, quoting from *Matter of City of Buffalo*, 68 N.Y. 167, as cited in Attorney General's Opinion, supra:

"To defeat the attainment of an important public purpose to which lands have already seen subjected, the legislative intent must unequivocally appear from the fact of the enactment, or from the application of it to the particular subject matter of it, so that by reasonable intendment, some special object sought to be attained by the exercise of the power granted could not be reached in any other place or manner."

Accordingly, it is our opinion that generally the authority to condemn property for public use or convenience does not, by necessary implication, provide for the taking of land already devoted to equivalent public purposes.

This opinion is restricted to the question stated and does not extend to a consideration of mutual public purposes as may be possible in specific factual situations where no real or important hindrance is caused one purpose by the establishment of a second.