

## Opinion No. 65-228

November 22, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

**TO:** Alfonso G. Sanchez, District Attorney, First Judicial District, P.O. Box 2041, Santa Fe, New Mexico

### QUESTION

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1. May a county maintain "Public" as opposed to "County" roads within a county?
2. In what instances, if any, may county road equipment be used to service other than county property?
3. May the county assist in the construction of bridges or community roads when it will benefit the general public?

#### CONCLUSION

1. See Analysis.
2. See Analysis.
3. See Analysis.

### OPINION

#### {\*373} ANALYSIS

We have taken the liberty of rewording and combining your {\*374} questions into the ones you see above. Each county is charged with the duty to maintain and keep in repair all public highways except those owned and operated by private corporations and those within the corporate limits of any incorporated city, or town. Section 55-1-2, N.M.S.A., 1953 Compilation. Public highways are defined in Section 55-1-1, N.M.S.A., 1953 Compilation as follows:

"Public highways -- Definition. -- All roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways."

Because of Section 55-1-1, supra, and **State v. Board of Commissioners of Bernalillo County**, 49 N.M. 218 we know that a board of county commissioners may impliedly accept a road so as to render the county liable for the maintenance of the highway. It is possible that the road you have described in your first question is actually a public highway, the maintenance of which is the responsibility of your county. If this is so, then the county has a duty to maintain that road. However, if the road is not a public highway within the meaning of Section 55-1-1, supra, then the county has neither the duty nor the authority to maintain such a road. Without specific statutory authority we believe the maintenance of a non-public highway would constitute misuse of county property.

We find no statutory authority that would permit the county to use its road fund and equipment in performing general services throughout the community. In other words there is no authority to maintain or perform services on such as church grounds, public recreation play grounds or public school grounds. In Attorney General Opinion No. 58-11 issued January 20, 1958, we ruled that county road funds may not be used for any purpose except the maintenance of public highways within a county. Because of the lack of authority noted above and because all funds for road or bridge purposes in each county must go through the road fund, we are of the opinion that road equipment may not be used for general community purposes. This conclusion does not mean, however, that the county may not hire out its road equipment for use on private property. This office has previously ruled that this was proper. See Attorney General Opinion No. 5260 dated December 2, 1949.

A county has the same authority to construct or repair bridges as it has for roads. All funds for road and bridge purposes must go through the county road fund. As outlined above this fund can only be used for those roads and bridges which are public highways within Section 55-1-1, supra. Therefore, if the community roads you refer to in question No. 3 are not public highways, then the county may not construct or maintain them. In this connection, however, we refer you to Article 5 of Chapter 55 N.M.S.A., 1953 Compilation which covers vacation, alteration and establishment of county roads and bridges. Perhaps the roads with which you are concerned should be established as county roads.

In connection with question No. 2, we add that we do feel that a county has the power to act through its commissioners in emergency situations to protect the lives and property of its inhabitants and this would include the use of county road equipment upon public highways or private property when an emergency warranted that use.