

Opinion No. 66-13

January 31, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Honorable George D. Amaya, State Senator - McKinley County, Capitol Building, Santa Fe, New Mexico

QUESTION

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The State Highway Commission and various municipal and county governing bodies have executed written agreements relative to highway construction and by-passes. Is the State Highway Commission bound by such written agreements if the so-called Anti By-Pass Law (Sections 55-2-50 and 55-2-51, N.M.S.A., 1953 Compilation (P.S.)) is repealed?

CONCLUSION

Yes.

OPINION

{*17} ANALYSIS

Section 55-2-51, N.M.S.A., 1953 Compilation (P.S.) provides in pertinent part as follows:

"Except as provided in subsection B, no expenditure, or contract for the expenditure, of state public funds for purposes of construction of highway by-passes or highway relocation projects diverting public motor vehicle travel from a previously existing highway route through a municipality with a population of fifty thousand (50,000) persons or less or through an unincorporated community shall be made by the state highway commission, without prior consent of the governing authority of the municipality affected or the board of county commissioners on behalf of the unincorporated community affected. The consent shall be expressed in the form of a resolution, duly adopted and passed by a majority of the members of the proper governing authority. The resolution expressing approval or disapproval shall either approve or reject the proposed construction in toto. **Once such authority is given by the governing authority, and the state highway commission has affirmatively acted in reliance upon the expressed approval, public funds may be expended, and contracts executed, despite subsequent withdrawal of approval by the authority.**" (Emphasis added.)

In accordance with this statutory provision, local governing bodies have approved certain by-passes upon specified terms and conditions. For example, the City Council of Gallup and the County Commissioners of McKinley County gave permission to the State Highway Commission to construct Interstate Route 40 through the city of Gallup in accordance with the State Highway Commission's plans if the State Highway Department agreed to various matters such as over-passes, interchanges, lighting facilities, signs and widths to the off-ramps.

We believe such agreements to be valid and binding upon the state highway commission and the state highway department even if the bypass laws (Sections 55-2-50 and 55-2-51, supra) are repealed. With respect to already existing contracts, most case law holds that neither the obligation nor the remedy may be destroyed. 3 **Corbin on Contracts**, § 551 (1960).

The case of **Von Hoffman v. Quincy**, 71 U.S. 535, 18 L. Ed. 403, dealt with just such a matter. The Illinois legislature authorized the city to issue bonds for public improvements and levy a tax sufficient to pay for them. The mood of repudiation arrived after many such bonds had been injudiciously issued and the money wasted. The state then passed a statute limiting the right of cities to levy such taxes. This was held to be unconstitutional as an impairment of the obligation of contracts insofar as it attempted to prevent a levy for bonds issued under the first law.

{*18} We believe that for the State Highway Commission or the local government unit to attempt to evade the provisions of the agreements would be an impairment of the obligations of contract.