

Opinion No. 66-24

February 14, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Myles E. Flint, Assistant Attorney General

TO: Clay Buchanan, Director, New Mexico Legislative Council, State Capitol Building, Santa Fe, New Mexico

QUESTION

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Is a person a contractor, and required to be licensed, if he owns, purchases or leases real estate and by buying the materials and doing the labor himself or by hiring craftsmen for wages and paying applicable taxes, builds thereon billboards with the intent of retaining ownership of the real estate and structures for renting advertising space?

CONCLUSION

No.

OPINION

{*27} ANALYSIS

As we understand the question, the following facts may be assumed for the purpose of answering this question. The person involved herein contracts to sell advertising space in a certain area to a third party. No contract is entered into under which the person agrees to construct a billboard or sign. The only holding out made by the person is that he will sell advertising space within a certain area for a certain price over a definite period of time.

If there is available advertising space within the area, no problem is created under the Contractors Licensing Law.

If no space is available within the given area, the person must obtain the necessary space. This can be done either by constructing the space for himself or by contracting to have others undertake the construction of the necessary advertising space.

Undoubtedly, the person who contracts to construct the sign for the advertising company falls within the definition contained in Section 67-16-2, N.M.S.A., 1953 Compilation (P.S.).

The problem we are concerned with arises when the work is done by the person and his employees. In all cases the construction is done on land either owner or leased by the person and the billboard is the property of the person.

"67-16-2. Contractor defined. -- A. A contractor within the meaning of the Contractors' License Law is a person, firm, copartnership, corporation, association or other organization, or any combination thereof, who, for either a price, fee, percentage, or any compensation other than wages, { *28 } undertakes, or offers to undertake, or purports to have the capacity to undertake to construct, alter, repair, add to or improve any building, excavation, water well, or other structure, project, development or improvement, or any part thereof."

The requirements to fit into the category of contractor can be enumerated as follows: (1) a person (2) who for a price or any other compensation (3) **undertakes** or purports to **undertake** or purports to have the capacity to **undertake** (4) to construct, alter or repair any of a number of listed items. It is our opinion that the person constructing billboards for his own use on his own land does not meet the second and third requirements necessary to be a contractor and therefore need not be licensed as a contractor.

This person does not meet the second requirement because he does not receive any compensation for constructing, altering or repairing any building, excavation, structure, project, development or improvement. The only compensation he receives is derived from the sale of advertising space over a period of time.

This person does not meet the third requirement set out above because he does not "undertake" to construct, alter, repair, add to or improve anything. He only "undertakes", to sell advertising space. Whether or not the space is now available or whether or not the space must be constructed and how such space must be constructed is not a subject of the contract.

"Undertakes" as used in a statute, such as Section 67-16-2, N.M.S.A., 1953 Compilation (P.S.) has a definite meaning. Nearly identical language contained in a California statute was considered by the Court in **People v. Moss**, 87 P.2d 932 (1939). After some discussion, that court held that "Undertakes" as used in the statutory definition of "contractor", necessarily means "undertakes with another." One reason for arriving at this definition was a desire to avoid having a contractor without a contract. The definition given in **People v. Moss**, supra, has been approved indirectly in other states as well. See **Jordan v. Linderman**, 23 N.J. Misc. 194, 42 A 2d 781 (1945); **Heffner v. White**, 45 N.E. 2d 342 (Ind. 1942); **Moorhead v. Grassle**, 93 N.W. 2d 678 (Minn. 1958); and **Miller v. Batten**, 273, S.W. 2d 383.

In view of the fact that this work is done by the person alone for his own uses and that the work is not for compensation, we conclude that the person constructing billboards under our assumed facts need not obtain a contractor's license.