

Opinion No. 73-47

June 6, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: E.E. Chavez Chief Counsel State Highway Department 1120 Cerrillos Road Santa Fe, New Mexico 87501

QUESTIONS

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Pursuant to the legal authority of the State Highway Department for certain necessary relocation assistance functions under Sections 22-9A-1 through 22-9A-16, N.M.S.A., 1953 Comp. (1972 Interim Supp.), the Department needs answers to the following questions:

1. Relating to private lands available for relocatees, can the Department pay for:
 - a) test holes to determine adequacy and quality of water?
 - b) expert advice and cost of bids relating to septic systems?
 - c) zoning change costs?
 - d) costs of title searching, surveying and acquiring rights on existing, but not dedicated, roads?
 - e) costs of constructing access roads to private tracts to be used for relocatees?
 - f) condemning the right of way for (d) or (e)?
2. Relating to lands which might be acquired in the name of the Department for "housing of last resort", can the Department:
 - a) pay more than market value if the owner declines the appraised value?
 - b) condemn?
 - c) spend any necessary funds relating to acquisition and development of lands bought by the Department for "housing of last resort", including, but not limited to, title search, appraisal, acquisition, surveys, wells, power, fuel, telephone, sewer, roads, etc.? In other words, all funds necessary to develop sites and construct homes as required under "housing of last resort".

CONCLUSION

1. Yes.
2. (a) No.
- (b) Yes.
- (c) Yes.

OPINION

{*93} ANALYSIS

A foundation must be laid before any of these questions can be answered. Section 22-9A-13, N.M.S.A., 1953 Compilation, provides:

"Housing replacement as a last resort. -- A. If a project cannot proceed to actual construction because comparable replacement sale or rental housing is not available and the agency determines that the housing cannot otherwise be made available, the agency may take action necessary or appropriate to provide the housing by use of funds authorized for the project.

{*94} B. No person shall be required to move from his dwelling on account of any project unless the agency is satisfied that replacement housing, in accordance with subsection C of section 12 [22-9A-12] is available to the person."

By the terms of the above-quoted statute, it is the opinion of this office that any necessary action may be taken to provide housing by using funds authorized for the project. This does not necessarily mean that the State Highway Department must build the houses required. But as an absolutely last resort the Highway Department could even build the necessary housing, since the statute gives authority to do anything that is determined to be needed by the Highway Department. With this basis, answers will be given to the questions as specifically set forth:

- "a) test holes to determine adequacy and quality of water?
- b) expert advice and cost of bids relating to septic systems?
- c) zoning change costs?
- d) costs of title searching, surveying and acquiring rights on existing, but not dedicated, roads?
- e) costs of constructing access roads to private tracts to be used for relocatees?

f) condemning the right of way for (d) or (e)?"

The answer to questions (a) through (f) is that the Highway Department, under the authority of Section 22-9A-13, **supra**, has the authority to expend public funds for these uses. If the private land is being acquired by negotiation and agreement, the only assurance which need be procured before funds are expended on these purposes is that the Highway Department has a valid legal binding option to purchase from the seller the land being developed for relocation purposes if it is found that the land has the required utility for relocation purposes. The reason for the valid legal binding option is that the Highway Department must have adequate assurances that this land will be conveyed to the relocatees, who need be moved as a result of the highway improvement project after all the preliminary work has been done. If the landowner refuses to sell the land or the easement for access to the land, the agency under Section 22-9A-13, **supra**, has the power to condemn both the land required for relocation and the rights of way necessary for access thereto.

Your second questions relates to lands which might be acquired in the name of the Department for "housing of last resort". The questions are:

"a) pay more than market value if the owner declines the appraised value?

b) condemn?

c) spend any necessary funds relating to acquisition and development of lands bought by the Department for 'housing of last resort', including, but not limited to, title search, appraisal, acquisition, surveys, wells, power, fuel, telephone, sewer, roads, etc? In other words, all funds necessary to develop sites and construct homes as required under 'housing of last resort'."

The answer to the questions under "housing of last resort" is also based upon Section 22-9A-13, **supra**. The Highway Department cannot pay more than the market value as found by an accepted appraisal. The above-quoted statute allows that "the agency may take action necessary or appropriate to provide the housing by use of funds authorized for the project." A reasonable interpretation of the statute would seem to authorize the agency to offer fair market value, but if the owner declines this appraised value, and if such an increase cannot be justified under an administrative settlement, then the agency must condemn the required tracts.

Item (b) must be answered in the affirmative. An agency has the authority by virtue of Section 22-9A-13, **supra** to condemn the required relocation site for "housing of last resort". Although this power is not explicit, it must be construed to exist because without it a public project or program could easily be deadended or postponed whenever a recalcitrant landowner persists in his refusal to sell to the state. The public purpose {*95} needed for constitutionally condemning the land is found in combining the purpose of the original construction project with Section 22-9A-13(B), **supra**, which effectively prohibits the completion of a project unless replacement housing is available to all

displaced persons. Without the authority to condemn, it could be that the Department would be powerless to see a project to completion.

Item (c) above would come firmly within the above-quoted statute, and therefore, is fully authorized and within the purview and intent of the statutory language.

By: Oliver E. Payne

Deputy Attorney General