

Opinion No. 74-16

May 6, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Carlos Jaramillo, Director Alcoholic Beverage Control Lew Wallace Building Santa Fe, New Mexico 87501

QUESTIONS

FACTS

The New Mexico Highway Department re-routed and rearranged certain roads in New Mexico in such a manner as to cause potentially an 80% decrease in traffic through or by an access road to an alcohol liquor license dispenser in the state.

QUESTIONS

While no specific or actual condemnation has been declared by the Highway Department with regard to the actual property on which the license in question exists, could the creation of the situation described which will decrease the traffic by or to the establishment by 80% be considered essentially a condemnation as contemplated by Section 46-4-11 (F), N.M.S.A., 1953 Comp., as amended in 1973.

CONCLUSION

Yes.

OPINION

{*31} ANALYSIS

Article II, Section 20 of the New Mexico Constitution provides that "private property shall not be taken or damaged for public use without just compensation."

Article II, Section 18 of the New Mexico Constitution provides that "no person shall be deprived of life, liberty or property without due process of law;. . ."

In applying a constitutional provision that private property shall not be taken without just compensation, a distinction is made between "damage" and "taking."

"Taking" under the power of eminent domain may be defined generally as entering upon private property for more than a momentary period and under the warrant or color of legal authority, devoted it to public use, or otherwise informally appropriated or

injuriously affected it in such a way as to substantially oust the owner and deprive him of beneficial enjoyment thereof. **Fruth v. Board of Affairs**, 75 W. Va. 456, 84 S.E. 105.

What is a taking of property within the due process clause of the state and federal constitutions is not always clear, but so far as general rules are permissible of declaration on the subject, it may be said that there is a taking when the act involves an actual interference with, disturbance of, property rights, resulting in injuries which are not merely consequential or incidental. **Sanguinetti v. U.S.**, 264 U.S. 146, 68 L. Ed. 608, 44 S. Ct. 264.

The question which you raise, however, presents a unique problem which has not directly been before our court, but the right to access to property, it has been held, is equal to the taking of property and therefore compensable. **Stehr v. Mason City & Ft. D. R. Co.**, 77 Neb. 641, 110 N.W. 701.

Many cases hold that interference with an abutting owner's easement or access by a bridge or other structure in the street or highway is a damage or injury to property for which he may recover compensation under similar constitutional provisions as exist in New Mexico. See **Chicago v. Taylor**, 125 U.S. 161, 31 L. Ed. 638, 8 S. Ct. 820.

It has been widely held that where an established "land-service road" in which the normal right of access had already come into being is converted into a marked access way in such a manner that the existing rights of access are destroyed, the owners of such rights are entitled to compensation exactly as they would be if such rights were destroyed by any other type of construction. **State ex rel. Morrison v. Thelberg**, 87 Ariz. 318, 350 P.2d 988.

In **Board of County Commissioners of Lincoln County v. Harris & Harris**, 69 N.M. 315, 366 P.2d 710, the Harris' were owners of property abutting on Highway 70, a paved highway in Lincoln County, New Mexico. The improvements consisted of store buildings, a filling station and garage located on the corner. The highway improvements being made and for which damages were claimed included the lowering of the grade of the street approximately 20" which resulted in considerable inconvenience in getting from the street onto the property, and from the property to the street. The trial court denied recovery. The Supreme Court of New Mexico reversed the trial court decision, holding that it is clear that in order for an owner to be entitled to compensation, a taking is not required -- it being sufficient if there are consequential damages. This case was cited with approval in **Allen v. McClellan**, 75 N.M. 400, 405 P.2d 405.

It would appear to me that the legislative intent surrounding the enactment of the statutory section you inquire about, and a liberal construction thereof, would lead one directly to the conclusion that an attempt was being made to protect license holders from consequential damage resulting from condemnation directly, or as contemplated in your {*32} letter, indirectly. The question you raise is a bit easier in that no compensation is sought for the taking, if in fact a taking exists. Rather, all the relief that could be granted by your department would be a transfer of the license to a location

within the county in which the license exists, to a place not hampered by the restraints which exist as a result of the rearranging or re-routing of the highway. I, therefore, conclude that the situation which you describe could create a condemnation within the purview of Section 46-4-11 (F), N.M.S.A., 1953 Comp., as amended.