

Opinion No. 88-62

October 5, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Scott Spencer, Assistant Attorney General

TO: Honorable William P. Vandergriff, New Mexico State Senator, Box 176, Las Luz, New Mexico 88337

QUESTIONS

1. May a board of county commissioners temporarily close a county road for the purpose of repair and maintenance without holding a prior public hearing regarding that specific closure?
2. Is there any time limit on how long a road may be temporarily closed for such purposes?

CONCLUSIONS

1. Yes.
2. See analysis.

ANALYSIS

On June 24 and July 1, 1983 the Alamogordo Daily News published a "Public Notice of Temporary Closure of County Road B-014." The notice stated that the temporary closure was effective Friday, July 8, 1983 and was for the purpose of "maintenance, repair and cleaning of said road." We understand that this road continues to be closed.

1. A county through its board of county commissioners has a duty to control, maintain and repair highways and roads within its boundaries: "All public highways, except such as are owned and operated by private corporations, and highways within the corporate limits of any incorporated city or town, shall be maintained and kept in repair by the respective counties in which they are located." Section 67-2-2 NMSA 1978. Similarly, Section 67-4-1 NMSA 1978 provides.

The several boards of county commissioners shall have the general control and management of all roads, highways and bridges in their respective counties with the exception of such roads, highways and bridges as are declared by the state highway commission to be state highways or bridges, and roads constructed or maintained with state aid, and shall have the power to establish and change as provided by law and to maintain the same, save as by this act otherwise provided.

Section 67-4-13 NMSA, 1978 provides.

All county roads and bridges shall be maintained at the expense of the respective counties. All roads, and bridges upon roads, that have been declared to be a state highway by acts of the legislature or resolution of the state highway commission shall be maintained at the expense of the state; provided, that whenever there shall not be sufficient funds available in the state road fund for maintenance of all state highway mileage in any county, the state highway commission shall certify to the board of county commissioners of such county, the section or sections of such highways which it is unable to maintain at state expense and the same shall thereafter be maintained at the expense of said county until such time and there may be state funds available to maintain same.

We are not aware of any statute that requires a board of county commissioners to hold a public hearing before it temporarily closes a road for repair and maintenance. However, Section 67-4-9 NMSA 1978 provides:

At a meeting to be held between the first day of June and the second Monday of September in each year, after publication for two consecutive weeks in a newspaper of general circulation in the county, of a notice stating the time, place and purpose of such meeting, the board of county commissioners of each county in this state shall prepare and adopt a plan of road work for the ensuing fiscal year, and shall prepare and adopt a budget covering all expenditures of county road and bridge funds for the ensuing fiscal year. Such plan and budget shall recognize each school district in the county and provide for a fair and equitable distribution of road and bridge fund expenditures throughout the entire county. Said budget shall be in the form of a resolution of the board of county commissioners and it shall be unlawful to expend or disburse any moneys from the county road and bridge fund for any other purpose or in any other manner, than as provided in said budget, except in accordance with an amendment to said budget, duly adopted by resolution of said board of county commissioners.

The board must therefore hold a hearing to adopt a road work plan for the ensuing fiscal year. Such a plan should include repair and maintenance of county roads and highways. Accordingly, while the board need not hold a hearing when it closes a county road or highway for repair and maintenance, Section 67-4-9 does require a public meeting that educates county residents about roads on which the country will work on in the following year.

We note, however, that Section 67-4-9 provides that the budget covers all expenditures of county road and bridge funds, and that the board may not use moneys from the county road and bridge fund for any purpose or in any other manner other than as provided in the budget, save by amendment adopted by a resolution of the board.

2. No New Mexico statute limits the amount of time a county may close a road for repair and maintenance. Under the common law, construction and repairs of roads are to be undertaken promptly and completed within a reasonable time. See *State ex rel. Smith v.*

Board and Commissioners of Miami County, 289 P. 394, (1930), 131 Kan. 144, see also 40 C.J.S. Highways § 177 (1944). Delay of construction or repair work is generally permitted where funds, equipment or manpower is not available or when circumstances make it imprudent for the county promptly to proceed. See State ex rel. Smith, supra, (recognizing unavailability of funds as a legitimate reason for postponing road improvement; but county's arbitrary use of funds earmarked for such improvements for other purposes was not a legitimate reason for delay).

We do not know why County Road B-014 remains closed and therefore we cannot opine whether the delay in reopening it violates the common law rule. We recommend that any such inquiry be referred to the board of county commissioners having jurisdiction over this road.

ATTORNEY GENERAL

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