

Opinion No. 34-729

February 12, 1934

BY: E. K. NEUMANN, Attorney General

TO: Mr. G. D. Macy, State Highway Engineer, Santa Fe, New Mexico. Attn.: R. W. Bennett

{*116} We have your letter of February 9th in which you raise certain questions as to the rights of the State Highway Commission in connection with establishing highways through incorporated municipalities.

Your first question is as follows:

"Has the State Highway Commission the right and authority to designate, as a State Highway, a certain route through an incorporated municipality, which route may traverse a certain dedicated street or certain dedicated streets or may follow a course entirely new and without regard to the system of dedicated streets in such municipality or partly upon dedicated streets and partly traversing a new route, and thereafter, after having secured the necessary rights of way from private property owners for the lands not within dedicated streets, enter upon such route and proceed to construct, reconstruct, improve and maintain such route, in any way they may see fit so to do even though such designation, construction, maintenance, etc., may be adverse to the desires and without the consent of the governmental body of such municipality?"

As to the right of the State Highway Commission to designate as a State Highway a certain route through a municipality over property which has not been used as a street, there can be no doubt under the decision in Gallegos vs. Conroy, recently rendered by the Supreme Court, and in all probability this opinion could be construed as authority for the proposition that the State Highway Department may also use a street through a municipality as a part of said highway although the latter premise is not so clear.

In this latter connection the Court held that Section 90-402, sub-paragraph 7 of the 1929 Compilation, gave a municipality the control over its own streets and alleys and that the Highway Commission could not divest it of such control unless clearly provided by the Legislature. The Court also went on to say that it did not intend to hold that the State Highway Commission could ruthlessly disregard any municipal plan or program relative to a municipal design {*117} relating to its streets and alleys, and the question as to whether or not the "Y" in the Conroy case became a street or an alley of the municipality was not decided.

It would be my belief, however, that the Supreme Court would hold in a proper case that the State Highway Commission has the right to use a street through a municipality as a part of its general highway system.

Your second question is as follows:

"Where the dedicated width of a street is insufficient, in the opinion of the State Highway Commission, for the proper improvement or use of such street as a part of a State Highway, or where such State Highway will traverse an entirely new route, thereby in either case making it necessary to acquire rights of way from private owners, and where the County or the Municipality both refuse to acquire such necessary rights of way, may the State Highway Commission acquire such rights of way in its own name, either by donation from the owners, by purchase, or by exercising the power of eminent Domain?"

Assuming our contention to be correct as to question one, it follows that your second question should be answered in the affirmative as it was specifically and definitely held in the Conroy case that the State Highway Commission would have the right to acquire the rights of way.

In answer to your paragraph number 3, it would be our opinion that where such rights of way have been acquired by the State Highway Commission in the absence of any agreement between the County Commissioners or the municipalities that such rights of way should be paid for by the state rather than charged against the county or municipality.

As to the control of traffic regulations upon highways within the limits of a municipality there is room for doubt, inasmuch as municipalities have the power to regulate speed and traffic within its limits. If the highway can obtain the right of way and establish the highway, it follows in our belief that it could also stipulate as to the minimum width between curb lines.

In answer to your question number 5, it is our opinion that the designation by the State Highway Commission of the particular route as a State Highway is sufficient to entitle the State Highway Commission to begin construction and operation through the municipality.

As intimated herein some of the questions presented by you were not decided in the Conroy case, and it is possible that upon objections made by a municipality that these questions will have to be presented to the Supreme Court before final decision can be rendered thereon.

At any rate, in order that such questions may properly be submitted we suggest that the State Highway Commission act in accordance with the views expressed herein, and that the municipality go into Court in an attempt to obtain an injunction.

By: FRANK H. PATTON,

Asst. Attorney General