Mr. George M. Foster  
Executive Director  
State Highway Department  
State House Annex  
Indianapolis, Indiana

Dear Mr. Foster:

I have received your letter containing a request for my Opinion concerning certain matters relating to road closures in the construction of limited access highways. You refer to the cooperative approach as between the State Highway Department and the several city and county highway authorities in areas in which such highways are to be constructed, including a graphic and verbal presentation of a proposed improvement. In my discussions with members of the Highway Department it was also concluded that following such presentations to the local highway authorities they should be requested to pass a resolution of approval as a matter of record.

Your question for my Official Opinion in that regard is stated as follows:

"Do they (the local governmental agencies) have full authority to act in such matters without additional formal petition as to road closures at the right-of-way line of the limited access facility, or do they need to have approval in the form of a petition or other instrument from the local property owners along the road to be closed, particularly the owners adjacent to the limited access highway."

In my Official Opinion No. 44, 1957 O. A. G., page 213, I have previously referred to the Acts of 1945, Ch. 245, Secs. 3 and 4, as found in Burns’ (1949 Repl.), Sections 36-3103 and 36-3104, which read in part as follows:

"The highway authorities of the state, counties, cities, and towns, acting alone or in cooperation with each other or with any federal, state, or local agency of any other state having authority to participate in the construction and maintenance of highways, are
hereby authorized to plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide limited access facilities for public use whenever such authority or authorities are of the opinion that traffic conditions present or future, will justify such special facilities—Provided, That within cities and towns such authority shall be subject to such municipal consent as may be provided by law. * * *

"The state highway commission of Indiana and the proper authorities of any county, city, or town having charge of any highway or street affected by this act are authorized to design any limited access facility and to regulate, restrict or prohibit access as to best serve the traffic for which such facility is intended. * * * No person shall have any right of ingress or egress to, from, or across limited access facilities to or from abutting lands, except at such designated points at which access may be permitted, upon such terms and conditions as may be specified from time to time by rules and regulations adopted and promulgated as by law provided."

It is also further provided in Section 7, as found in Burns' (1949 Repl.), Section 36-3107, as follows:

"The highway authorities of the state, county, city, or town, may designate and establish limited access highways as new and additional facilities or may designate and establish an existing street or highway as included within a limited access facility. The state or any of its subdivisions or municipalities shall have authority to provide for the elimination of intersections at grade of limited access facilities with existing state and county roads, and city and town streets, by grade separation or service road, or by closing off such roads and streets at the right-of-way boundary line of such limited access facility; and after the establishment of any limited access facility, no highway or street which is not part of said facility shall intersect the same at grade. No city or town street, county or state highway, or other public way shall be opened into or connected with any such limited access facility without the con-
sent and previous approval of the proper authorities of the state, county, city, or town, having jurisdiction over such limited access facility. Such consent and approval shall be given only if the public interest shall be served thereby.” (Our emphasis)

We are here concerned only with limited access facilities designated and planned for construction by the State Highway Department, and the closure of any street or county highway on each side of the limited access highway is solely the responsibility of the State Highway Department, and will be accomplished by its action. If such street or county highway, as it extends on each side of the limited access highway, is not designed and designated as a part of such limited access facility, the General Assembly has clearly prohibited its opening into and connection with such limited access facility without the prior consent and approval of the State Highway Department, and the General Assembly has further provided three alternative means by which the State Highway Department shall eliminate existing intersections:

A. Grade separation,

B. Service roads, or

C. Closure of such roads and streets at the right-of-way boundary line of such limited access facility.

I am aware that in emphasizing the importance of cooperation between state and local highway authorities I stated in my 1957 Official Opinion No. 44, that the consent and approval of the city and county authorities was “necessary.” I hold firmly to a belief and faith in “home rule” in Indiana, and, as indicated in my aforesaid Opinion, the General Assembly of Indiana clearly intended to promote cooperation and joint action between all highway authorities. But the action of the State Highway Department is not conditioned by law upon prior consent and approval of local authorities.

The primary control of public streets in a city or town in Indiana is vested in the state, and any such power and control over the same as municipalities may have are only such as have been delegated to them. It follows that the power of the state to delegate control over streets to municipalities in which
they are situated necessarily carries with it the power to withdraw such control any time the state deems it to be in the best interest of the public.


By general statute the State Highway Department is authorized to select the route of highways in the system of highways under its control through incorporated cities and towns in the state, and may from time to time change such routes as said Department may determine most convenient for public travel; and likewise the State Highway Department is authorized to select routes of highways under its control outside of incorporated cities and towns, and to relocate the same.

It is important to note that the statute in question, Acts of 1945, Ch. 245, makes no new provision or requirement for obtaining the consent of local authorities. But it does provide, as aforesaid, that "within cities and towns such authority shall be subject to such municipal consent as may be provided by law." This provision was obviously intended to operate primarily as a limitation on the broad new power granted to the municipal highway authorities, such as the board of public works in cities of the first and second class, which authorities are presently subject to municipal consent as to certain matters affecting the establishment, vacation, alterations and maintenance of city and town streets. A good example of existing provisions by law for municipal consent is the requirement as to cities of the first class found in the Acts of 1925, Ch. 169, as found in Burns’ (1950 Repl.), Section 48-2401 et seq. that no street in such city shall be located, changed, etc. in any manner other than as indicated by the official thoroughfare plan of such city when adopted by the city plan commission, approved by the board of public works, and adopted by ordinance by the city council. It is further provided therein that the ordinance cannot be altered or amended except by a three-fourths vote of the common council, unless the amendment is recommended by the city plan commission.

The only instance of which I am presently aware in which the State Highway Department would be required by existing
law to secure municipal consent as provided by law is in the case of the improvement by the State Highway Department of secondary or feeder roads which are not in fact in the state highway system. In such case the consent of the board of commissioners of the county is a necessary condition precedent to such improvement in the county, and the consent of the municipality through which the road passes is a necessary condition precedent to such improvement in the municipality.

Acts of 1937, Ch. 256, Sec. 20, as found in Burns' (1949 Repl.), Section 36-2920.

It is not probable that a secondary or feeder road, not in the state highway system, would be improved also as a limited access facility by the State Highway Department.

You will therefore consider my Official Opinion No. 44, 1957 O. A. G., page 213, as withdrawn and superseded to the extent that it states and infers that the consent and approval of the city and county highway authorities is “necessary” as a condition precedent to construction of limited access facilities by the State Highway Department. It should further be noted that to the extent that the state and local highway authorities are in fact cooperating in the construction of a limited access facility, and the particular county or municipality has assumed the responsibility for a particular part thereof lying within its jurisdiction, such local highway authority has the choice of the same three alternative means of eliminating existing intersections, as provided by the Acts of 1945, Ch. 245, Sec. 7, as found in Burns' (1949 Repl.), Section 36-3107; but the procedure in such instances, where the State Highway Department is not assuming the responsibility of construction, will not concern your Department.

In conclusion, therefore, it is my opinion that local highway authorities do not need to act upon any petitions of property owners in order to express approval of a planned limited access highway which is designated and established by the State Highway Department; and that such approval, though desirable, is not necessary to authorize action by the State Highway Department.