

OPINION 30

OFFICIAL OPINION NO. 30

July 23, 1959

Mr. John R. Peters, Chairman
State Highway Department
State House Annex
102 N. Senate Avenue
Indianapolis, Indiana

Dear Mr. Peters:

I have before me a request from Mr. George Foster, Executive Director of the State Highway Department, requesting my Official Opinion on the following questions:

“1. Can the State Highway Department legally enter into an agreement with a city wherein the construction of storm sewers are involved, and whereby the city would be permitted to make payment to the State Highway Department for their obligation in the cost of such construction over a period of say 2 to 4 years?

“We have several instances in which improvement of state roads through incorporated areas involves, under the law, that the incorporated area pay the cost of any storm sewer construction. In certain instances it is necessary that they levy a tax for such purpose and these monies would not be available until sometime hence, thus delaying the project which otherwise could go ahead at this time and which is badly needed as of now.

“2. If the answer to the above question is in the affirmative would the State Highway Department have recourse to and could they request the withholding of monies allocated from the gasoline tax to such incorporated areas in case such parties failed to make payments in accordance with such an agreement?”

The observations made in this opinion are limited to situations as set out in your first question.

The State Highway Department is an administrative agency of the state, and as such may exercise only such authority as is conferred upon it by statute.

Thomas v. Lauer (1949), 227 Ind. 432, 86 N. E. (2d) 71;

Chicago & E. I. R. Co. v. Public Service Comm. (1943), 221 Ind. 592, 49 N. E. (2d) 341.

The Acts of 1937, Ch. 256, Sec. 2, as amended, and as found in Burns' (1949 Repl.), Section 36-2902, makes provision for the responsibility of work to be performed on drains and sewers in connection with highway construction within the limits of incorporated cities and towns having a population of more than thirty-five hundred (3500). This statute requires that the incorporated city or town pay the cost of any storm sewer construction. I find no provision for the advancement of funds by the state directly to the city, nor do I find any provision for the state to effect the construction and charge the cost thereof to the city or town.

Thus, in the absence of statutory authority either permitting the loaning of highway funds to the city or town in order to facilitate that part of the construction which the cities and towns are required by law to bear, or permitting the State Highway Department to assume these responsibilities and later charge the same to the city or town, it would be unlawful for the Highway Department to enter into such an agreement.

In a previous opinion concerning this same statute and the question of whether the Highway Department should pay the expense of moving fire hydrants and utility poles, the Attorney General stated:

"I find no authority in the above section which would permit the Highway Commission to pay the expense of moving fire hydrants or utility poles. In fact, the implication is to the contrary: that the Highway Commission may only assume the burden of discharging the State's obligation to the public for adequate highway facilities. Other obligations to provide municipal services remain those of the municipality. I think that is true whether the municipality is engaged at the time in a proprietary or government function."

1947 O. A. G., pages 339, 341, No. 68.

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Since there is no authority for the Highway Department to enter into an arrangement such as contemplated in your first question it is unnecessary to answer your second inquiry.

However, may I suggest that the same purpose might be accomplished by the formation of a Conservancy District under the provisions of Acts of 1957, Ch. 308, as found in Burns' (1957 Supp.), Section 27-1501 *et seq.* This statute provides for the establishment of Conservancy Districts for the purpose of flood prevention and control, improving drainage and providing for the collection, treatment and disposal of sewage and other liquid wastes produced within the district. Any area can be established as a district, including a city or a part of a city with the consent of the mayor and common council.

The Highway Department, as well as other State agencies, under the act is mandated to co-operate in every way with the Indiana Flood Control and Water Resources Commission (Burns' 27-1528, *supra*), and is authorized to take part in an agreement with the Board of Directors of the Conservancy District to provide funds for the project.

Acts of 1957, Ch. 308, Secs. 49 and 68(1), as found in Burns' (1957 Supp.), Sections 27-1549 and 27-1568(1).

The Highway Department could also enter into an agreement with the Board of Directors of the Conservancy District for necessary construction by the Department within the District.

Acts of 1957, Ch. 308, Sec. 61(10), as found in Burns' (1957 Supp.), Section 27-1561(10).

However, as hereinabove stated in response to your specific question, the State Highway Department has no authority to enter into an agreement to advance the cost of such construction directly to the city.