

OPINION  
63-147

May 31, 1963 (OPINION)

HIGHWAY DEPARTMENT

RE: Commissioner's Discretion

This will acknowledge receipt of your request for an official opinion, clarifying an earlier opinion, addressed to Senator Meidinger on the subject of the constitutionality of the use of highway funds for the acquisition of advertising control rights and an agreement relating to such acquisition between the State Highway Commissioner and the Secretary of Commerce.

You specifically asked:

- (1) Does your expressing doubt as to these constitutional matters impose on me any personal liability, should I choose not to consider it unconstitutional to use highway funds for the acquisition of advertising control rights?
- (2) Should an action be instituted against me or against the State Highway Department alleging the unconstitutionality of the use of highway funds for the acquisition of advertising control rights, will your office, through the special assistant attorneys general assigned to the Highway Department, defend such action?

In reply to Question No. 1 above, it is our opinion that the mere expressing of doubt as to the constitutionality of any act or any statute, does not impose any personal liability on you or any other official that chooses not to agree. The legislature in enacting Section 24-01-32 of the North Dakota Century Code, knowing that the only funds available for the acquisition of advertising control rights must come from the state highway fund, it therefore raises a presumption of constitutionality of the statute itself and of all action taken thereunder and the mere expression of doubt by this office does not remove such presumption.

In reply to your second question as to whether or not this office will defend any action that may be instituted against you or against the State Highway Department, which alleges the unconstitutionality of the use of highway funds for the acquisition of advertising control rights, we do now state officially that only in the event that this office is required or elects to represent the party or parties instituting the action against you or against the State Highway Department, will those special assistant attorneys general assigned to the State Highway Department be prohibited from representing you or the department. In such case, counsel will be provided by this office at no costs to you or the department.

HELGI JOHANNESON

Attorney General