

OFFICIAL OPINION NO. 07-01, Ability of a Board of County Commissioners to Maintain or Repair Roads within an Unorganized Township

June 12, 2007

Robert W. Klimisch
Yankton County State's Attorney
P.O. Box 58
Yankton, SD 57078

OFFICIAL OPINION NO. 07-01

Ability of a Board of County Commissioners to Maintain or Repair Roads within an Unorganized Township

Dear Mr. Klimisch:

You have requested an opinion from this Office based upon the following factual situation:

FACTS:

The Yankton County Commission wants to asphalt and grade an existing gravel road within an unorganized township of Yankton County. The unorganized township in question is located along the bluffs of the Missouri River near Lewis and Clark Lake. The property on the north side of the road is predominately agricultural in nature. The property on the south side of the road is being developed for non-agricultural and recreation oriented residences. The township road in question is not covered by any existing road district.

Based upon the above facts, you have requested answers to the following questions:

QUESTIONS:

1. Pursuant to SDCL 31-13-51, a Board of County Commissioners has the power to levy a special front foot assessment, not to exceed eighty cents per front foot, for the purpose of maintaining or repairing roads within an unorganized township. Does maintaining or repairing include asphalt surfacing and/or final grading?

2. Does a Board of County Commissioners have the ability to use the provisions of SDCL ch. 9-43 to finance the repayment of the cost of any "maintaining or repairing" undertaken pursuant to SDCL 31-13-51?

IN RE QUESTION 1:

SDCL 31-13-51 states:

The township board of supervisors or, in the case of any township which is no longer organized, the board of county commissioners, prior to the assessment of real property within the township, or unorganized township, for the next fiscal year, may levy annually for the purpose of maintaining or repairing street surfaces, whether of a permanent type or not, a special front foot assessment not to exceed eighty cents per front foot upon the real property fronting and abutting the roadway. Such assessment shall be apportioned on a front foot basis and shall be levied pursuant to § 31-13-52. If the board of county commissioners is levying a special assessment on real property pursuant to this section, the board of county commissioners shall perform the duties, as applicable, that are required of the township board of supervisors pursuant to §§ 31-13-32 to 31-13-54, inclusive.

The South Dakota Supreme Court has stated that "no standards for road repair and maintenance exist" in South Dakota law. Krier v. Dell Rapids Township, 2006 S.D. 10, ¶ 17, 709 N.W.2d 841, 845 (citing Willoughby v. Grim, 1998 S.D. 68, ¶ 10, 581 N.W.2d 165, 166). Therefore, the "details" for repair and maintenance remain within the discretion of the public entity charged with such maintenance or repair. Krier, 2006 S.D. 10, ¶ 17, 709 N.W.2d at 845 (quoting Willoughby, 1998 S.D. 68, ¶ 10, 581 N.W.2d at 166). My predecessors in this office have recognized and adopted this position. A.G.O. 95-01, 93-01, 89-17; 1963-64 A.G.R. 233. I agree with their conclusions.

The public entity charged with the duty of ensuring a public highway remains safe and passable has wide discretion in determining what the proper level of maintenance and repair is for that road. The only duty placed upon these public entities is that they exercise "reasonable and ordinary care" to preserve the highways in a "reasonably safe condition." Bland v. Davison County, 507 N.W.2d 80 (S.D. 1993); A.G.O. 95-01.

In reviewing SDCL 31-13-32 through 31-13-54 it is clear, however, that the Legislature drew a distinction between improvements to township roads and maintenance and repair of those roads. The Legislature, in SDCL 31-13-32 through SDCL 31-13-50, speaks specifically

of "improvements." In SDCL 31-13-33 the Legislature, in effect, defined an improvement by stating:

Whenever the board of supervisors of any township deem it necessary to open, widen, grade, gravel, surface with oil or other bituminous material, pave, repave, bridge, construct a viaduct upon or over, erect equipment for street lighting in, curb, gutter, drain, or otherwise improve any streets within platted land or subdivision for which a special assessment is to be levied, it shall declare in a resolution the necessity of the improvement...

These statutes deal solely with that process. By comparison, SDCL 31-13-51 and -52 speak in terms of "maintenance and repair" of township roads.

"Words or phrases in a statute must be given their plain meaning and effect." Martinmaas v. Engleman, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611. Statutes must be construed according to their intent which is determined by the plain, ordinary, and popular meaning of the statute's language, as well as the enactments that relate to the same subject. Loesch v. City of Huron, 2006 S.D. 93, ¶ 8, 723 N.W.2d 694, 697 (citing State v. Ducheneaux, 2003 S.D. 131, ¶ 9, 671 N.W.2d 841, 843; Dahn v. Trowsell, 1998 S.D. 36, ¶ 14, 576 N.W.2d 535, 539). The foregoing analysis of the statutes indicates that the Legislature intended a distinction be drawn between an improvement and maintenance or repair. While no definition of maintenance or repair exists, the plain meaning of the terms, and common sense, indicate they are something less than an improvement. It is my opinion that the asphalt surfacing or paving of a gravel township road would be an improvement as envisioned by SDCL 31-13-33, and would not fall under the maintenance or repair provision of SDCL 31-13-51.

IN RE QUESTION 2:

The last sentence of SDCL 31-13-51 states that "[i]f the board of county commissioners is levying a special assessment on real property pursuant to this section, the board of county commissioners shall perform the duties, as applicable, that are required of the township board of supervisors pursuant to §§ 31-13-32 to 31-13-54, inclusive." SDCL 31-13-50 states, in pertinent part, that "... the board of supervisors of a township may use, as a method for the financing or repayment for the improvement, the provisions of chapter 9-43." SDCL ch. 9-43 deals with a municipal government's use of special assessments to finance improvements. Specifically, SDCL 9-43-29 allows a municipality to collect special

assessment payments in any number of annual installments not exceeding twenty-five. Also, SDCL 9-43-31 allows the municipality to fix the interest rate to be borne by unpaid installments collected under the chapter.

Yankton County, operating under SDCL 31-13-50 and -51, would like to finance any maintenance or repairs to the road in question through special assessments levied and collected according to the provisions of SDCL ch. 9-43. Essentially the question is whether the last sentence of SDCL 31-13-51, by way of SDCL 13-13-50, allows the County access to the financing provisions available to municipalities in ch. 9-43?

It is my opinion that a county commission may not use the provisions of SDCL ch. 9-43 to finance an assessment made under SDCL 31-13-51 for maintenance or repair to unorganized township roads.

The purpose of statutory construction is to ascertain the intent of a law from a review of the language expressed in the statute. Martinmaas, 2000 S.D. 85, ¶ 49. "Words or phrases in a statute must be given their plain meaning and effect." Id. In interpreting a statute, only when the language used is unclear or ambiguous should a person then look beyond the express language to determine the Legislature's intent. State v. Myrl & Roy's Paving, Inc., 2004 S.D. 98, ¶ 6, 686 N.W.2d 651, 654.

The plain language of SDCL 31-13-51 directs that a county commission must perform those acts affirmatively required of a township board of supervisors by SDCL 31-13-32 through 31-13-54. However, the language used in SDCL 31-13-50 is merely permissive in nature. SDCL 31-13-50 creates no affirmative duty on behalf of the township board of supervisors to use the financing provisions of ch. 9-43. Therefore, a county commission operating under SDCL 31-13-51 is likewise not required to use the provisions of SDCL ch 9-43.

It is well established that a county possesses only those powers conferred upon them by specific constitutional or statutory authorization, along with those powers incidental to or implied by an authorized power. See Olesen v. Town of Hurley, 2004 S.D. 136, 691 N.W.2d 324; Sioux Falls Employees v. City of Sioux Falls, 233 N.W.2d 306 (S.D. 1975); Schryver v. Schirmer, 171 N.W.2d 634 (S.D. 1969); A.G.O. 89-17. The language of SDCL 31-13-50 is permissive in nature and creates no duty on behalf of a county. Because of this, the last sentence of SDCL 31-13-51 is not adequate justification to find that a county has been specifically, or impliedly, granted by statute the authority to use the municipal special assessment provisions of SDCL ch. 9-43. A county is precluded from using those provisions

to finance the maintenance or repair of unorganized township roads absent statutory authorization.

Furthermore, the statute itself contradicts the interpretation put forward by Yankton County. SDCL 31-13-51 states that an assessment made under its terms "shall be apportioned on a front foot basis and shall be levied pursuant to SDCL 31-13-52." SDCL 31-13-52 states:

The township board of supervisors prior to the assessment of real property may, by resolution, designate the real property, the lot, or the portion of lots or real property against which the assessment is to be levied, the amount of the assessment against the real property, lot or portions thereof for such purposes, and direct the county auditor to add such assessment to the general assessment against the property to be collected as township taxes for general purposes. The assessment shall be subject to review and equalization the same as assessments or taxes for general purposes. For the purposes of this section, "front foot" shall mean the actual front of the premises as established by the buildings thereon, record title and use of the property regardless of the original plat thereof.

The Legislature clearly intended that any assessment for maintenance and repair under SDCL 31-13-51 shall be assessed and levied according to the provisions of SDCL 31-13-52, and not according to the special assessment provisions of SDCL ch. 9-43.

Moreover, it should be noted that there are other statutory avenues that allow a county to undertake maintenance and repair of roads within an unorganized township. First, SDCL 31-12-26 states:

Each board of county commissioners and county superintendent of highways in organized counties, shall construct, repair, and maintain all secondary roads within the counties not included in any municipality, or organized civil township, or county road district organized pursuant to chapter 31-12A.

Our Supreme Court has recognized that this is an affirmative duty that falls upon a county. Matters v. Custer County, 538 N.W.2d 533 (S.D. 1995); Bryant v. Butte County, 457 N.W.2d 467 (S.D. 1990). Also, a county may designate a road within an unorganized township as a county aid road according to SDCL 31-13-12, which states:

The board of county commissioners of each county is hereby empowered to designate in its discretion township roads or roads in unorganized townships within the county, as it may deem advisable and in the public interest as "county aid roads," and to expend any funds available from the county highway funds for laying out, constructing, graveling, and maintaining such township roads or roads in unorganized townships so designated as "county aid roads."

Thirdly, a county road district may be formed under the provisions of SDCL ch. 31-12A to construct or maintain roads in any area outside the boundary of a municipality. SDCL 31-12A-1.

In conclusion, my answer to your first question is no. The statutory scheme created by SDCL 31-13-32 through 31-13-54, and the plain language of the terms used therein clearly reveals that the phrase "maintenance or repair" is something different than an improvement as defined by SDCL 31-13-33. The answer to your second is no. The language of SDCL 31-13-50 and -51 does not specifically or impliedly authorize a county to use the municipal special assessment provisions of SDCL ch. 9-43. As such, Yankton County may not use these provisions to finance the maintenance or repair of roads within an unorganized township.

Very truly yours,

Larry Long
ATTORNEY GENERAL

LL/lde