

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

May 7, 2012

Glenn Brenner
Pennington County State's Attorney
300 Kansas City Street #400
Rapid City, SD 57701

OFFICIAL OPINION NO. 12-01

Highway Maintenance Responsibility at State/County Highway Intersections

Dear Mr. Brenner:

You have requested an official opinion from this Office regarding responsibilities for maintenance of the driving surfaces that lie within the state highway right-of-way where state trunk highways and county highways intersect. Recognizing that you have narrowly framed your questions to address only existing state/county highway intersections, I believe a broader review of the law is necessary to assist in properly addressing the issues. Your reframed questions are as follows:

QUESTION 1:

For intersections connecting a state trunk highway with a local government highway, is the South Dakota Department of Transportation (DOT) responsible for maintaining all connecting driving surfaces (roadways) located within the state highway right-of-way?

ANSWER:

Responsibility for maintenance of an intersecting local government highway roadway located within a state highway right-of-way is controlled by SDCL 31-24-9 and is dependent upon the date each highway came into existence. The government entity of the second or intersecting highway is responsible for construction and maintenance of the connecting roadway within the state highway right-of-way.

QUESTION 2:

Is maintenance of the roadway for Pennington County secondary highway Teewinot Drive located within the South Dakota Highway 44 (SD 44) right-of-way the responsibility of DOT or of Pennington County, where the approach was originally constructed by a developer as a connection to a private roadway and the county later added the roadway to its county secondary system?

ANSWER:

Pennington County is responsible for construction and maintenance of the connecting roadway. Prior private ownership of an approach is not a recognized exception for maintenance responsibilities. Under SDCL 31-24-9, as the second or intersecting public highway, Pennington County is responsible.

FACTUAL BACKGROUND:

SD 44 is a part of the state trunk highway system and runs easterly across South Dakota from its intersection with U.S. Highway 385 in Pennington County to Interstate Highway 29 in Lincoln County. For the portion located in Pennington County, the SD 44 highway right-of-way varies in width between approximately 140 feet and 190 feet, with the roadway or main-traveled portion of the highway essentially centered in the right-of-way.

Teewinot Drive is a Pennington County secondary highway that intersects with SD 44. DOT has advised that this portion of SD 44 has existed at its current location since 1951. Teewinot Drive was initially constructed as a private roadway. The intersection with SD 44 was constructed by a private developer pursuant to an approach permit issued by the DOT in 1988. At some point after the approach was constructed, Pennington County assumed maintenance responsibility for Teewinot Drive. According to the minutes of its November 3, 1998, meeting, the Pennington County Board of Commissioners authorized the Pennington County Highway Department "to do minimal maintenance" on certain "Rapid Valley Streets," including Teewinot Drive. Subsequently, on May 22, 2007, the Pennington County Board of Commissioners adopted Resolution No. 14-07-01, which "added" Teewinot Drive, along with other road segments, to the "Pennington County Secondary Highway System as full maintenance roads."

It is unclear if Pennington County assumed jurisdiction of Teewinot Drive in accordance with the statutory procedure prescribed in SDCL §§ 31-3-6 through 31-3-9 for locating public roads. One of my predecessors, in Attorney General Opinion No. 89-17, concluded that the procedure prescribed by those statutes is mandatory upon county boards of commissioners considering locating a public highway. The May 2007 resolution certainly evidences Pennington County's intent to convert Teewinot Drive from a private subdivision road to a public highway by adding it to the county secondary system. Moreover, Pennington County does not dispute that it is responsible for maintenance of Teewinot by virtue of SDCL 31-12-26.

It has been the practice of the Pennington County Highway Department to not maintain the Teewinot Drive connecting approach within the state highway right-of-way. It has been the position of the DOT, however, that the Teewinot Drive approach is the maintenance responsibility of the county, as the successor in interest to the private developer. When surface repairs have been required to the approach to Teewinot Drive, the DOT has completed the repairs after the county refused to do so, and billed Pennington County for the repair costs.

SDCL 31-4-5 requires municipalities with populations over 2500 to perform snow removal on the state trunk highway system within their municipal limits. Snow removal is therefore not at issue here.

The discussion below is intended to address maintenance responsibilities which are not addressed by SDCL 31-4-5. Further, I am not addressing construction or maintenance responsibilities for private approaches, which are separately addressed in SDCL ch. 31-24.

IN RE QUESTION 1.

South Dakota law defines a highway as “[e]very way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel[.]” SDCL 31-1-1. The term “highway” does not include a roadway or driveway on grounds owned by private persons, except that colleges, universities and other institutions may designate such roadways as highways with the concurrence of the DOT. SDCL 31-1-1. *Id.* Highways are classified by South Dakota law as: (1) streets and alleys within the limits of municipal corporations; (2) the state trunk highway system; (3) the county highways systems; and (4) all other highways denominated secondary highways. SDCL 31-1-4.

DOT is responsible for maintenance of the state trunk highway system. SDCL 31-2-21 provides: “The Department of Transportation shall supervise the construction and maintenance of the state trunk highway system, its bridges, and culverts.” SDCL 31-4-14 states: “All marking, surveying, construction, repairing, and maintenance of the state trunk highway system is under the control and supervision of the department. The department shall administer the laws relative thereto.” SDCL 31-5-1 provides: “The Department of Transportation shall maintain, and keep in repair, all highways, or portions of highways, including the bridges and culverts, on the state trunk highway system.”

Other public entities are responsible for highways outside of the state trunk system. Cities have authority over streets and alleys within their jurisdictional limits. *State ex rel Jackley v. City of Colman*, 2010 S.D. 81, ¶ 9, 790 N.W.2d 491, 494 (citing SDCL 31-1-4). Under SDCL 31-13-1, the board of township supervisors is responsible for the construction, maintenance and repair of all secondary roads within an organized civil township. SDCL § 31-12-5 makes counties responsible for the county highway system:

The construction, improvement, maintenance, and repair of the county highway system, except as provided for state trunk highways shall be under the supervision of the county superintendent of highways in organized counties, who shall formulate and direct the policy of the county for the construction, improvement, maintenance, and repair of the county highway system.

Counties are also responsible for the construction, maintenance and repair of secondary highways that are within the county and not included in a municipality, organized civil township, road district, or improvement district. SDCL 31-12-26. Given the legislative division of responsibilities for the various classifications of public highways, the Supreme Court has refused to find overlapping jurisdiction, duties or responsibilities. *Van Gerpen v. Gemmill, et al.*, 33 N.W.2d 278, 279-80 (S.D. 1948); *City of Colman*, 2010 S.D. 81, ¶ 9 790 N.W.2d at 494.

SDCL 31-24-9, as amended by the Legislature in 2010, addresses public entity respective responsibilities when highways intersect as follows:

Township supervisors, county commissioners, the Department of Transportation, or others having direction of any highway grade shall provide at every place where such grade crosses an intersecting public highway an easy and accessible approach to such grade on each side thereof upon each such intersecting public highway. The approach shall be at least twenty-four feet in width. Any officer or other person charged with the duty of providing approaches at an intersection, as provided in this section, who fails in the performance of the duty, commits a petty offense.

In my opinion, this statute establishes the responsibilities of the respective government entities over connecting roadways where two public highways intersect. SDCL 31-24-9 makes it clear that the public highway that intersects an existing public highway is responsible for all connecting roadway surfaces. Thus where DOT constructs a highway which intersects with an existing public highway, the DOT is responsible for the connecting roadway surfaces or approaches to the pre-existing highway. The same follows when the Legislature adds an existing highway or private driveway to the state truck highway system and it intersects with an existing county or township highway. In such a case the DOT is again responsible for the connecting roadway surfaces or approaches to the county or township highway.

The rule applies the same regardless of the identity of the governmental unit. If the county constructs a highway, or adds a roadway to the county highway system, and that highway intersects with a highway on the state trunk system or with a township highway, the county is responsible for the connecting roadway surfaces or approaches to the state or township highway.

Though the duty to maintain and repair is not directly addressed by SDCL 31-24-9, it can be implied from the language used. SDCL 31-24-9, as set forth above, requires that the governmental unit constructing the intersecting highway "provide . . . an easy and accessible approach". In my opinion, this language implies not only the responsibility of construction, but also maintenance. A governmental unit cannot "provide" an "accessible approach" if it does not also maintain the approach. If an approach is not maintained, it would quickly not be "provide[d]" or in the dictionary definition, suppl[ied] for use". *Webster's New Collegiate Dictionary*, p. 921 (1979).

Moreover, another construction of the statute creates an absurd result, at least in the case of the state truck highway system. In particular, if the statute is not read to include maintenance responsibility, a county or township could unilaterally add maintenance responsibilities to the state trunk highway system in the absence of any express legislative authority. This result is prohibited by South Dakota law, which regards counties, townships and cities as subordinate arms of the State possessing only that authority specifically given by the Legislature. See, e.g., *Pennington County v. State of South Dakota*, 2002 S.D. 31, ¶ 10, 641 N.W.2d 127, 130-31 (citing S.D. Const. art. IX § 1). In fact, the Legislature has expressly reserved unto itself the power to designate the state trunk system, subject only to limited authority of DOT to make changes to the system. See SDCL 31-4-1, 31-4-4, 31-4-130 through -247. Under this statutory scheme, local governments have no power to add to the state trunk system through their own construction activities. Their power is limited to the authority in SDCL 31-24-9.

Further, I do not find the general provisions of SDCL 31-5-1, which were also amended in 2010, to supersede the provisions in SDCL 31-24-9. SDCL 31-5-1 now reads: "The Department of Transportation shall maintain and keep in repair, all highways or portions of highways, including the bridges and culverts thereon, on the state trunk highway system." It is a rule of statutory construction that where there is a conflict between two existing statutes, the more specific or the later in time generally controls. See *State v. Moschell*, 2004 S.D. 35, ¶ 39, 677 N.W.2d 551, 564 (more specific controls); *Estate of Smith*, 401 N.W. 2d 736, 740 (S.D. 1987). Since both statutes were amended in 2010, the more specific must control. SDCL 31-24-9 is the more specific of the two statutes, as it addresses DOT responsibility regarding intersecting highways.

IN RE QUESTION 2.

When Pennington County assumed jurisdiction of Teewinot Drive from the developer, the private road became a public highway. Since SD 44 was already in existence at that location when jurisdiction was assumed, Teewinot Drive became the intersecting highway. Pennington County became responsible for all connecting roadway within the state right-of-way to the actual roadway. Contrary interpretation would mean that a county could add public highway pavement to the state highway system, to be maintained at the state taxpayers' expense, without the state's consent, and contrary to the Legislature's preemption of that authority.

The fact that the Teewinot Drive approach to SD 44 was constructed prior to Pennington County adding the private roadway to its secondary highway system has no effect on the application of SDCL 31-24-9. The statutes are not concerned with when a private developer constructs a private roadway; the statutes are concerned only with the time at which the roadway becomes part of a state or local government's system of roads.

Accordingly, Pennington County is obligated to maintain the roadway connecting Teewinot Drive with SD 44, including the roadway within the state right-of-way, absent further legislative action.

Respectfully submitted,

Marty J. Jackley
Attorney General

MJJ/JPH/rar