

OFFICIAL OPINION NO. 73-36, Liability for cost of sidewalk on public right of way.

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

October 19, 1973

Mr. Arthur L. Rusch
States Attorney, Clay County
Vermillion, South Dakota 57069

OFFICIAL OPINION NO. 73-36

Liability for cost of sidewalk on public right of way.

Dear Mr. Rusch:

You have requested an opinion based on the following facts:

South Dakota Highway 50 goes through Vermillion in an east west direction. The highway runs along a section line. In 1951 in anticipation of widening the highway, the state purchased by warranty deed an additional 35 feet of right-of-way south of the original right-of-way. The highway was subsequently widened but it did not take up all of the right-of-way.

The City of Vermillion has now determined that it is necessary that sidewalks be constructed along said highway. The sidewalks would fall solely within the state owned right-of-way, leaving a narrow strip of land between the south endge of the sidewalk and the north edge of the privately owned property.

Your question is whether the State or the abutting owner is liable for the sidewalk construction and repair cost.

In my opinion, the State only acquired an easement for highway purposes, and the abutting owner remains liable for the sidewalk construction and repair costs.

South Dakota Constitution, Article VI, §13, provides:

Private property shall not be taken for public use, or damaged, without just compensation. .
.. The fee of land taken for railroad tracks or other highways shall remain in such owners,
subject to the use for which it is taken.

The Constitution indicates that even though the State purchased the right-of-way by
warranty deed, its interest remains only an easement. See *Meek v. Meade County*, 12 S.D.
162, 80 N.W. 182 (1899) Also 1945-46 AGR 336 and 1959-60 AGR 19.

This being true, the abutting property owner's interest would extend through the State's
casement.

SDCL 9-43-5 provides:

Every municipality shall have power to make assessments for local improvements on
property *adjoining or benefitted thereby*, to collect the same in the manner provided by law,
and to fix, determine, and collect penalties for nonpayment of any special assessments.
(Emphasis added)

The construction of these sidewalks benefit the private property adjacent thereto. They do
not benefit the State, whose only interest is in maintaining the highway.

In interpreting SDCL 9-435, our Supreme Court held in *Chicago & North West Railway Co. v.
City of Hot Springs*, 52 S.D. 484, 218 N.W. 876 (1928) that collection for an assessment
could not be restrained because the property specially assessed w'as separated from the
improvement by railroad right-of-way. See also, 39 Am. Jur. 2d, *Highways, Streets and
Bridges*, §160.

In my opinion, SDCL 9-43-5 contemplates that the abutting owner and the fee owner of the
State's easement for highway purposes (being one and the same) is the benefactor of the
improvement. SDCL Chs. 9-43 and 9-46 require the City of Vermillion to charge the hcost of
the sidewalk construction and repair to the benefitted owner.

Respectfully submitted,

Kermit A. Sande
Attorney General