

OFFICIAL OPINION NO. 89-17, Location change and vacation of public highways

August 28, 1989

Mr. Dennis A. Groff
Pennington County State's Attorney
300 Kansas City Street
Rapid City, South Dakota 57701

OFFICIAL OPINION NO. 89-17

Location change and vacation of public highways

Dear Mr. Groff:

You have requested an official opinion relating to the following factual situation:

FACTS:

In Pennington County there are numerous roadways which arguably should be considered "county secondary highways" as defined by SDCL 31-1-5(4). These roadways typically would acquire the status of a "county secondary highway" by operation of SDCL 31-3-1 and SDCL 31-12-26. In addition, Pennington County also has jurisdiction presumably over numerous unimproved section-line highways by operation of SDCL 31-18-1. On a regular basis, the Pennington County Board of Commissioners are asked by interested citizens to take action to locate or vacate a public highway. Further, the Board itself may determine on its own that a location or vacation of a public highway is desirable. Private citizens will typically ask the Board to locate a public highway in order to provide better access to their land. In some instances, those citizens will ask the Board to vacate an established public highway because they want to close the roadway to public use. (In the case of an unimproved section-line, those citizens might want to utilize their land in a manner inconsistent with the section-line right-of-way). Finally, the Board may on its own initiative determine that a vacation of a particular public highway is desirable in order to relieve the County of the unjustifiable expense of maintaining the highway.

Based upon this factual situation, you have asked the following questions:

QUESTIONS:

(1) Pursuant to SDCL 7-8-20(5), does a Board of County Commissioners have the authority to vacate, locate or change a county secondary road apart from any procedures set forth in SDCL 31-3-6 through 31-3-9?

(2) Under SDCL 31-12-26, is it the responsibility of a Board of County Commissioners to maintain every public highway as defined by SDCL 31-1-1 and 31-3-1 which is not included in an incorporated municipality or organized civil township or assumed by the State?

IN RE QUESTION NO. 1:

Your first question goes not to the power of county commissioners to change, vacate, or locate highways, but rather to the procedure by which they may do so. I have no doubt that the power over county secondary roads held by the county commissioners is extensive. See, for example, SDCL 7-8-20(5) (general grant of authority); SDCL 31-6-1, et seq. (power to enter into agreements with the federal government for county federal aid secondary system); SDCL 31-12-19 (duty to maintain county highway system and county federal aid secondary system); SDCL 31-12-26 (duty to maintain secondary roads); SDCL 31-13-12 (power to designate county aid highways); SDCL 31-18-1, et seq. (section-line highways).

Your question, however, deals not with power of the county but with the means by which it exercises these powers.

It is a well established rule that powers of counties and other state subdivisions are viewed restrictively absent a specific constitutional or statutory authorization. This is known as Dillon's Rule, and provides that only such powers as are specifically granted may be exercised by a municipal corporation, and then those powers may be exercised only in the manner provided by the Legislature. In addition, authority necessarily implied may be exercised, but again only in the manner provided. See *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). Under the rules of these cases, if a manner for exercising the power is provided by statute, that procedure must be followed. I find a well defined, specific, detailed procedure has been provided in SDCL 31-3-6 through 9. The county may not, therefore, use another procedure if it is not found in the statute. This conclusion is bolstered by the fact that Dillon's Rule requires that fair doubts as to the existence of a power or the means of its exercise are resolved against the municipality involved, not in its favor. At best, the power to vacate section lines in some manner other than that set forth in SDCL ch. 31-3 would have to be implied from vague grants of generalized power. SDCL ch. 31-3, however, is

specific in its statement of how the power is to be exercised. Under ordinary circumstances, the specific statute would control over the general. See *Hartpence v. Youth Forestry Camp*, 325 N.W.2d 292 (S.D. 1982); *Knodel Common School District No. 58. v. County Bd. of Education*, 82 S.D. 185, 144 N.W.2d 38 (1966). In the case of municipal corporations, this conclusion is reinforced by Dillon's Rule as explained herein.

Another rule of statutory interpretation also bolsters this conclusion. SDCL 31-3-6 through 9 were amended in 1985, and thus are more recent legislation than the other generalized powers to which I have referred. See SDCL 2-14-16.1; *Nord v. Connecticut General Life Ins. Co.*, 71 S.D. 1, 20 N.W.2d 403 (1945). Specifically, SDCL 7-8-20(5) is a statute that has been in effect since statehood. It would appear that the amendments by the 1985 Legislature indicate a specific intent that the power shall be exercised in the manner provided.

Further support for this conclusion may be found by examining the provisions of SDCL ch. 31-3. Not only is a petition required to initiate the process, but public notice, a public hearing, and a de novo appeal to circuit court are also provided. These are significant procedural rights that the Legislature has given to individual citizens to protect their interests in the maintenance, use, continuation, and location of public highways. If the county commission were permitted to locate, vacate, or change public highways without going through these procedures, citizens would be deprived of significant participation in the process, participation that has been specifically granted to them by the Legislature.

Such participation is not merely a matter of going through the motions. I take note of the fact that there has been considerable controversy in the location, vacation, and change of public highways in the last several years. This is a matter of considerable public importance, and public input is allowed by our Legislature. I must, therefore, conclude that the procedures required by SDCL 31-3-6 are mandatory, and are not dispensable for the convenience of the commission or others wishing to change, vacate, or locate public highways.

IN RE QUESTION NO. 2

Your second question relates to the obligation of the county to maintain secondary roads that are outside the boundaries of any municipality or organized township. As you are aware, power over these highways is given to the county by SDCL 31-12-26. This statute

defines the responsibilities of the county commissioners broadly, and without more, would seem to obligate maintenance of all such secondary highways.

I find, however, that other statutes limit the apparent broad reach of this statute, and that this Office has consistently interpreted them as so doing. In addition, where and to what extent a particular road is maintained is within the discretion of the governing board maintaining it. 1981-82 Report of Attorney General at 78. Thus, even where there is an arguable obligation to maintain a road, there is discretion to maintain it to a lesser degree than full maintenance. The county commissioners obviously have the power and duty to determine which roads shall be graveled, oiled, and paved with concrete, among other determinations as to road specifications. In addition, the township's ability to designate a minimum maintenance highway, SDCL 31-13-1.1 and 31-13-1.2 would appear to devolve upon the county when acting under SDCL 31-12-26.

Regarding which roads fall under the maintenance responsibility, I would refer you to Official Opinions of this Office as follows:

1983-84 Report of the Attorney General at 112 states that under the various county responsibilities for roads, a county is not responsible for maintenance of the road unless it is designated as a secondary highway pursuant to SDCL 31-3-22 through 31-3-37. This opinion dealt with an easement granted to Lawrence County for a public highway across Forest Service land. Unless and until the road across Forest Service land was duly designated as a secondary highway under SDCL 31-3-22 through 31-3-37, my predecessor stated that the county was not responsible for maintaining it. To the same affect is 1981-82 Report of the Attorney General at 78. This opinion dealt with subdivision lots and cited SDCL 11-3-12, which states that "[No] governing body shall be required to open, improve, or maintain any dedicated streets, alleys, ways, commons, or other public grounds solely by virtue of having approved a plat or having partially accepted any such dedication, donation or grant." In essence, a street in a subdivision does not become a secondary road, under county responsibility, merely because a plat has been accepted. In 1951-52 Report of the Attorney General at 16, another of my predecessors came to the same conclusion. In essence, until the county has accepted and designated a platted road as a secondary road, it does not fall under the county's maintenance responsibility. I come to the same conclusion as to those roads that are public under SDCL 31-3-1.

I would, however, differentiate section-line highways from plated streets and roads. It is plain that the Legislature has designated section-line highways as secondary highways. Maintenance, improvement, and construction on them, therefore, does come under the county's responsibility under SDCL 31-12-26, if they are outside any municipality or organized township. They could be designated as minimum maintenance pursuant to SDCL 31-13-1.1 and 1.2. In addition, there is considerable discretion in the county commissioners as to level of maintenance of highways, even where a duty to maintain arises. See 1948-49 Report of the Attorney General at 123; *Id.* at 341; SDCL 7-8-20(5).

Therefore, my answer to your questions is that the county must follow the procedure of SDCL 31-3-6 through 31-3-9 when it seeks to vacate, locate, or change a highway. It must also accept responsibility for maintaining those secondary roads outside the territory of a municipality or organized township. These secondary roads consist of such as have been designated by the county commissioners, as well as section-line highways, which have been designated by the Legislature. How to execute appropriate maintenance on all such secondary highways is a matter within the discretion of the county commissioners.

Respectfully submitted,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL

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