

OFFICIAL OPINION NO. 93-01, Section-line Highways

April 13, 1993

Mark Smith
Hughes County State's Attorney
104 East Capitol
Pierre, SD 57501

OFFICIAL OPINION NO. 93-01

Section-line highways

Dear Mark:

You have requested the official opinion of this Office regarding the following factual situation.

FACTS:

Hughes County has numerous unimproved section-line highways. From time to time, private citizens will ask the Board of County Commissioners or County Superintendents of Highways to construct a public highway over these unimproved section lines. The Board may see the construction of such a highway as an unjustified expense even if it were to designate the road as a minimum maintenance highway pursuant to SDCL 31-13-1.1 and 1.2.

At the current time, one Hughes County resident has requested that Hughes County construct a new highway on an unimproved section line to provide better access to property where he has built a home.

With regard to the foregoing factual situation, you have asked the following questions:

QUESTIONS:

1. Under what circumstance is the county required to construct a new highway on an unimproved section line right-of-way?

2. If the county is required to construct such a public roadway, who has standing to request such construction? May one abutting landowner, or any one county resident, make such a request?

IN RE QUESTION NO. 1:

Under SDCL 31-18-1, every section line in this state is a public highway, unless it has expressly been vacated. *Thormodsgard v. Wayne Township Board of Supervisors*, 310 N.W.2d 157 (S.D. 1981). Under SDCL 31-13-1, township supervisors are charged with the responsibility of construction and maintenance on all such secondary roads within the township. If the section lines are not in an organized civil township or municipality, the county is responsible pursuant to SDCL 31-12-26. SDCL 31-12-26 states:

It shall be the duty of the board of county commissioners and county superintendent of highways in organized counties, to construct, repair and maintain all secondary roads within the counties not included in any city, incorporated town or organized civil township.

The South Dakota Supreme Court does not appear, however, to have specifically ruled on the issue of whether counties or townships have a mandatory duty under these statutes to construct secondary roads on section lines. See *Van Gerpen v. Gemmill*, 72 S.D. 265, 33 N.W.2d 278, 279 (1948) (where the Supreme Court expressly declined to determine whether the duty and responsibility for construction, repair and maintenance of secondary roads is a mandatory or discretionary duty); see also *Herrmann v. Board of Commissioners of City of Aberdeen*, 285 N.W.2d 855, 858 (S.D. 1980).

Although the South Dakota Supreme Court has not expressly issued an opinion on the subject, the Circuit Court for the Third Judicial Circuit has done so. *Hansen v. Stockholm Township, et al.*, (S.D. 3rd Cir. Civ. No. 85-2056, opinion issued May 28, 1985). The Third Circuit ruled that "The granting and denial of a petition to open or locate a township road are discretionary acts" In that case, the landowner involved had claimed that the township had a mandatory duty to build a township road on a section-line highway. The Third Judicial Circuit, Judge Thomas G. Ries, determined that the township responsibility was not a mandatory responsibility under SDCL 31-13-1. The Hansen case was appealed to the South Dakota Supreme Court and summarily affirmed. 384 N.W.2d 323 (S.D. 1986). (NOTE: summary affirmance by the South Dakota Supreme Court is deemed to have no precedential effect in litigation regarding other controversies. SDCL 15-26A-87.1).

In addition to the foregoing judicial determination, this Office has also previously expressed its opinion regarding this subject. See 1963 A.G.R. 233, 1989 A.G.R. 17. On both occasions, this office opined that although county commissioners have a statutory duty to construct, repair and maintain highways in unorganized townships, there is considerable discretion as to the level of improvement or maintenance of such highway. As stated in 1989 A.G.R. 17, such discretion may include the designation of section-line highways as "minimum maintenance highways" pursuant to SDCL 31-13-1.1 and SDCL 31-13-1.2. I concur in the opinions of my predecessors on this issue.

Given the fact that section lines in this state are public highways by operation of law, it is clear that counties, townships and landowners must consider them to be public highways and allow passage accordingly. It is, however, a matter of discretion for the county or township assigned that responsibility by SDCL 31-12-26 or SDCL 31-13-1 whether to improve the highway at all; further, assuming the entity determines to improve the highway, the extent of improvement is a matter of discretion.

IN RE QUESTION NO. 2:

Your second question addresses the issue of whether any one county resident or any one abutting landowner has standing to request that the county commission improve a section-line highway. Your question is dependent on the response to the foregoing question. Consistent with the above response, it is apparent that while any abutting landowner, county resident or individual intending to make use of the section-line highway would be able to petition the county commission for maintenance or improvement on the section-line highway, none of these individuals would have an absolute right to demand that discretion be exercised in a particular manner.

MWB:DB:nas