

OFFICIAL OPINION NO. 95-01, County Maintenance of Highways and Roads.

February 23, 1995

Curtis D. Mortenson
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OFFICIAL OPINION NO. 95-01

County maintenance of highways and roads.

Dear Mr. Mortenson:

You have requested an opinion from this Office concerning county maintenance of highways and roads. Your inquiry cites the following facts:

FACTS:

Stanley County is updating its county highway system. This revision may add substantial miles of roads which have been maintained by the county for more than twenty years. These roads are frequently located on private property and are situated both on and off section lines. In many instances, they lead from an existing county highway serving the public, to a home or farm building, and may best be described as long driveways. The county highway revision may also include little used roads which lead to isolated tracts of land.

Based upon the above facts, you have asked the following questions:

QUESTIONS:

1. Does SDCL 31-3-1 allow the county to treat private driveways as public highways or part of the county highway system, due to the county's expenditure of public funds for their upkeep during the past twenty or more years?
2. Are section-line highways, as defined in SDCL 31-18-1, equivalent to the "secondary roads" mentioned in SDCL 31-12-26?

3. What level of maintenance is the county obligated to provide for "secondary roads" mentioned in SDCL 31-12-26?
4. May a county provide varying levels of maintenance for section-line highways?
5. May a county designate portions of the county highway system or county secondary highways and roads, as "minimum maintenance," allowing a road to be maintained without gravel or more than annual grading?
6. Do the county's obligations under SDCL 31-28-6 apply only to public highways which are part of the county highway system, and not to secondary highways and roads not included in the county highway system?

IN RE QUESTION NO. 1:

County commissioners may not convert private driveways into public highways under SDCL 31-3-1 even though these roads have been maintained with public funds for the past twenty or more years.

SDCL 31-3-1 states in pertinent part as follows:

Whenever any road shall have been used, worked, and kept in repair as a public highway continuously for twenty years, the same shall be deemed to have been legally located or dedicated to the public, and shall be and remain a public highway until changed or vacated in some manner provided by law.

(Emphasis added). "Highway," defined at SDCL 31-1-1, specifically excludes roadways or driveways upon land owned by private persons. This Office has previously opined regarding this definition, confirming that a private driveway cannot be part of a designated county highway system, and public funds should therefore not be expended on its construction or maintenance. See 1953-54 AGR 51 and 389, 1959-60 AGR 368, 1967-69 AGR 207.

As a result, a private roadway or driveway is not a "public highway" subject to SDCL 31-3-1, despite county maintenance for twenty years. Furthermore, a private roadway or driveway is not used as a public highway as required by this statute, and SDCL 31-3-1 would not apply.

A county therefore may not treat a private roadway as a public highway, include it in the county highway system, or expend public funds for its maintenance.

IN RE QUESTION NO. 2:

A section-line highway is not equivalent to a "secondary road" mentioned in SDCL 31-12-26. This statute 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. (Emphasis added).

A section-line highway is defined at SDCL 31-18-1 as follows:

There is along every section line in this state a public highway located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal.

This statute does not define section-line highways as secondary roads. The Supreme Court has characterized this statute as an acceptance of the United States grant of rights-of-way for highway construction over public land. See *Gustafson v. Gem Township*, 58 S.D. 308, 235 N.W. 712 (1931); *Costain v. Turner County*, 72 S.D. 427, 36 N.W.2d 382 (1949). It essentially means that section-lines must remain accessible to public travel unless vacated or relocated by a governing body. Å

See also *State v. Peters*, 334 N.W.2d 217 (S.D. 1983) (improved section-lines open to public hunting).

The definition of "highway" in SDCL 31-1-1 is very broad and includes "[e]very way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel..." Therefore, the use of "secondary roads" in SDCL 31-12-26 is synonymous with "secondary highways," defined at SDCL 31-1-5(4) as follows:

(4) "County secondary highways," the rural local highways in organized counties, excluding the approved county highway system, that are under the supervision of a board of county commissioners.

According to this definition, a county must assume supervision over the construction and maintenance of a road before it is deemed a "secondary highway." See 1963-64 AGR 233, A.G.O. 81-33 and 84-02. While a section-line highway is required to be kept open to the public pursuant to SDCL 31-18-1, it is not a county secondary road/highway unless a county has assumed supervision over it.

IN RE QUESTION NO. 3:

No clear standard has been established by statute or the courts concerning the level of maintenance which a county must provide to secondary roads/highways. SDCL 31-12-26 provides:

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.

This statute does not set out a specific standard of road maintenance.

The Supreme Court has addressed the obligation of counties to maintain roads in the county highway system pursuant to SDCL 31-12-19. *Bryant v. Butte County*, 457 N.W.2d 467, 469-470 (S.D. 1990). SDCL 31-12-19 requires county commissioners to "maintain properly and adequately the county highway system . . . on all or different portions of the same as the board of county commissioners may deem most expedient . . ." The Court found the mandatory language of this statute imposes a ministerial obligation on a county to maintain roads in the county highway system. *Id.* at 470.

The minimum standard for this maintenance was recently discussed in *Bland v. Davison County*, 507 N.W.2d 80 (S.D. 1993). In addressing the duty to perform snow and ice removal on county roads which are part of the county highway system, the Court noted that "negligence occurs when one fails to exercise that care which an ordinarily prudent or reasonable person would exercise under the same or similar circumstances, commensurate with existing and surrounding hazards." *Id.* at 81. The Court found the obligation of SDCL 31-12-19 to "maintain properly and adequately the county highway system" requires counties to exercise "reasonable and ordinary care" to preserve the highways in a "reasonably safe condition." *Id.* at 82.

The Court has not, however, specifically ruled on the minimum standard of maintenance required to be performed on county secondary roads/highways. In *Bryant*, the Court referred in dicta to the mandatory language of SDCL 31-12-26, characterizing it as imposing a ministerial duty on counties to maintain and repair county secondary roads/highways. However, because both *Bryant* and *Bland* actually involved roads which were part of the county highway system, a definitive minimum standard of maintenance required to be performed on secondary roads has not been established.

IN RE QUESTION NO. 4:

A county does have some discretion to provide varying levels of maintenance to section-line highways. If a section-line highway has been designated as part of the county highway system, the commissioners must comply with the minimum standards set out in SDCL 31-12-19 and the *Bryant* and *Bland* decisions. If the county has assumed supervision over section-line highways so that they are deemed secondary roads/highways, the county has a general duty to maintain them under SDCL 32-12-26. However, no clear minimum standard for this maintenance has been established.

If a section-line highway is neither part of the county highway system nor a county secondary road/highway, the county has no duty to maintain it. It is entirely within the discretion of the county to perform any improvements upon section-line highways. See 1963-64 AGR 233; A.G.O. 89-17 and 93-01.

IN RE QUESTION NO. 5:

County commissioners do not have statutory authority to designate any road as "minimum maintenance." There is a specific statute that allows a township board to designate a road

as "minimum maintenance" and to maintain it at "less than the minimum standards" (SDCL 31-13-1.1), but there is no corresponding statute authorizing such action by a county.

Along with this absence of statutory authority, the Supreme Court held in *Bland and Bryant* that a county has a mandatory duty to maintain roads which are part of the county highway system in a "reasonably safe condition" to comply with the "adequate and proper" language of SDCL 31-12-19.

Furthermore, counties lack express statutory authority to designate a county secondary road/highway as "minimum maintenance." However, as discussed above, there has not yet been a definitive ruling on the minimum standard of maintenance required on county secondary roads. It is possible that this minimum standard may be less than that required on roads which are part of the county highway system, and may include the discretion to declare and post secondary roads/highways as "minimum maintenance."

Counties will, when allocating available funds, inherently exercise discretion in determining where and to what extent county roads are improved or maintained. See 1963-64 AGR 233; A.G.O. 89-17 and 93-01. Whether an annual grading trip is sufficient to meet the standard set out in *Bryant and Bland* for roads on the county highway system, or what minimum standard of maintenance a court would require on county secondary roads/highways, will depend on the circumstances of each case.

IN RE QUESTION NO. 6:

The duties placed upon county commissioners by SDCL 31-28-6 apply to all roads for which a county is responsible. SDCL 31-28-6 requires all public boards or officers "whose duty it is to repair or maintain any public highway," to erect and maintain warning signs concerning points of danger on the highway. This statute appears to apply to all roads which a county must maintain by statute, and to all roads over which a county has assumed responsibility pursuant to SDCL chs. 31-3 and 31-12. Accordingly, a county's duty under SDCL 31-28-6 encompasses county secondary roads/highways, as well as roads in the county highway system.

MB:PJF:clr