

Official Opinion No. 83-32, Authority of Townships With Respect to Surveying for Electric Utility Facilities

October 7, 1983

Mr. George H. Danforth
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Official Opinion No. 83-32

Authority of Townships With Respect to Surveying for Electric Utility Facilities

Dear Mr. Danforth:

You have requested an official opinion from this office based on the following factual situation:

FACTS:

Registered land surveyors are surveying along the route for a power line to be constructed in eastern South Dakota. Some of the townships in this area recently have adopted ordinances that affect the surveying. For example, Banner Township in Beadle County and Benedict Township in Sanborn County have adopted ordinances which require utilities that need to conduct survey and construction activities for power lines to post a surety bond, in a form and amount to be approved by the Board of Supervisors, to indemnify the townships for any damage to roads caused by the construction, surveying, or related work. Logan Township in Clark County has denied the surveyors permission to conduct any survey activities that the Board may have jurisdiction over, and specifically the activity of locating property corner monuments with a backhoe. Several townships in Hutchinson County have denied surveyors access to township records.

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

QUESTION:

Do townships have the authority to adopt ordinances or take any other official actions that affect the survey activities conducted by registered land surveyors, such as the requirement

for posting of a surety bond for road repair, the refusal to allow use of a backhoe to locate property corners, the refusal to allow access to township records, or similar actions?

In my opinion, the answer to the question based upon the factual situation you have stated above is no. The Legislature has authorized registered land surveyors to enter not only public lands within the state but privately-owned lands as well for the purpose of making surveys for the determination of boundaries of real estate. SDCL 1-1-10 provides:

For the purpose of making surveys required by or essential to the effect of any acts of the United States Congress or of the Legislature of this state or for the determination of boundaries of real estate . . . any engineer or land surveyor duly qualified or registered under the laws of this state, and the persons necessarily and lawfully employed in making any such survey may enter upon lands within the boundaries of this state for such purposes

Nothing herein contained shall exempt any person from payment of actual damages done by him while upon such land.

In addition, electric utilities are authorized to cause such surveys to be made as may be necessary to the selection of a route for a power line. SDCL 49-33-6 provides:

Every corporation organized under this chapter shall have power to cause such examinations and surveys to be made as may be necessary to the selection of the most advantageous route for its proposed . . . power line, and for such purpose to enter, by its agents, officers and servants, upon the lands or waters of any persons; subject, however, to responsibility for all damage done to such property by such entry.

Electric utilities incorporated in other states may exercise this right to enter lands for surveying for power lines granted by SDCL 49-33-6, provided they have complied with the laws of this state relating to foreign corporations doing business herein. SDCL 49-34-8.

Townships may not interfere with the survey activities of registered land surveyors permitted by statute. A township's authority to exercise its lawful powers is limited by SDCL 8-2-10 which provides:

No organized township shall possess or exercise any powers except such as are enumerated in this chapter [SDCL 8-2], . . . or are necessary to the exercise of the powers so enumerated.

Our Supreme Court has held that a township's implied powers must be 'essential and indispensable,' and not just convenient, to the exercise of a power expressly enumerated in the statute. Van Antwert v. Dell Rapids Township, 3 S.D. 305, 53 N.W. 82 (1892) (township has no implied power, as incident to its express power to construct township roads, to contract for survey of such roads). See also, South Dakota Employers Protective Assoc. v. Poage, 65 S.D. 198, 272 N.W. 806 (1937). (implied powers--counties)

Townships have the authority, and duty, to repair secondary roads and to pay for such repairs through the levying of a highway tax. SDCL 31-13-1 provides:

It shall be the duty of the Board of Township Supervisors to arrange for the construction, repair and maintenance of all secondary roads within the township.

SDCL 31-13-10 provides:

There shall be voted and levied in each civil township . . . a highway tax for the construction and repair of secondary highways within such township.

The township's duty to finance all repairs of secondary roads through the highway fund must be strictly construed. See Attorney General Report 1931-32, p. 813 (township may not use monies from the general fund for repair of secondary roads). The legislature has carefully and specifically set forth the authority of townships to finance road repairs in SDCL 31-13, and no authority is provided to require surety bonds from highway users to finance repairs. Townships have no authority, of course, with respect to county, state or federal roads. Hannigan v. Minnehaha County, 47 S.D. 606, 201 N.W. 522 (1924).

This conclusion is further supported by our Supreme Court's decision in Norman v. Cummings, 73 S.D. 559, 45 N.W.2d 839 (1951). There the Court held that users of public roads are not liable to townships for road repairs or obstructions caused by the usual, ordinary and reasonable use of the highways. Accord, Syres v. Eastern Clay Products, Inc., 75 S.D. 45, 59 N.W.2d 248 (1953). If a township has no authority to recover for damages for ordinary use of the highway, it cannot require highway users to post a surety bond for any such damages.

Though a township cannot require a surety bond from a surveyor, a township under SDCL 1-1-10 and SDCL 8-2-1(1) has the right to sue for actual damages that occurred from a survey. This would include the right to sue for any damages to secondary roads that did not result from usual, ordinary or reasonable use.

Finally, it is generally well known that SDCL 1-27-1 requires townships to make the records of their official business 'available and open to inspection by any person during normal business hours.'

The legislature has given to registered land surveyors the statutory right to conduct land surveys on public and private land for electric transmission lines. Township Boards do not have the authority to prevent or restrict in any way such surveying.

Respectfully submitted,

Mark V. Meierhenry
Attorney General