



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

October 21, 1982

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ATTORNEY GENERAL OPINION NO. 82- 225

Leonard J. Dix
Rooks County Attorney
Rooks County Courthouse
Stockton, Kansas 67669

Re: Roads and Bridges -- Vacating Road -- Procedures;
Effect of Failure to Follow

Synopsis: A board of county commissioners may, pursuant to K.S.A. 68-102, act on its own motion to vacate all or part of a county road. In addition to the notice required by K.S.A. 1981 Supp. 68-102a, further requirements established by K.S.A. 68-106 include a certified survey of the section to be vacated by the county surveyor, and an order approving the vacating by the commissioners. Failure to enter such an order leaves the initial notice without legal effect. Cited herein: K.S.A. 68-102, K.S.A. 1981 Supp. 68-102a, K.S.A. 68-104, 68-106.

* * *

Dear Mr. Dix:

As County Attorney for Rooks County, you request our opinion on a question concerning the vacating of a county road. Specifically, you inquire regarding the effect of actions taken by the board of county commissioners in 1956, and whether a one-half mile section of road was in fact vacated at that time. This question is important in light of a request that the road, now closed to traffic, be re-opened. Should it be found that a valid vacating occurred, a new easement for the roadbed may need to be acquired, perhaps by condemnation.

The statutes setting forth the procedures to be followed when a road is vacated are found at K.S.A. 68-101 et seq. We note that the statutes pertinent to your inquiry remain unchanged

Leonard J. Dix

Page Two

since 1956 when the Commission actions in question took place. At K.S.A. 68-102, it is provided, in pertinent part, that

"in counties having a population of not more than ninety thousand (90,000) and not less than twelve hundred (1,200) inhabitants, the board of county commissioners are hereby given authority to vacate any road of such county without such petition being signed and presented to them and without the signer of bond as provided herein when, in their judgment, said road is not a public utility by reason of neglect, nonuse, or inconvenience or from other cause or causes said road has become practically impassable and the necessity for said road as a public utility does not justify the expenditure of the necessary funds to repair said road or put the same in condition for public travel:"

In such cases where no petition is received, K.S.A. 1981 Supp. 68-102a requires notice to be given of the proposed vacation, either by posting or by "publication for three consecutive weeks in a newspaper of general circulation in the county." Said notice must also give a description of the road that is to be closed. From what we can determine from the materials you enclose, these steps were correctly followed.

In addition, other procedures must be followed before the road may actually be vacated. As noted in the case of Heatherman v. Kingman County Comm'rs, 123 Kan. 77 (1927), the procedure is the same as that for laying out a road, i.e. "petition, notice, view, report of view, and decision." (123 Kan. at 78.) Although K.S.A. 68-102 removes the need for a petition, K.S.A. 68-104 requires the appointment of "three disinterested householders of the county" as "viewers," while K.S.A. 68-106 provides for a meeting of the commission with the viewers and the county surveyor at the place set forth in the notice. This latter statute also provides in pertinent part:

"[The county surveyor] shall also make out and deliver to the county clerk, without delay, a correct and certified return of the survey of the said road, and a plat of the same, and the said commissioners or viewers shall make out and sign a certificate stating their opinion in favor of or against the establishment, alteration or vacation of said road or any part thereof, and set forth the reason of the same, which certificate shall be filed with the county clerk on or before the first day of

the session of the commissioners then next ensuing; and at such session next ensuing the said commissioners shall, if they conclude that said road should be established, altered, or vacated, and no legal objections appear against the same, and they are satisfied that such road will be of public utility, enter an order upon their records."

It is our understanding that the county records do not indicate that a certificate on the vacating of the road was ever filed with the county clerk, nor was a formal order ever entered by the commissioners. In the early case of Gutherie v. Atchison County Comm'rs, 94 Kan. 584 (1915), it was held that the procedures set forth by these statute are "absolutely necessary" to follow before valid action can be taken. While the action of the county commissioners in that case was upheld, constructive notice being found to have been given, it is our opinion that the lack of any record of final action here is fatal. Accordingly, the section of road in question is still officially a county road, and may be reopened without the need for condemnation proceedings.

In conclusion, a board of county commissioners may, pursuant to K.S.A. 68-102, act on its own motion to vacate all or part of a county road. In addition to the notice required by K.S.A. 1981 Supp. 68-102a, further requirements established by K.S.A. 68-106 include a certified survey of the section to be vacated by the county surveyor, and an order approving the vacating by the commissioners. Failure to enter such an order leaves the initial notice without legal effect.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Jeffrey S. Southard
Assistant Attorney General