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November 4, 1991

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ATTORNEY GENERAL OPINION NO. 91- 140

Avon Township Board
c/o Jerry White
Rt. 1
Wellington, Kansas 67152

Re: Roads and Bridges; Roads -- General Provisions -- Laying Out and Opening Roads

Roads and Bridges; Roads -- County and Township Roads; General Provisions -- Classification and Designation of Roads in Non-County Unit Road System Counties

Synopsis: Upon recording of the viewers' report, survey and plat, a county road is regarded as established. By contrast, such a road is considered opened when the way is unenclosed and unobstructed; when it is minimally traveled; or when it is available or put in condition for public use. The 1879 non-user statute may have applicability to an established road which was not opened prior to the repeal of that statute. Mandamus does not lie to control a township board's exercise of discretion to open or to maintain a road in the absence of obstruction of duty, fraud, bad faith or gross impropriety. Neither the doctrine of abandonment nor of adverse possession generally has applicability to property established for use as a public road. The board of county commissioners are empowered to vacate any county or township road within their county by following statutory procedure. Cited herein: K.S.A. 68-102; 68-102a; 68-106; 68-115; 68-117;

68-124; K.S.A. 1990 Supp. 68-506; K.S.A. 68-518c; 68-526; 68-527; 68-527a; 68-530; 68-701; L. 1874, ch. 108, § 6; L. 1879, ch. 150, § 1.

* * *

Dear Board Members:

You pose a number of questions regarding the opening and/or maintenance of what was established as a township road in Avon township more than a century ago.

From your opinion request and discussions with the county engineer we have learned the following: On October 3, 1877, a particular road was established with a 60 foot right-of-way. The road record does not indicate whether the road was ever opened. A hedge row, estimated by the county engineer to have been established in the 1920's, now grows in the middle of the right-of-way, i.e. 30 feet from each platted fence line. In addition a 20 inch, high pressure gas line is "almost" buried the length of the unimproved "road." A second gas pipeline is also buried in the "road." Further, a large gully now makes the "road" impassible. There is evidence of use by one landowner as field access on a sporadic basis. This "road" is the boundary line between Avon and Wellington townships.

Recently an individual has purchased a small tract of land on this "road" based on assurances by the real estate salesman that the road was a "public road" and that the township was required to "build a road" to the tract. You inform us that the township is not in a financial position to expend monies to make this "road" available for use. This situation has prompted your questions regarding the responsibility of the township in relation to this "road."

We assume the road record recites in regular order all the statutory steps for the location of a road, i.e. that the road was lawfully established in 1877 pursuant to the laws then applicable and the township board was notified to cause the road to be opened to public travel.

> "[S]ection 6 of the statute quoted above [Laws 1874, ch. 108, § 6, now K.S.A. 68-106] provides that the commissioners shall order the viewers' report, the survey and the plat to be recorded, and that 'from thence forth said road shall be

> considered a public highway.' This is a legislative declaration, that upon the recording of the report, survey and plat, the road shall be regarded prima facie as legally established. The declaration is unqualified, binds landowners, public officials and the courts, and casts upon any person contesting the road proceedings the burden of establishing their invalidity." Gehlenberg v. Saline County, 100 Kan. 487, 491 (1917).

While the road was presumably lawfully established, the question of whether the road was opened is more problematic, both in law and in fact. We therefore first review the Kansas case law relating to the definition of the term "opened road." One of the earliest Kansas cases addressing this term was Kiehl v. Jamison, 79 Kan. 788 (1909), later quoted in Kollhoff v. Board of County Commissioners, 193 Kan. 370, 374 (1964):

> "'[A] road cannot be regarded as unopened or unused where the country through which it lies was open and unobstructed at the time it was authorized and established. It was also decided in City of Topeka v. Russam, supra, that a road is not 'unopened' within the meaning of the statute when it is located and established and everything done which the law or necessity requires to be done in order to render it open for public use. As Mr. Justice Valentine tersely stated the matter in the opinion in that case:
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> > "'"Indeed, the road was virtually opened. It was located and established in full compliance with the law; and there was nothing to prevent the public from travelling over it. It was not closed or enclosed. It was not shut up. It was not obstructed. And if the road was not closed or enclosed or shut up or obstructed, it must have been opened; and a road that is open cannot well be an unopened road." (page 559)'" (Emphasis original).

Gehlenberg, supra, held that once a road has been established, it is opened in fact when it is travelled. [Citing Webb v. Commissioners of Butler County, 52 Kan. 375 (1890)] In that case the only evidence of use of the road was by one person hauling corn from his field. The court held that use sufficient to find the road had been opened.

A much later case, Moore v. City of Lawrence, 232 Kan. 353 (1982), used the term "opened" as referring to a road put in condition for use by the public. Moore cites 39 Am.Jur.2d Highways, Streets, and Bridges § 68, which provides this discussion of the meaning of the term "opened road":

> "The 'opening' of a highway or street, as the term is here used, means either to put in condition for use, or to place at the service or use of the public, a way which theretofore had a merely legal or paper existence, or which had not theretofore been used, and is to be distinguished, in this respect, from the active establishment and from the subsequent improvement or removal of obstructions from a highway or street after it has been opened and used as such. The matter has, therefore, both a physical and a purely legal or formal aspect. Such opening is essential to the creation and existence of many of the legal incidents appertaining to public ways."
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> "It is not practicable to attempt to lay down definite and comprehensive rules as to what does or does not constitute such opening. In order that a way may be considered open in a physical sense, it must be passable for its entire length. In a legal sense, the opening of a way, so as to confer upon the public the right to use it, may ordinarily be accomplished by appropriate declaration by the proper public authority, or by formal acceptance of a dedicated way. . . . When an authorized highway or street is put in condition for travel, and the public is invited to use it, such roadway becomes 'opened' as a public way in fact."

As a matter of law, therefore, a road may be considered opened when the way is unobstructed; when it is travelled, however minimally; when it is available for public use; or when it is put in condition for public use. Using any of the legal definitions of "opened road," a question of fact still remains unanswerable from the information provided, i.e. whether the established road was opened and subsequently fell into disrepair or whether the road was never opened. The answer to this question of fact has a bearing on one possible resolution of the situation.

In 1879 the legislature passed an act for the vacation of unopened roads, commonly known as the "non-user" statute (Laws of 1879, Chapter 150, found at Compiled Laws of Kansas 1879 [5075] Section 44) which in pertinent part provided:

> "Section 1. That any county road or part thereof, which has heretofore or may hereafter be authorized, which shall remain unopened for public use for the space of seven years at any one time after the order made or the authority granted for opening the same, shall be and the same is hereby vacated, and the authority granted for erecting the same is barred by lapse of time; . . . ."

The road in question was established in 1877. The non-user statute was enacted in 1879. The time period specified in the non-user statute commenced to run from the time of enactment and not from the time of establishment of the road. Cowley County v. Johnson, 76 Kan. 65 (1907), Kolhoff v. Board of County Commissioners, 193 Kan. 370 (1964). Therefore, if it can be factually established that the road had not been opened within seven years of 1879, the road became vacated as a matter of law. Concededly, this factual determination may be impossible at this time to establish. If that is the case, the non-user statute has no meaningful applicability. As we stated in Attorney General Opinion No. 90-86:

> "When the legislature enacted this [non-user] statute, they intended to 'allow those interested seven years in which to avail themselves of the privilege offered' and 'if no advantage should be taken within that time it should be withdrawn.' Kollhoff v. Board of County Commissioners, 193 Kan. 370, 373

> (1964). Citing Cowley County v. Johnson, 76 Kan. 65, 69 (1907). It has also been held that this statute 'applies only to roads authorized which have never been opened or used.' Kollhoff v. Board of County Commissioners, 193 Kan. 370, 374 (1964), citing Kuhl v. Jamison, 79 Kan. 788 (1909)."

Since the 1879 non-user statute was repealed in 1911, its applicability, if any, terminated the year of its repeal. Assuming, without deciding, that the applicability of the non-user statute cannot be established, the question becomes whether the township must now open the road, i.e. would a court acting pursuant to its mandamus power order the township to open the road.

Kansas courts have not dealt gently with recalcitrant officials who appear to be merely stonewalling the opening of established roads by refusal, evasion, or obstruction of their duty, by offering trifling excuses or purposefully postponing their clear duty to open a road. E.g. see State, ex rel. v. Linn County Commissioners, 120 Kan. 356 (1926), State ex rel. v. Franklin County Commissioners, 124 Kan. 141 (1927), State ex rel. v. Johnson County Commissioners, 124 Kan. 511 (1927), State ex rel. v. Leavenworth County Commissioners, 126 Kan. 571 (1928).

On the other hand it is recognized that mandamus does not lie to control the exercise of discretion by public officials, including the discretionary question entrusted to governing bodies of whether or not a street should be opened. Hill v. City of Lawrence, 2 Kan.App.2d 457, Rev. Den. 225 Kan. 844 (1978). Factors which have been recognized as appropriate to the exercise of discretion include prohibitive economic conditions, Linn, supra, and changed conditions which make the public utility and necessity of a road doubtful, Ellis, supra. In Hill the court noted that "the authorities stress one major controlling factor in determining whether a street should be opened, i.e., the public use and not mere private benefit. 2 Kan.App.2d at 459. In discussing whether a city was required to open a street, Moore v. City of Lawrence, 232 Kan. 353 (1982) gave the following guidance:

> "[W]hen a road is to be open, or put in condition for use by the public, is within the discretion of the city's governing

> body. (Citations omitted). A city is not required to open all streets which have been formally laid out or dedicated. As stated in Gardarl v. City of Humbolt, 87 Kan. at 43:
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> > 'A street may not be available for use by the public when the plat is filed. Nevertheless, the city, as the public agent having control of streets, may wait until its resources will permit, or until the public need demands, before it undertakes to open the way or to improve it so that it will be fit for travel; and meanwhile, all persons in possession hold subject to the paramount right of the public.'" (p. 363).

Again, assuming it cannot be established whether the road in question has been opened, while we cannot say with certainty whether a court would compel its opening, there appear to be factors present which in our opinion would militate against a court ordering the opening of the road. These include present economic conditions of Avon township, the two buried gas pipelines, and the apparent minimal public benefits as opposed to private benefit of the road.

Assuming now that the road at some point was opened and has fallen into disrepair to the point of being impassable, questions regarding abandonment, adverse possession and maintenance responsibilities arise.

The doctrine of abandonment has not been looked upon favorably in Kansas and has been repudiated in respect to many types of public property. Gardarl v. City of Humboldt, 87 Kan. 41 (1912) citing the syllabus of McAlpine v. Railway Co., 68 Kan. 207 (1904) stated:

> "Land dedicated to a public use does not revert to the dedicators because of misuse or nonuse, unless its use for the dedicated purpose has become impossible, or so highly improbable as to be practically impossible."

In our opinion, while putting the road in question into condition for ease of travel may be expensive, it is not so

impossible as to cause an abandonment of the established public use.

Likewise, the general rule is that a private individual cannot obtain title to a public highway by adverse possession. See Kollhoff, supra, and cases cited therein at 373.

Once a township road has been opened, the responsibility for maintenance of that road falls upon the township. K.S.A. 68-530. If the road is a dividing line between two townships, maintenance, repair and improvement of that road are the joint responsibilities of both townships. K.S.A. 68-527. Disputes between such townships are to be settled by the district court of the county in which the road is located. K.S.A. 68-527a. In addition, if the township board or boards neglect, refuse or fail to repair, place or keep in condition for travel such roads, the county may undertake such responsibility and charge the expenses to the township or townships. K.S.A. 68-124.

The situation herein regarding what should be clear statutory duties, is complicated by the factors discussed above, i.e. apparent long term non-use of the road, buried gas pipes, hedge row growing in the middle of the road and apparent negligible public benefit. The question again, therefore, becomes whether a court would compel the township or townships to repair and maintain such a road. As with the discussion regarding the opening of a road, we cannot predict with certainty a final outcome. However, in our opinion, a court would evaluate the issue of township maintenance in much the same way as it would evaluate the issue of the opening of a road. In the absence of fraud, bad faith or gross impropriety, the courts will not interfere to control discretion vested in public officials. Pratt v. Fall River Township Board, 155 Kan. 442 (1942).

> "The township board of highway commissioners is vested with a wide discretion in the maintenance and repair of the township roads, the levying of taxes for road purposes and the expenditure of township funds on highways." Pratt 155 Kan. at 445.

As mentioned, once a road is established, regardless of whether it is opened, it becomes a part of the public domain, and is generally not subject to claims of adverse possession or abandonment. However, an established road may be vacated

by county commissioners whether or not it has been opened. In relation to an established opened road:

> "If the county or township determines that the cost of maintenance exceeds any practical use in retaining the highway under its jurisdiction, it can be vacated under the provisions of K.S.A. 68-102 to 68-107. The board of county commissioners are empowered to vacate any road within their county, whether it be a county or township road." VI Opinions of the Attorney General 513 (1970).

In relation to an established unopened road:

> "Except as a statute may preclude the vacation of a highway within a specified time after its establishment, a highway may be subject to discontinuance after it has been laid out and recorded, although it has never been opened, where the original occasion for it has ceased by reason of the opening of another highway, or when there has been a material change as to its necessity." 39A C.J.S. Highways § 115.

K.S.A. 68-102 authorizes a board of county commissioners to vacate any road within its jurisdiction upon presentation of a petition signed by at least 12 householders of the county residing in the vicinity where the road is to be vacated, or without petition in a county having a population of between 1,200 and 90,000 inhabitants if the road is no longer a public utility. Further, under K.S.A. 68-102a, a board of county commissioners may vacate a road without the presentation of a petition for vacation, providing notice of the proposed vacation is given once in the official county newspaper and to each owner of property adjoining the road. The exercise of the authority to vacate a road must follow the statutory procedure in order to be valid. See Mills v. Commissioners of Neosho Co., 50 Kan. 635 (1889). And Stock Farm Co. v. Pottawatomie Co., 116 Kan. 315 (1924).

Should the county's exercise of its authority to vacate the road result in any person's premises being left without access to a public road, K.S.A. 68-117 provides a mechanism for the establishment, maintenance and report of a private road at the landowner's expense.

A number of your questions are difficult to answer because it appears the local practice in relation to "accepting" from the county only "improved" township roads does not correspond with Kansas statutes. According to the statutory scheme, once a road has been lawfully established, a township is responsible for opening the road for public travel (K.S.A. 68-106), keeping the road in repair and removing obstructions (K.S.A. 68-115), repairing, placing and keeping the road in condition for travel (K.S.A. 68-124), constructing and repairing the road (K.S.A. 68-526), and maintenance of the road (K.S.A. 68-530). We find no statutory authority providing for the "acceptance" of a township road from a county; nor do we find any statutory authority for allowing a township to accept only "improved" roads.

You also question whether a township has the authority to classify roads and designate levels of maintenance on such classified roads. K.S.A. 1990 Supp. 68-506 requires counties which have not adopted the county road unit system to classify and designate roads and highways within such county as "secondary roads or highways," "county minor collector roads or highways," or "township or local service roads." We find no statutory authority which would require a township to further classify roads which have been designated "township" roads. However, we find nothing which would prohibit a township from classifying its roads nor do we find anything which would prohibit a township from designating levels of maintenance on such roads. We note that K.S.A. 68-518c authorizes a township board to make an annual tax levy "for road purposes" in order to finance the adopted budget of expenditures for road purposes. That statute does not make any differentiation between different types of road maintenance within a township. In our opinion a classification for maintenance purposes would be an appropriate exercise of the board's discretion.

You also question the applicability of the improvement of roads in benefit districts act, K.S.A. 68-701 et seq. As it does not appear that any petition has been filed pursuant to that act, in our opinion that act is not presently applicable to your situation.

The situation you have presented for our consideration is very fact specific to the status of the road in question. Because we cannot resolve the factual issues, we are only able to present a discussion of some of the legal issues which may be involved should this matter proceed to litigation.

In conclusion, upon recording of the viewers' report, survey and plat, a county road is regarded as established. By contrast, such a road is considered opened when the way is unenclosed and unobstructed; when it is minimally traveled, when it is available or put in condition for public use. The 1879 non-user statute may have applicability to an established road which was not opened prior to the repeal of that statute. Mandamus does not lie to control a township board's exercise of discretion to open or to maintain a road in the absence of obstruction of duty, fraud, bad faith or gross impropriety. Neither the doctrine of abandonment nor of adverse possession generally has applicability to property established for use as a public road. The board of county commissioners are empowered to vacate any county or township road within their county by following statutory procedure.

Very truly yours,

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