



STATE OF KANSAS

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February 5, 1987

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ATTORNEY GENERAL OPINION 87- 22

Steve Kraushaar
Marshall County Counselor
P.O. Box 107
Marysville, Kansas 66508

Re: Roads and Bridges--County and Township
Roads--Maintenance of Township Road Located on
State Line

Synopsis: Kansas law allows for and encourages agreements between the townships and counties for maintenance of the roads. If, however, no agreement can be reached, the county can take over maintenance in the event the township neglects proper care. Cited herein: K.S.A. 68-124, K.S.A. 1986 Supp. 68-506, K.S.A. 68-516a; K.S.A. 1986 Supp. 68-560; K.S.A. 68-561; 68-572; 68-591.

* * *

Dear Mr. Kraushaar:

As Marshall County Counselor, you request our opinion concerning the maintenance of a particular township road. Specifically you ask whether the county, which does not operate under the county road unit system, may undertake the repair of a township road which is no longer maintained by the township and charge the expense of such repair to the township.

K.S.A. 1986 Supp. 68-506(a)(3) provides that a township road in a non-county road unity system county is one not designated by the county commissioners for inclusion in the

secondary road system or as a county minor collector road or highway. The Kansas Supreme Court has stated: "A township, having the exclusive care and control of a street or road, has a duty to maintain that road or street for the safe passage of persons and property. Other governmental entities cannot be held liable for failure to maintain that road safely."
Finkbiner v. Clay County, 238 Kan. 857, 861 (1986),
citing City of Eudora v. Miller, 30 Kan. 494 (1883).

Despite this protection from liability, a county may desire to take over maintenance of a neglected township road, and the law provides ways for this to occur. Two statutes pertain to counties desiring to maintain non-county road unit system status. K.S.A. 1986 Supp. 68-560 states: "In any county not operating under the county road unit system, any township in such county may, with consent of the county commissioners, elect to turn over the maintenance, repair and construction of township roads to the counties as provided by this subsection." K.S.A. 68-572 allows for agreements between townships and counties for the maintenance of roads. You inform us that the township in question has not turned over maintenance of the township roads to the county pursuant to K.S.A. 68-560 and 68-561 and we assume that no agreement has been reached as provided in K.S.A. 68-572.

There is, however, a statute which permits a county to repair a township road and charge the township for the cost of such repair. K.S.A. 68-124 states:

"Where under the laws of the state of Kansas, now in existence, or that may hereafter be enacted, any road or highway that is not a county road has been declared to be a public road or highway, it shall be the duty of the board of highway commissioners of the township in which such road is located to repair, place and keep in condition for travel such roads (sic) or highway. If such board of highway commissioners shall neglect, refuse or fail to comply with the provisions of this act, the board of county commissioners of the county may repair and put in good condition for travel such road or highway, and shall charge the expenses therefor to the township in which such road is located."

See Stock Farm Co. v. Pottawatomie
County, 116 Kan. 315, 319 (1924).

It would appear that this statute applies to the circumstances you describe. The road in question is a township road, not a county road, and it is a public rather than private road which has been publicly maintained for many years. If the township board of highway commissioners (the board of trustees) fails to repair and maintain the road, the board of county commissioners may do so and charge the expense to the township in which the road is located. In taking over maintenance, however, liability for negligence in maintaining the road may fall upon the county.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General

RTS:JLM:jm