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ATTORNEY GENERAL OPINION NO. 87- 124

Philip E. Winter
Lyon County Counselor
County Courthouse
Emporia, Kansas 66801

Re: Roads and Bridges; Roads -- State Highways --
Responsibility to Accept Abandoned State Highways

Roads and Bridges; Roads -- General Provisions;
Laying Out and Opening Roads -- Vacation

Synopsis: K.S.A. 68-406 gives the secretary of transportation the power to remove from the state highway system roads which have little or no state-wide significance. The statute by implication therefore requires counties to accept legal responsibility for abandoned state highways. However, a board of county commissioners is empowered to vacate any abandoned highway for which it has accepted responsibility, if the commissioners determine that the cost of maintenance exceeds any practical use in retaining the highway under its jurisdiction. Cited herein: K.S.A. 68-102; 68-102a; 68-107; 68-406.

Dear Mr. Winter:

As county counselor for Lyon County, you ask our opinion as to whether counties must accept abandoned state highways from the state.

This question was addressed in VI Opinions of the Attorney General 513 in 1970. Based upon the provisions of K.S.A. 68-406, the Attorney General opined that a local unit of government has a legal responsibility to accept a highway which has been abandoned by the state. The opinion went on to state, however, that:

"If the county or the 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." p. 514.

Thus, the opinion concluded that a local unit of government which accepts an abandoned state highway is not necessarily precluded from vacating that road. We concur with this conclusion.

In support of this result, we note that K.S.A. 68-406(a) provides:

"The secretary of transportation shall designate, adopt and establish and may lay out, open, relocate, alter, vacate, remove, redesignate and reestablish highways in every county in the state, the total mileage of which shall not exceed 10,000 miles. . . . The secretary of transportation shall make such revisions, classifications or reclassifications in the state highway system as are found on the basis of engineering and traffic study to be necessary, and such revisions, classifications or reclassifications may include, after due public hearing, removal from the system of roads which have little or no state-wide significance, . . . changes may be made in the state highway system when the public safety, convenience, economy, classification or reclassification require such change." (Emphasis added).

It is significant that the statute gives the secretary of transportation the power to make revisions, classifications or reclassifications in the state highway system, which may

include removal from the system of roads which have little or no state-wide significance.

While K.S.A. 68-406 has been amended numerous times since 1970, we believe the statute in its present form still requires counties to accept abandoned state highways from the state. Clearly, the secretary of transportation has the statutory authority to remove a road from the state highway system. Once such action is taken, responsibility for maintenance of that road must fall upon the county in which the road is located. However, the board of county commissioners of the county is empowered to vacate said road.

K.S.A. 68-102 authorizes a board of county commissioners to vacate any county road upon presentation of a petition signed by at least twelve householders of the county residing in the vicinity where said road is to be vacated, or without petition, in a county having a population between 1,200 and 90,000 inhabitants, if said 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, provided notice of the proposed vacation is given once in the official county newspaper and to each owner of property adjoining the road.

In light of these provisions, it is our opinion that a board of county commissioners is empowered to vacate any abandoned highway for which it has accepted responsibility, if the commissioners determine that the cost of maintenance exceeds any practical use in retaining the highway under its jurisdiction.

Should the secretary of transportation remove a highway from the state highway system, there is no statute which requires the Kansas Department of Transportation (K.D.O.T.) to repair the vacated highway before transferring it to the jurisdiction of a county. However, K.D.O.T. adopted a policy for maintenance prior to such a transfer in an internal memorandum dated June 27, 1984, entitled "Transferring Road Maintenance to the County/City," Subject No. 3230.00/03. The memorandum provides:

"[A] roadway being transferred to a city or county responsibility [must] be in a good state of maintenance at the time of the transfer." (p. 1, No. 2)

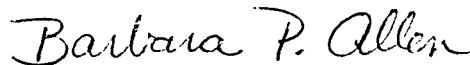
The specific procedure the state must follow in repairing a highway is spelled out in the memorandum at p. 1, No. 5. The state has a responsibility to ensure the highway is in a good state of repair at the time of the transfer. Provided the road is repaired to the K.D.O.T. standard level of maintenance, and subsequent to the transfer, the accepting county is responsible for maintaining the highway until such time as the road may be vacated by the board of county commissioners.

In summary, K.S.A. 68-406 gives the secretary of transportation the power to remove from the state highway system roads which have little or no state-wide significance. The statute by implication therefore requires counties to accept legal responsibility for abandoned state highways. However, a board of county commissioners is empowered to vacate any abandoned highway for which it has accepted responsibility, if the commissioners determine that the cost of maintenance exceeds any practical use in retaining the highway under its jurisdiction.

Very truly yours,



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