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October 26, 2015

ATTORNEY GENERAL OPINION NO. 2015- 18

Robert A. Walsh, County Attorney
Cloud County Courthouse
811 Washington
Concordia, KS 66901

Re: Roads and Bridges—Roads—General Provisions—Laying Out and
Opening Roads—Laying Out, Altering or Vacating Roads

Roads and Bridges—Roads—General Provisions—Laying Out and
Opening Roads—Laying Out, Altering or Vacating Roads; Notice

Synopsis: Before vacating a road on its own motion, a board of county
commissioners must follow the statutory notice requirements contained in
K.S.A. 68-102a. The viewing and report requirements contained in K.S.A.
2015 Supp. 68-104 and K.S.A. 68-106 only apply when a road is installed,
altered, or removed following a petition of any adjacent landowner. Cited
herein: K.S.A. 68-102; 68-102a; 68-103; K.S.A. 2015 Supp. 68-104;
K.S.A. 68-106; L. 1931, Ch. 243, § 2; L. 1981, Ch. 173, § 67; L. 1999, Ch.
146, §§ 1, 2.

* * *

Dear Mr. Walsh:

As the Cloud County Attorney, you ask our opinion on whether a county road closure initiated by a board of county commissioners (board) on its own motion and not as a result of a petition needs to follow the procedures outlined in K.S.A. 2015 Supp. 68-104 and K.S.A. 68-106. You also ask about the implications of Attorney General Opinion No. 82-225, which opined that the procedural requirements for vacating a county road are “the same as that for laying out a road, *i.e.* ‘petition, notice, view, report of view, and

decision.”¹ As a result of statutory changes in the intervening years, we do not believe Attorney General Opinion No. 82-225 applies in the situation you describe. Instead, we conclude K.S.A. 68-102a is the statute that governs when a board vacates a county road on its own motion and not as a result of a petition.

Attorney General Opinion No. 82-225

In your opinion request, you state Attorney General Opinion No. 82-225 “seems to suggest that a road closure initiated by the [board] would still need to follow the procedures outlined in K.S.A. 68-104 and K.S.A. 68-106.” We note for the sake of convenience those procedures generally require a board to “appoint three disinterested householders of the county as viewers”² and, after at least 20 days’ notice through advertisement in the county clerk’s office and two weeks’ consecutive publication in a newspaper of general circulation in the county,³ proceed to the location of the proposed road and, considering “the utility, convenience and inconvenience, and expense”⁴ of the proposed road, “survey, lay out, alter or vacate the road.”⁵ The board may omit the viewing process if the proposed road follows a section line.⁶ The board must “enter an order upon their records that said road, survey and plat be recorded in the office of the county surveyor” before the road can “be considered a public highway,”⁷ but no formal action appears to be required if the board decides *not* to establish, alter, or vacate the proposed road.

Attorney General Opinion No. 82-225 also dealt with a question regarding “the vacating of a county road.”⁸ The opinion discusses the relevant statutes, notes that those statutes had not been amended since the subject road was vacated in 1956, and ultimately concludes the subject road was vacated improperly, allowing the road to be re-opened without additional condemnation proceedings.

We note the ultimate conclusion of Attorney General Opinion No. 82-225 was based on “the lack of any record of final action” and the absence of sufficient evidence to demonstrate constructive notice of the board’s actions; we would likely affirm the opinion if that specific question were again before us. We cannot, however, affirm the opinion’s reliance on *Heatherman v. Bd. of County Comm’rs of Kingman County*, which noted “the procedure for vacating a road is the same as the procedure for laying out a road—petition, notice, view, report of viewers, and decision.”⁹ We reach this conclusion after first noting *Heatherman’s* declaration that “there is no specific provision, and, so far

¹ Citing *Heatherman v. Bd. of County Comm’rs of Kingman County*, 123 Kan. 77 (1927).

² K.S.A. 68-104(a).

³ K.S.A. 68-104(a).

⁴ K.S.A. 68-106.

⁵ K.S.A. 68-106.

⁶ K.S.A. 68-104(b).

⁷ K.S.A. 68-106.

⁸ Attorney General Opinion No. 82-225, at 1.

⁹ *Heatherman*, 123 Kan. 77 (1927).

as discovered, never has been, for an order vacating a road”¹⁰ is no longer accurate; K.S.A. 2015 Supp. 68-102a explicitly mentions requirements for “the order laying out, altering or vacating [a] road.” We therefore believe the question of which procedures apply to the vacating of a road warrants a fresh look.

K.S.A. 68-102, et seq.

There are two situations in which the Legislature contemplated a county laying out, altering, or vacating a road. The first is “[u]pon petition of any adjacent landowner,”¹¹ where the petition must “specify the place of beginning, the intermediate points, if any, and the place of termination of such [proposed] road.”¹² The second is “when deemed necessary by the board,”¹³ although if the board is *vacating* a road the standard requires a determination that either the “road is not a public utility by reason of neglect, nonuse, or inconvenience” or that “from other cause or causes such road has become practically impassable and the necessity for such road as a public utility does not justify the expenditure of the necessary funds to repair such road or put the same in condition for public travel.”¹⁴

K.S.A. 68-102a was codified in 1931, four years after the *Heatherman* decision.¹⁵ From the outset, the statute provided for the vacation of county roads. The statute was first amended in 1981, when the Legislature revised outdated language and the notice requirements.¹⁶ In 1999, the Legislature amended both K.S.A. 68-102 and 68-102a, making extensive revisions to both.¹⁷ The effect of overhauling both statutes in 1999 was to consolidate the statutory scheme that evolved through patchwork revision more clearly into two separate situations: where a petition is filed, and where a board acts on its own motion. K.S.A. 68-102 now serves as an overview of a board’s authority; K.S.A. 2015 Supp. 68-102a now serves as a minimum notice requirement for each of the board actions contemplated in K.S.A. 68-102.

When a board takes action without a petition, only the notice requirements of K.S.A. 68-102a apply.¹⁸ When board action is taken following the petition of an adjacent landowner, the additional requirements of K.S.A. 2015 Supp. 68-104 through K.S.A. 68-106 must be followed. In both circumstances, the board must enter an order laying out, altering, or vacating the road.¹⁹

¹⁰ *Heatherman*, 123 Kan. at 77.

¹¹ K.S.A. 68-102(a).

¹² K.S.A. 68-103.

¹³ K.S.A. 68-102(a).

¹⁴ K.S.A. 68-102(b).

¹⁵ L. 1931, Ch. 243, § 2.

¹⁶ L. 1981, Ch. 173, § 67.

¹⁷ L. 1999, Ch. 146, §§ 1, 2.

¹⁸ K.S.A. 68-102(c).

¹⁹ K.S.A. 68-102a, K.S.A. 68-106.

Conclusion

Due to the addition of statutory language addressing the instances in which a board might seek to vacate an unused or prohibitively damaged road, we do not believe it is accurate to state “the procedure for vacating a road is the same as the procedure for laying out a road—petition, notice, view, report of viewers, and decision.” Instead, there are two statutory schemes that apply, based on whether a petition was filed or if the board is taking action on its own motion. Language to the contrary in Attorney General Opinion No. 82-225 is accordingly revised.

The requirements for notice, viewing, report of viewers, and decision contained in K.S.A. 2015 Supp. 68-104 and K.S.A. 68-106 only apply after an adjacent landowner has filed a petition; when a board acts on its own motion after making the required necessity or non-public utility determinations, only the notice requirements of K.S.A. 68-102a apply.

Sincerely,

Derek Schmidt
Kansas Attorney General

Craig Paschang
Assistant Attorney General

DS:AA:CP:sb