

Date Issued: February 5, 1981 (AGO 81-9)

Requested by: Tom P. Slorby,
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- QUESTION PRESENTED -

Whether a county must assume responsibility for the maintenance of any part of a former highway abandoned by the State Highway Department, a part of which lies within the jurisdiction of a city.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a county is not required to assume responsibility for the maintenance of a highway or any part thereof abandoned by the State Highway Department.

- ANALYSIS -

The Legislature has granted the Commissioner of the State Highway Department the authority to abandon sections of the state highway system when such abandoned sections are substantially replaced by improvements on new locations serving the area. The specific section reads as follows:

24-01-06. AUTHORITY TO ABANDON SECTIONS OF ROUTES. The commissioner shall have the authority to abandon sections of routes on the state highway system when such abandoned sections are substantially replaced by improvements on new locations serving the area. Such abandonment may be made even though such highway is not placed on any other road system.

This section clearly sets forth the intent of the Legislature to allow the Commissioner of the State Highway Department to abandon sections of the state highway system without first requiring another governmental authority be found to assume jurisdiction over the highway section being abandoned.

The fact that a section of the state highway system is abandoned in a county does not force the county to assume responsibility for it. The boards of county commissioners in their respective counties have the right of determining the county road system.

This authority is set forth as follows:

24-05-17. RESPONSIBILITY FOR COUNTY ROAD SYSTEM. The boards of county commissioners in their respective counties shall have the sole authority and responsibility to acquire land for, construct, maintain and operate the county road system as designated and selected by them. (Emphasis supplied).

Section 24-05-16, N.D.C.C., reinforces the authority that the counties have with respect to the county roads system. It provides that: "The county road system shall be the roads designated and selected by the boards of county commissioners, with the approval of the state highway commissioner."

Accordingly, from the foregoing sections of law, the Commissioner of the State Highway Department has the authority to abandon sections of the state highway system and the county commissioners have the right to designate the county roads system. Hence, the county commissioners are not required to take over the maintenance of an abandoned section of the state highway system or to include that abandoned section in the county roads system.

There is one interesting North Dakota case on this point. In Casey v. Corwin, 71 N.W.2d. 553 (N.D. 1955), the North Dakota Supreme Court dealt with the question of the abandonment of a section of the state highway system that had been acquired by prescription. This abandoned section of highway was located within the limits of a city. The Court noted that:

A consideration of the applicable statutes leads us to the conclusion that while the State Highway Department has the power to include highways within the state highway system and exclude others from it, it has no power to vacate a highway which has been established and over which the public has acquired a right of passage. The only effect which the relocation of a highway by the State Highway Department can have therefore is to detach the old highway from the state highway system. The old highway remains as a public way within the control of the governing board of the territory in which it lies. 71 N.W.2d. 553, 555, 556.

From this case, it is apparent that the public retains a right-of-way over the abandoned highway section. However, this case does not change the statutes cited above. The county retains the sole right to decide what roads will be included in the county roads system. A similar right must exist within a city. Although under this case the jurisdiction over the section of the abandoned state highway system goes to the governing board of the territory in which it lies, the governing board, be it a county or city, is not required to maintain the section of abandoned highway unless it chooses to do so. This conclusion is consistent with section 24-01-01, N.D.C.C., containing the declaration of legislative intent with respect to roads. The Legislature has declared that a high degree of trust should be placed in the hands of officials whose duties are to provide for an adequate and integrated system of roads and streets in the State of North Dakota. The Legislature has declared that the State Highway Commissioner shall have sufficiently broad authority to plan, develop, maintain and operate public highway facilities in his state. Likewise, the similar broad authority was given to the boards of county commissioners with respect to the county road system and to local officials with respect to roads under their jurisdiction.

Accordingly, although a section of the state highway system has been lawfully abandoned, the governing board in which it lies receives authority over it but it has no concurrent obligation to maintain such an abandoned section of the state highway system.

-EFFECT-

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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