

## **N.D.A.G. Letter to Hoy (March 13, 1987)**

March 13, 1987

Mr. Robert G. Hoy  
Cass County State's Attorney  
P.O. Box 2806  
Fargo, ND 58108

Dear Mr. Hoy:

Thank you for your letter of January 26, 1987, wherein you expressed your disagreement with my letter opinion on a county's responsibility for a section of highway removed from the county highway system pursuant to N.D.C.C. § 24-05-16. I apologize for the delay in responding to you.

Your disagreement covers three specific points. Your first concern addresses the county's maintenance responsibility on a segment of highway removed from the county highway system. Your initial question on this issue was stated in your letter of October 22, 1986, as "what statutory authority governs a county's responsibility for roads not designated a part of the county road system?" Your first inquiry was much broader than the singular matter of the maintenance responsibility for the deleted sections of highway.

N.D.C.C. § 24-05-17 does provide that a county is responsible for the construction and maintenance of a road on the county highway system. Conversely, a county would not have the maintenance responsibility for a road no longer a part of the county highway system. See Umpleby v. State, 347 N.W.2d 156, 160 (N.D. 1984). However, there is the potential that the county would be responsible for the public traveling over such road, unless the road is subsequently vacated or transferred to another governmental entity. This conclusion is based on the fact that the county continues to hold the title or an easement to the land occupied by the road and that the public, by its former and present use, retains the right to use the road.

I agree with your second proposition wherein you state that a township or city should have the opportunity to utilize that portion of highway removed from the county highway system. Both a township and a city have governmental duties relative to the establishment of highways and streets. See N.D.C.C. Chs. 24-06 and 40-39. Since these entities have such power, they could also contractually agree with a county to take that portion of the road deleted from the designated county highway system and incorporate it into their road or street systems.

It should be emphasized that the mere deletion of a portion of the designated county highway system would not cause the deleted section to automatically become a part of a township road or city street system. Both entities have autonomous authority to designate the road system under their jurisdiction. See 1983 N.D. Op. Att'y Gen. 91 and N.D.C.C. §

40-39-01. This concept is distinct from your original question, which implied that the deleted section of road would "become a township road" upon removal from the designated county highway system.

As to your third inquiry, N.D.C.C. § 24-05-17 would be controlling and my response to your first question would have application, because there is no statutory authority imposing a maintenance responsibility upon the county for those segments of highway removed from the county highway system.

I would also repeat my previous caveat. The title to the right-of-way, be it an easement or in fee, would remain in the county, even though the road thereon was deleted from the county highway system. Unless the highway is vacated or otherwise closed, the public would still retain the right to travel thereon. Consequently, in absence of clear statutory direction or case law on the point, this opinion should not be construed as addressing any issue pertaining to a county's potential liability arising from its status of being the owner of a road available for public use.

I understand the dilemma you must deal with, but the liability issue must be resolved by the Legislature. A partial resolution is presently being addressed by the Legislature in Senate Bill 2080, which relates to minimum maintenance roads and limited liability. I have attached a copy of the bill as introduced.

Sincerely,

Nicholas J. Spaeth

dfm  
Enclosure