

Chapter

I

SD ASSOCIATION OF COUNTY HIGHWAY SUPERINTENDENTS

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Certification Manual



# Supervision of County Highways

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### **Purposes and limitations of the Manual**

This manual was updated in the summer of 2018 at the direction of the South Dakota Association of County Highway Superintendents as a resource for county highway superintendents. This Manual is not all encompassing but is instead presented as a general outline of state statutes governing the operation of county highway departments. This manual does not include every statute and court opinion related to county highways and does not constitute legal advice. Further, laws, and the courts' interpretation of such laws, often change. If you are confronted with a particular issue, contact your state's attorney to research how the latest law applies to such issue.

## **Control of County Highway System**

Except as provided for state trunk highways, the construction, improvement and maintenance of the county highway system is the responsibility of the county. Expenses incurred in carrying out the highway program are considered the expense of the entire county. (SDCL 31-12-5, 31-12-6)

**31-12-5. Supervision of construction, improvement, maintenance and repair of system.** The construction, improvement, maintenance, and repair of the county highway system, except as provided for state trunk highways shall be under the supervision of the county superintendent of highways in organized counties, who shall formulate and direct the policy of the county for the construction, improvement, maintenance, and repair of the county highway system.

**Source:** SL 1919, ch 333, § 16; SDC 1939, § 28.0303.

### **Cross-References**

*Guideposts on public highways within county but not within town, see § 31-28-12.*

*Standards and advice to counties from Department of Transportation, see § 31-2-22.*

### **County Relieved of Responsibility**

*The Legislature, by placing a county road on the state trunk highway system, intended to relieve the county of all duty to maintain and repair such road. Tripp County v. Department of Transp. (1988) 429 NW 2d 473.*

### **Opinions of Attorney General**

*Possible referendum involving resolution to purchase highway maintenance equipment, 1989 S.D. Op. Att'y Gen. 13 (1989).*

**The following Opinions of Attorney General are no longer included in the annotated statutes. They are retained here for historical reference purposes.**

*Control of use of county road machinery, Report 1919-20, p. 279.*

*County not liable for damages resulting from negligence of township in maintaining secondary roads, Report 1933-34, p. 182.*

*County superintendent authorized to employ workmen and fix salaries, Report 1919-20, p. 281.*

*Overflow of artesian wells on highways, duty to abate nuisance of, Report 1919-20, p. 282.*

*Surfacing of county highway within limits of municipality is discretionary with county board, Report 1943-44, p. 403.*

**31-12-6. County system at expense of entire county – Tax levy.** The county highway system shall be permanently constructed and improved, and shall be maintained and repaired at the expense of the whole county, and the funds necessary therefor shall be levied and collected in the same manner as other county taxes, and it shall be the duty of the board of county commissioners to determine upon and make such levy in the manner now provided by law.

**Source:** SL 1919, ch 333, § 16; SDC 1939, § 28.0303.

### **Cross References**

*Annual county tax levy, §10-12-8.*

*County disaster and snow removal fund, § 34-5-1 et seq.*

### **Notes of Decisions/Attorney General Opinions:**

#### **Unorganized areas**

*Pol. Code, § 1732, conferring on county commissioners general supervision of county roads and the power to appropriate money from the county treasury as they think advisable for opening, vacating, or*

*improving such roads, invests the commissioners with authority to appropriate money out of the county general fund to repair and improve county roads in territory not included in an organized civil township, notwithstanding section 2137, providing, by subsections 3 and 7, special funds for roads in unorganized territory. Hughes v. Board of Com'rs of Lawrence County, 1910, 25 S.D. 480, 127 N.W. 613.*

**The following opinions are no longer listed in West's annotated SDCL. They are retained here for historical reference purposes.**

*Bridge within city limits on county highway system repaired by city or county, Report 1933-23, p. 362.*

*Construction of bridges within corporate limits of city, payment of cost, Report 1921-22, p. 49.*

*Right-of-way for county system paid for out of highway funds, Report 1931-32, p. 448.*

*State highway funds for county roads after Trunk highway system completed, authority to spend, Report 1927-28, p. 188.*

*Township funds cannot be used for graveling road of county highway system, Report 1953-54, p.389.*

## **County Highway Superintendent**

Immediate supervision of the county highway system is under the county highway superintendent. The county board employs the superintendent, determines his salary and approves his expenses. These costs are paid from the motor vehicle fund of the county. Moreover, a member of the county board is ineligible for the position as highway superintendent. The tenure of the superintendent may be terminated at any time by resolution of the board upon thirty days' notice; otherwise the term of office is two years. (SDCL 31-11-1).

The county highway superintendent is authorized and is expected to inspect scale tickets for any vehicle transporting construction aggregate from a county-permitted gravel pit if the material is being used on a public road project being administered by the county, township or municipality. Violations discovered during this inspection must be reported to the Department of Public Safety. (SDCL 32-22-31.2).

The county's performance in conducting the overweight vehicle enforcement program will be reviewed by the SDDOT at least twice each year. An unsatisfactory report could result in the suspension, for up to 180 days, of all or any portion of the authorized federal and state funds that would normally be distributed. The SDDOT must give the county written notice specifying the deficiencies at least 30 days before certifying the performance as unsatisfactory. (32.22.31.3).

**31-11-1. Employment of county highway superintendent – Salary – Tenure.** The board of county commissioners at its discretion may employ a county highway superintendent, the salary and expenses to be fixed and allowed by the board of county commissioners, to be paid out of the motor vehicle fund of the county. No member of the board of county commissioners shall be appointed as county highway superintendent. The tenure of office of the county highway superintendent may be terminated at any time by resolution of the board of county commissioners upon thirty days' notice, but unless so terminated, the tenure of office shall be for two years.

**Source:** SL 1919, ch 333, §15; 1920 (SS), ch 89; 1921, ch 388; 1927, ch 138; 1933, ch 119; SDC 1939, §28.0304; SL 1951, ch 137.

### **Cross-References**

*Educational conferences and meetings, reimbursement of expenses, see §§ 7-7-25, 7-7-26.*

### **Notes of Decisions/Attorney General Opinions:**

#### ***Personal Liability of Superintendent***

*Since highway superintendent was a public officer appointed by the board of county commissioners under authority of this section, where wrongful death action was against him in his official capacity, his liability was subject to the same statutory limitations as the county, and removal by Legislature of any liability of county in maintaining county roads immunized superintendent. Dohrman v. Lawrence County (1966) 82 SD 207, 143 NW 2d 865.*

**Duty of County to Repair**

*Under 1939 revision of statute imposing liability upon counties for damages resulting from defective highway or bridge, county's obligation is confined to specific duty to guard and repair damaged or destroyed highway. Dohrman v. Lawrence County (1966) 82 SD 207, 143 NW 2d 865.*

**Removal of Superintendent**

*Substitution of the words "at any time by a resolution of the board" for "for cause" in regard to commissioners' power to terminate the tenure of the county highway superintendent under this section evidenced legislative intent that commissioners had unrestricted power in this matter, so that superintendent could be removed for other than just cause, and was not entitled to notice and hearing before his removal, where board removed him by resolution. In re Dwyer (1926) 49 SD 350, 207 NW 210.*

**Workers' Compensation Coverage of Superintendent**

*Whether county highway superintendent is "public officer" excluded from operation of Workmen's Compensation Law, must be determined by consideration of nature of services to be performed and duties imposed on him. Griggs v. Harding County (1942) 68 SD 429, 3 NW 2d 485.*

*The 1933 amendment to law relating to county highway superintendent, not changing functions of office, but merely relating to appointment and tenure, did not change superintendent's status from "public officer" to "employee" so as to bring superintendent within Workmen's Compensation Law. Griggs v. Harding County, 1942, 68 S.D. 429, 3 N.W.2d 485.*

*The duties imposed upon the county highway superintendent under this section made him a public officer and not an employee within the meaning of the workers' compensation law, so that widow of highway superintendent could not recover compensation under workers' compensation law for husbands' death. Griggs v. Harding County (1942) 68 SD 429, 3 NW 2d 485.*

**Tenure**

*Under statute authorizing county board to employ annually a county highway superintendent whose tenure of office could be terminated at any time by resolution of board on 30 days' notice, superintendent's "tenure of office" is one year unless sooner removed by board. Griggs v. Harding County, 1942, 68 S.D. 429, 3 N.W.2d 485.*

**Opinions of Attorney General**

*Termination of employment of county highway superintendent by county commissioners, Report 1919-20, p. 428; 1921-22, p. 283; 1929-30, p. 259.*

**31-11-4. Employment of engineer by superintendent.** In cases where the county superintendent of highways is not an engineer he shall have power and authority with the approval of the county commissioners to employ an engineer whenever necessary to survey and to do other engineering work.

**Source:** SL 1919, ch333, §19; SDC 1939, §28.0305; SL 1953, ch 145.

**31-11-7.** Annual inventory of county and road building equipment and supplies – Destruction of records. The county highway superintendent shall prepare and file with the county auditor not later than the fifth of January of each year a true and correct inventory of all road building equipment, supplies, and Materials on hand together with his estimate of its present value. However, the county auditor may destroy any record which the records destruction board, acting pursuant to, §1-27-19, declares to have no further administrative, legal, fiscal, research or historical value.

**Source:** SL 1927, ch 138; SL 1933, ch 119; SDC 1939, § 28.0304; SL 1951, ch 137; 1981, ch 45, § 20.

**32-22-21.2. Highways to which maximum weight limit applies.** The maximum weight limit as provided by subsection 32-22-21(1)(e) applies to the following highways:

- (1) The interstate highway system;
- (2) Any locally designated highway within the corporate limits of any municipality adjacent to the interstate highway system;
- (3) U.S. Highway 12 from Interstate 29 to Aberdeen;
- (4) State Highway 37 from Interstate 90 to Huron;
- (5) U.S. Highway 83 from Interstate 90 to Pierre;
- (6) State Highway 79 from Interstate 90 to the Nebraska border;
- (7) U.S. Highway 85 from Interstate 90 to Belle Fourche; and
- (8) State Highway 50 from Interstate 29 to Yankton.

**Source:** SL 2013, ch 148, § 2.

**32-22-31.2. Highway construction vehicles on contract to county, township or municipality – Inspection of scale tickets for compliance with weight limitations – Reporting offenders.** Any county highway superintendent or municipal street superintendent may inspect any scale ticket issued by any weight scale operator for a vehicle being used in connection with removal of construction aggregate from a county-permitted gravel pit or for the construction, repair, or maintenance of a public highway pursuant to a contract administered by a county, township, or municipality for compliance with the weight limitations imposed by this chapter. Any violation shall be reported to the Department of Public Safety.

**Source:** SL 1999, ch 162, § 3; SL 2004, ch 17, § 141.

**32-22-31.3. Review of county overweight vehicle enforcement programs – Factors considered – Certification of unsatisfactory programs – Prior specification of deficiencies – Withholding funds.** The secretary of the Department of Transportation shall, not less than semi-annually, review the performance of each county's program of overweight vehicle enforcement and shall certify a list of those counties whose enforcement programs are unsatisfactory. In reviewing each county's enforcement program, the secretary shall consider the following factors:

- (1) Whether the county has requested that the Division of Highway Patrol assist in the enforcement of that county's spring or other posted load limits;
- (2) The diligence of that county in enforcing in court to the fullest extent possible all fines authorized by chapter 32-22 without plea bargaining or reducing statutory fines or civil penalties under the following conditions:
  - a. For any second or subsequent offense by a driver occurring in a four-year period; or
  - b. For any violation of the provisions of § 32-22-24;
- (3) The effort of local law enforcement agencies to enforce chapter 32-22 on the roads of that county; and
- (4) Such other factors as the secretary may deem appropriate after consultation with the state associations for county sheriffs, county commissioners, state's attorneys, and county highway superintendents and with the Division of Highway Patrol.

The secretary may not find any county's program to be unsatisfactory unless the secretary has given the county a written specification of the county's program deficiencies at least thirty days before the unsatisfactory certification.

For any county whose overweight vehicle enforcement program is certified by the secretary as unsatisfactory, the secretary may withhold or suspend for a period of one hundred eighty days all or any portion of any transfer of federal surface transportation funds and state funds otherwise authorized by § 32-11-35 to be distributed to such county. The Department of Revenue shall cooperate with the secretary in the administration of this section.

*Source: SL 1999, ch 162, § 6; SL 2003, ch 169, § 1.*

## **Survey of Highways Before Construction or Repair**

Before any permanent improvement is undertaken on a county highway, the highway superintendent may be directed by the county board to make a survey of part or all of the county highway system for the purpose of ascertaining its condition and to obtain a record of the existing highway structures. After the construction specifications and the estimated costs have been approved by the board, the improvements are made. (SDCL 31-12-8, 31-12-9).

**31-12-8. Survey and report by superintendent on condition of system and structures.** The board of county commissioners may, if it deems it expedient, direct the county highway superintendent to make or cause to be made a survey and report upon all or parts of the county highway system for the purpose of ascertaining the condition of the parts thereof and of obtaining a record of existing structures and their condition.

*Source: SL 1919, ch 333, § 20; SDC 1939, § 28.0306.*

**31-12-9. Survey, plans, specifications and estimates for permanent improvements.** Before any permanent improvement is undertaken upon the county highway system, the county highway superintendent shall, under the general direction the board of county commissioners where deemed necessary, make or have made a survey and prepare or have prepared plans, specifications, and estimates for the improvement. Unless the county has adopted its own standards, the survey, plans, specifications and estimates shall be prepared according to standards to be prescribed by the Transportation Commission, and shall be on the basis and with the object in view of permanent improvement, each as to bridge, culvert, tile, and road work.

*Source: SL 1919, ch 333, § 20; SDC 1939, § 28.0306; SL 2018, ch 168, § 16.*

### ***Cross-References***

*Condemnation of private property for highway purposes, see § 7-18-9.*

*Agency rule-making, see §§ 1-26A-1, 1-26-4 to 1-26-14.*

*Standards and advice to counties from Department of Transportation, see § 31-2-22.*

### **Notes of Decisions/Attorney General Opinions:**

#### ***In General***

*What should be done by county to protect the public from injury occasioned by highways, culverts or bridges that are destroyed or out of repair is a question for the Legislature, and courts may only determine what duty in such respect the Legislature by statute has imposed on county. Lipp v. Corson County, 78 N.W.2d 172 (S.D. 1956).*

#### ***Purpose of Statute***

*Legislative purpose of requiring plans, specifications, cost estimates, and advertisements for bids on competitive basis before day labor may be employed is to provide for orderly and systematic development of county highway system, to provide comparative cost estimates and yardsticks, and to guard against favoritism, improvidence, extravagance, fraud, and corruption.*

*State ex rel. Small v. Hughes County Comm. 133 N.W.2d 228 (S.D. 1965).*

#### ***Specifications***

*In an action against county for injuries sustained by truck passenger allegedly as a result of failure of county to erect a sufficient guard across highway on which a bridge was being repaired by county, standard specifications for roads and bridges issued by State Highway Commission, applicable only to contractors performing highway work for state pursuant to plans and specifications, were properly*



*stricken, in absence of showing that such standard specifications were adopted pursuant to statute. Lipp v. Corson County, 78 N.W.2d 172 (S.D. 1956).*

#### **Equipment Rental**

*County commissioners had no authority to enter into a contract after requesting bids for rental of road equipment and operators therefor on an hourly rental basis where equipment and operators would be used to construct, repair and maintain entire county highway system under authority of "day labor" without preliminary plans, specifications, surveys, cost estimates or advertisement for bids of any kind on any project regardless of estimated cost. State ex rel. Small v. Hughes County Commission, 133 N.W.2d 228 (S.D. 1965).*

#### **Purchase of Gravel**

*To obtain gravel for county highway improvement purposes, the county board should adopt a resolution for the purchase or condemnation of the gravel. The statute provides for the purchase or condemnation of lands upon which gravel, among other things, is located for the purpose of constructing and maintaining highways. A contract for the removal of the gravel is a public improvement contract; thus, the contract should be let to the lowest bidder. (AGR 1953-54, pp. 92-93).*

### **County Aid Roads in Townships**

Funds may be made available from the county highway funds for constructing and maintaining Township roads which have been designated by the county board as "county aid roads." the board may also enter into agreements with a township board of supervisors in the county for the laying out, construction, graveling, hard surfacing or maintenance of designated township roads (SDCL 31-13-12, 31-13-13). Townships, however, are not authorized to contribute toward the improvement of county highways. (AGR 1953-54, p. 108).

**31-13-12. County aid roads – Designation by county commissioners.** The board of county commissioners of each county is hereby empowered to designate in its discretion township roads or roads in unorganized townships within the county, as it may deem advisable and in the public interest as "county aid roads," and to expend any funds available from the county highway funds for laying out, constructing, graveling, and maintaining such township roads or roads in unorganized townships so designated as "county aid roads."

**Source:** SL 1933 (SS), ch 7; SDC 1939, § 28.0314; SL 1943, ch 109; 1976, ch 183.

#### **Cross-References**

*Duty of board to construct and maintain county secondary roads outside of cities, towns, and organized townships, see §§ 31-12-26 to 31-12-27.1.*

#### **Notes of Decisions/Attorney General Opinions:**

##### **In General**

*The duty and responsibility for construction, maintenance of secondary roads has been placed on township board. Van Gerpen v. Gemmill, 33 N.W.2d 278 (S.D. 1948).*

*Under the legislative plan for division of responsibility with reference to various types of highways, there are no overlapping duties and responsibilities among the different township boards, county commissioners, and State Highway Commission. Van Gerpen v. Gemmill, 33 N.W.2d 278 (S.D. 1948).*

##### **Creek Crossings**

*Where the creek crossed a road that provided access to residents of the county to a county highway system, the county could determine the creek crossing to be a "County Aid Road" pursuant to this section; this would authorize the expenditure of county highway funds or township funds apportioned*

pursuant to § 32-11-41 and authorized to be spent by the county pursuant to §§ 32-11-7 and 32-11-8 (now repealed). Op. Atty. Gen. Opinion No. 1987-34, 1987 WL 341038.

**Mandamus**

Since the duty to construct secondary highway along section line was on township board, and board of county commissioners has no overlapping duties and responsibilities, mandamus judgment directing township supervisors and county commissioners to construct and supervise construction of the secondary road was improper. Van Gerpen v. Gemmill, 33 N.W.2d 278 (S.D. 1948).

**Opinions of Attorney General**

County may contract with township to maintain township roads, Report 1959-60, p. 368.

Special highway fund not to be used in county aid roads, Report 1937-38, p. 307.

County aid roads, 1987 S.D. Op. Atty. Gen. 95 (S.D.A.G.). (See above, Creek Crossings.)

**31-13-1.3. Designation of full and minimum maintenance roads at annual meeting--Map.** The board shall, at its annual meeting, designate which township roads are full maintenance roads and which are minimum maintenance roads. The board of township supervisors shall publish any resolution designating a township road as minimum maintenance if the road is a school route. The designation is final, after a lapse of thirty days, unless appealed as provided in chapter 31-3. Following its annual meeting, the board shall submit to the county auditor an official map showing each road on the township road system, including any road designated as a minimum maintenance road.

Source: SL 2012, ch 158, § 3.

**31-13-1.4. Designation of no maintenance section line.** The board of township supervisors may designate an unimproved section line not maintained for vehicle travel as a no maintenance section line. The board shall identify the beginning and end point of the section line designated as no maintenance. The board does not have any responsibility on a no maintenance section line except to require removal or remediation of a manmade obstruction, if needed, to maintain the public access.

Source: SL 2013, ch 131, § 2.

**Notes of Decisions/Attorney General Opinions:**

**Farming**

Section-line highway's statutory maintenance level does not factor into factual determination as to whether farming constitutes an obstruction or injury to section-line highway. Op. Atty. Gen. Opinion No. 18-01, 2018 WL 1456529.

**31-13-1.5. Posting of signs on no maintenance section line.** The board of township supervisors shall post signs on a no maintenance section line to notify the motoring public that it is a no maintenance section line and that no travel is advised. The signs shall be posted at each entry point and at regular intervals along a no maintenance section line. A properly posted sign is prima facie evidence that adequate notice of a no maintenance section line has been given to the motoring public.

Source: SL 2013, ch 131, § 3; SL 2014, ch 48, § 19.

**Notes of Decisions/Attorney General Opinions:**

**Farming**

Township's obligation to provide signage does not transfer to landowners or occupants of land adjoining or abutting section-line highways if they are permitted to farm section-line highway. Op. Atty. Gen. Opinion No. 18-01, 2018 WL 1456529.

**31-13-1.6. Designation of road unsafe for vehicle travel as no maintenance road.** The board of township supervisors may designate a road that is unsafe for vehicle travel as a no maintenance road. The

board shall identify the beginning and end point of the road designated as no maintenance. The board does not have any responsibility on a no maintenance road except to require removal or remediation of a manmade obstruction, if needed, to maintain the public access.

Source: SL 2015, ch 154, § 2.

**31-13-1.7. Posting of signs that no vehicle travel is advised on no maintenance road.** The board of township supervisors shall post signs on a no maintenance road to notify the motoring public that it is a no maintenance road and that no vehicle travel is advised. The signs shall be posted at each entry point and at regular intervals along a no maintenance road. A properly posted sign is prima facie evidence that adequate notice of a no maintenance road has been given to the motoring public.

Source: SL 2015, ch 154, § 3.

**31-13-3.1. Secondary road capital improvement fund.** The township board of supervisors may establish a secondary road capital improvement fund for the purpose of constructing, reconstructing, repairing, and maintaining secondary roads, bridges, and culverts under the jurisdiction of the township board of supervisors.

Source: SL 2015, ch 165, § 23, eff. Apr. 1, 2015.

**31-13-13. Joint contracts for construction and maintenance of township roads.** The board of supervisors of any township may jointly contract with the county of which the township is a part, and also with any municipality within or adjoining the township, for the laying out, construction, graveling, hard surfacing, or maintenance of designated township roads. The agreement shall designate the governing board to be charged with contracting for performance of the work, provide for supervision of the work and allocate the costs between the units of government participating. The board of township supervisors may also contract with any other political subdivision, homeowners' association, or rural subdivision developer to perform maintenance work on any road that is not on the township road system. Maintenance work performed on a road under contract does not imply dedication or acceptance of the road to the township road system.

Source: SDC 1939, § 28.0314 as added by SL 1943, ch 109; 1968, ch 125; SDCL Supp. § 31-13-13.1; SL 1974, ch 202, § 1; SL 2012, ch 158, § 4.

## **County Control of Secondary Roads**

Ten or more freehold electors from each county commission district within a county, with the permission of the county commissioners, may submit a petition requesting the county to construct and maintain all secondary roads in the several townships. Under these circumstances the commissioners are required to submit the question to the voters at a special or general election (SDCL 31-12-28). The question submitted so that it may be voted on by all the electors of the county (AGR 1947-48, p. 235). If a majority of the voters are in favor of the proposition, the commissioners are to take the same powers and authority with respect to the secondary roads which are conferred upon them with respect to the county highway system. All township highway funds are then turned over to the county treasurer to be put in the special township motor vehicle fund (AGR 1953-54, pp. 6-8). If a township should fail to make a levy for highway purposes, the work done on the secondary roads within that township would probably be correspondingly less (AGR 1947-48, p. 235). Moreover, counties may purchase road machinery to maintain township roads with funds accumulated for township purposes by assessing each township its proportionate share of the cost. (AGR 1953-54, pp. 6-8).

A county may enter into road construction contracts with the townships without open bidding and without publication in local newspapers in competition with private contractors, but the conditions enumerated by law must be adhered to. If outside contracting is necessary to complete the project agreed upon, rather than by day labor, then the conditions are limiting factors. (AGR 1959-60, p. 368).

The county highway superintendent must make an accounting of the cost of improving, maintaining, and constructing the highways of the township. (SDCL 31-12-41).

Whenever an affidavit has been filed by a patron of a mail route with the county auditor that a secondary road in a township of the county is in urgent need of repairs and the township board of supervisors fails to repair the road, the county auditor refers the matter to the county highway superintendent. If the superintendent finds the affidavit to be true, he proceeds at once to put the road in a reasonable state of repair and maintenance. The work is paid by warrants drawn on the county treasurer payable out of funds belonging to the township which are under the control of the county treasurer payable out of funds belonging to the township which come into the county treasury. The expense incurred by the county for mail routes may not exceed two hundred dollars for any one mile of road during any year. (SDCL 31-13-18, 31-13-19, and 31-13-20).

Township supervisors have no authority to expend the township's special highway fund for the graveling of roads on the county highway system. (AGR 1953-54, p. 389).

**31-12-41. Contracts for county maintenance of streets and alley in municipalities.** Counties are authorized to contract with municipalities within their respective boundaries for the maintenance of public streets and alleys or any portion thereof within said municipalities. Whenever it shall be made to appear to the board of county commissioners of any county by a resolution of any municipality within the county, duly adopted, copy of which resolution shall be filed in the office of the county auditor of the county of which such municipality is located that it will be to the best interest of such municipality and in the public interest that the municipality enter into an agreement in writing with the board of county commissioners of such county for the maintenance of any public street or alley or any portion thereof, the board of county commissioners may, in its discretion, enter into an agreement in writing with the governing body of such municipality to maintain any such street or alley, to be specifically designated, at and for a price to be paid to the county to be expressed in the agreement for such maintenance. If it shall appear to the board of county commissioners that it will be to the public interest to enter into such an agreement, it shall be lawful for it so to do, and such county, by and through its highway department and with the personnel and equipment thereof, perform, or cause to be performed, for such municipality such maintenance specified in said agreement and such maintenance to be done under the supervision and control of the county highway superintendent. The prices specified in said contract shall be paid to the said county by the municipality upon estimates certified to by the county highway superintendent in the same manner as other obligations of the municipality are paid.

*Source: SL 1945, ch 120, § 1; SDC Supp 1960, § 12.1809.*

***Opinions of Attorney General***

*Snow removal from village streets using county snow equipment permitted under county-village contractual agreement, Opinion No. 74-20.*

**31-13-18. Affidavit of township failure to maintain mail route – Service of affidavit and notice on township.** Whenever it shall appear by an affidavit filed by a patron of the mail route with the county auditor that a certain described secondary road in any township of the county is regularly used as part of a United States mail route, and is, in certain designated places, in urgent need of repairs to put such road in reasonably suitable condition for travel, or is, in certain designated places, likely to be made impassable by reason of weeds along such highway are not being cut, as provided by law, so as to prevent the forming of snowdrifts, or is in other respects not being suitably maintained as provided by law, and that the board of supervisors of the proper township has been notified of the condition complained of and has refused or neglected to attend thereto, it shall be the duty of the county auditor to cause copies of such affidavit to be served upon the clerk of the proper township and upon the chairman of the board of supervisors thereof, together with a notice that unless the repairs or maintenance referred to in the affidavit are attended to forthwith by such board and a certificate that the same has been done delivered to the county auditor, that such repairs or maintenance will be executed by the county at the expense of the township as in this chapter provided. Such copy and notice may be served by registered or certified mail.

*Source: SL 1929, ch 154, § 1; SDC 1939, § 28.0407.*

**31-13-19. County maintenance and repair of mail route or failure by township.** If the fact of the execution of the repairs or maintenance referred to in §31-13-18 be not certified to the county auditor within a

reasonable time, or if the county auditor be satisfied that such repairs or maintenance have not been or will not be attended to by the township board within such time, he shall immediately refer the matter to the county highway superintendent who shall personally examine the road and investigate the facts stated in the affidavit and if he finds the statements in such affidavit to be true and that the condition complained of still exists, he shall cause the necessary repairs and maintenance to be made at once and may purchase material and employ day labor therefore, or may contract the work necessary to put such road in a reasonable state of repair and maintenance.

*Source: SL 1929, ch 154, § 2; SDC 1939, § 28.0407; SL 1955, ch 100.*

**31-13-20. Payment from township funds for county repair and maintenance of mail routes – Expense limitation.** The expense of repair and maintenance pursuant to §31-13-19 shall be paid, on the presentment of itemized and verified vouchers approved by the county highway superintendent to the county auditor, by warrants drawn on the county treasurer payable out of funds belonging to the township which are in the hands of the county treasurer or out of the first funds belonging to such township which thereafter come into the county treasury; but such expense incurred by the county highway superintendent shall not exceed the sum of two hundred dollars for any one mile of road during any year.

*Source: SL 1929, ch 154, § 2; SDC 1939, § 28.0407; SL 1955, ch 100.*

### **Location of Highways by County Commissioners**

Whenever a road has been used and kept in repair as a public highway for twenty years, it shall be deemed a public highway until changed or vacated in some manner provided by law. Such highway shall be sixty-six feet wide and shall be taken equally from each side of the roadbed center line. A county may purchase or condemn right-of-way for widening the highway to more than sixty-six feet or more right-of-way on one side than the other provided it is necessary to provide a better highway, to avoid destruction of trees or valuable buildings or to avoid unsuitable terrain (SDCL 31-3-1). Upon receiving the petition of two or more voters of an organized civil township or the number of voters equal to or greater than one percent of the ballots cast for the last gubernatorial election, the board of supervisors of the township or the board of county commissioners may, except as provided in SDCL 31-3-12 and 31-3-44, vacate, change or locate any highway located or to be used within the township or county, if public interest will be better off by the proposed change. The petition shall include the beginning, course, and termination of the highway proposed to be changed together with the names of the owners of the land through which the highway may pass. (SDCL 31-3-6). No county or township may vacate a highway which provides access to public lands. (SDCL 31-3-6.1). A public hearing must be called for and held after the petition is turned in. (SDCL 31-3-7).

If a person, over whose land the proposed highway will pass, opposes the granting of the petition and presents his opposition in writing at the hearing, setting forth the amount of damages he will sustain, the county board is required to determine the actual amount of damages sustained. If the board deems the highway of the utility to the public as to warrant the paying of damages thus assessed, it may declare it located < changed or vacated with all damages paid by the county; otherwise the petition should be dismissed. (SDCL 31-3-30).

Where the highway to be changed is under one -mile in length, the county board is to proceed in the usual manner, except that the petition for the highway may be submitted by one or more freeholders and the petitioner must pay the damages assessed for the location of the highway. (SDCL 31-3-23).

Public highways may be located without appointment of viewers when the written consent of all owners of the land to be used is filed in the auditor's office, and it is shown to the satisfaction of the county board that the proposed highway is of sufficient public importance. If it is necessary to survey a highway so proposed, the persons asking for the highway must pay the expense of the survey. (SDCL 31-3-36 & 31-3-37).

**31-3-1. Dedication to public by continuous use, work and repair of road--Width--Obtaining right-of-way.** Whenever any road shall have been used, worked, and kept in repair as a public highway continuously

for twenty years, the same shall be deemed to have been legally located or dedicated to the public, and shall be and remain a public highway until changed or vacated in some manner provided by law.

Such highway shall be sixty-six feet wide and shall be taken equally from each side of the roadbed center line. Nothing herein contained may prevent the highway authority charged with the construction, reconstruction, or repair of any public highway from purchasing or condemning right-of-way for widening the highway to more than sixty-six feet or from purchasing or condemning more right-of-way on one side of the roadbed center line than on the other, provided they deem it necessary so to do in order to provide a better highway, to avoid destruction of trees or valuable buildings or to avoid unsuitable terrain

Source: SDC 1939, § 28.0104; SL 1985, ch 232.

### **Cross-References**

*Adverse possession and limitation of actions to recover real estate, Chapter 15-3.*

*Dedication of streets and public ways by recording of plat, § 11-3-12.*

*Partition proceedings, dedication of roads and streets incident to, § 21-45-18.*

*Title defects cured by lapse of time, Chapter 43-29.*

### **Notes of Decisions/Attorney General Opinions:**

#### ***In general***

*A dedication can arise by operation of common law or application of statute. Niemi v. Fredlund Tp., 867 N.W.2d 725, 2015 S.D. 62.*

*“Dedication” is a term of art, and is a devotion of property to a public use by an unequivocal act of the owner of the property and an acceptance of that dedication by the public. Niemi v. Fredlund Tp., 867 N.W.2d 725, 2015 S.D. 62.*

*“Dedication” is an exceptional and peculiar mode of passing title to an interest in land. Niemi v. Fredlund Tp., 867 N.W.2d 725, 2015 S.D. 62.*

*When road is deemed dedicated to public use and becomes public highway, public acquires easement on servient estate of landowner. Brown v. Board of County Com'rs for Pennington County, 1988, 422 N.W.2d 440.*

*Once right-of-way was deeded to public for use as roadway, overriding public interest in road mandated an express action or “lawful method” employed by public before such right-of-way could be divested.. Aasland v. Yankton County, 1979, 280 N.W.2d 666.*

#### ***Express or implied dedication***

*An easement may be dedicated to public use if the owner clearly acts to dedicate the easement and the public entity accepts the designation. Chicoine v. Davis, 903 N.W.2d 544, 2017 S.D. 62.*

*A dedication is implied where it arises by operation of law from the owner's conduct and the facts and circumstances of the case. Niemi v. Fredlund Tp., 867 N.W.2d 725, 2015 S.D. 62.*

*What amounts to a dedication by implication depends upon the facts of the particular case. Niemi v. Fredlund Tp., 867 N.W.2d 725, 2015 S.D. 62.*

*A dedication is express when the intent is manifested by oral or written words, and is implied when the intent must be gathered from the acts of the dedicator. Niemi v. Fredlund Tp., 867 N.W.2d 725, 2015 S.D. 62.*

#### ***Parties***

*The government must be joined to an action seeking to declare a road public. Chicoine v. Davis, 903 N.W.2d 544, 2017 S.D. 62.*

*Town was a necessary party to landowner's action seeking a permanent injunction barring neighbor from creating a nuisance by placing signs, stakes and ropes on the shoulder of road between their properties; landowner claimed the shoulder area had previously been dedicated to the public and therefore neighbor had no legal right to keep the general public from freely accessing that area, effect of injunctive relief would have been a dedication that would have obligated town to maintain the shoulder area at taxpayer expense, and court's holding that road had been dedicated to the public at some point in the past subjected town to an obligation for road's upkeep. J.K. Dean, Inc. v. KSD, Inc., 709 N.W.2d 22, 2005 S.D. 127.*

**Presumptions and burden of proof**

*Clear and convincing standard is the burden of proof to establish an implied common-law dedication. Niemi v. Fredlund Tp., 867 N.W.2d 725, 2015 S.D. 62.*

*Courts do not presume dedication, but rather the intent of the dedicator must demonstrate a positive and unmistakable intent to permanently abandon property for specific public use. Niemi v. Fredlund Tp., 867 N.W.2d 725, 2015 S.D. 62.*

**Sufficiency of evidence**

*Conclusion that road was "public highway" within meaning of statute deeming same to have been legally dedicated to public was supported by county commissioner's testimony and other evidence of county's responsibility for maintenance, repair and snow removal regarding that road. SDCL 31-3-1. Smith v. Sponheim, 1987, 399 N.W.2d 899.*

*Evidence in action instituted to compel township board to open section line highways between two sections in township, including evidence that section line highway had not been open, improved or traveled and that highway in middle of one section was legally located, but not including evidence that township had acted affirmatively to vacate or relocate section line on highway, was not sufficient to show vacation and relocation of section line highway. SDCL 31-3-1, 31-18-1. Thormodsgard v. Wayne Tp. Bd. of Sup'rs, 1981, 310 N.W.2d 157.*

*Evidence supported finding that actions of landowners and predecessors in interest expressed intent to dedicate road traversing property as public road, and that township accepted dedication, so as to establish that roadway was public road by operation of implied common-law dedication; original homesteader requested or acquiesced in township's maintenance of road, other predecessors in interest similarly acquiesced and allowed township to pay for and install cattle guard, female landowner's first husband requested road maintenance, after female landowner became record owner, she acquiesced in maintenance of road, township had maintained road at request of surrounding landowners for over 80 years, and public had used road to access dam, school, and adjacent properties for decades. Niemi v. Fredlund Tp., 867 N.W.2d 725, 2015 S.D. 62.*

*Evidence in property owners' action to enjoin county from entering upon and constructing county highway on their property supported trial court's finding that the road was in fact used by members of the public as public highway from 1902 until 1970 with no interference by owners or their predecessors in interest, other than an attempt by prior owner to keep out hunters. Taylor v. Pennington County, 1973, 87 S.D. 172, 204 N.W.2d 395.*

*In an action by the owners of a quarter section of land to prevent the apportioning of a strip of land thereon for use as a highway, evidence held to show the existence of a highway across such section, and a dedication by the ancestor of owners, and acceptance by the county board, and a continuous use thereof without objection for more than 30 years prior to the commencement of the present action. Hanson v. Lake View Tp., 1924, 47 S.D. 253, 197 N.W. 679.*

**Review**

*Trial court's determination limiting width of easement that had been established as dedicated for public use to the roadway surface, rather than 66 feet specified by statute for roads dedicated as a public highway, was not clearly erroneous; statute, enacted after easement was established, was not*

*retroactive, and there was no evidence that the county has accepted the easement as a public highway, maintained the road, spent any public funds on the road, or claimed any ownership or control of the road. SDCL 2-14-21, 31-3-1. Cleveland v. Tinaglia, 582 N.W.2d 720, 1998 S.D. 91, rehearing denied.*

#### **Opinions of Attorney General**

*Application of section to particular, lengthy fact situation, Opinion N. 79-9.*

*Use, work and repair not required to be done by government agency, Opinion No. 75-16.*

#### **Collateral References**

*Highways 2, 18-78.*

*39 Am Jur 2d, Highways, Streets, and Bridges, §§ 22-63, 130-149, 184, 185.*

*39A CJS, Highways §§ 3, 25-129.*

*Constitutionality and construction of statute relating to location or relocation of highways, 63 ALR 516.*

*Reversion of title upon vacation of public street or highway, 18 ALR 1008, 70 ALR 564.*

*Use of property by public as affecting acquisition of title by adverse possession, 56 ALR 3d 1182.*

*Vacation, discontinuance, or change of route of street or highway, necessity for adhering to statutory procedure prescribed for, 175 ALR 760.*

**31-3-12. Limitation of jurisdiction of township supervisors.** The board of township supervisors may not vacate or change any portion of the state trunk highway system, the county highway system or any highway within the corporate limits of any city or town.

**Source:** *SL 1935, ch 125, § 3; SDC 1939, § 28.0413; SL 1978, ch 219; 1984, ch 208, § 3.*

**31-3-44. Highways within extraterritorial area of municipality.** Any resolution and order of the township board of supervisors or the board of county commissioners to vacate, change or locate a highway within a township or within a county and within the extraterritorial area of a municipality as defined in §11-6-10 shall be subject to the approval of the governing board of the municipality exercising comprehensive planning and zoning powers within such extraterritorial area.

**Source:** *SL 1984, ch 208, § 1.*

#### **Commission Note**

*Section 4 of SL 1984, ch 208 read: "Notwithstanding any other provision of law, any resolution and any order of a board of county commissioners to vacate, change or locate a highway within such county and within the extraterritorial area of a municipality, as defined in § 11-6-10, shall be subject to the approval of the governing board of the municipality exercising comprehensive planning and zoning powers within such extraterritorial area."*

**31-3-6. Power of county commissioner and township supervisors to vacate, change or locate highway on petition – Contents of petition.** Upon receiving the petition of two or more voters of an organized civil township or of the number of voters equal to or greater than one percent of the ballots cast for the last gubernatorial election in the affected county, the board of supervisors of the township or the board of county commissioners where in the highway is located or is proposed to be located may, except as provided in §§31-3-12 and 31-3-44, vacate, change or locate any highway located or to be used within the township or county, if the public interest will be better served by the proposed vacating, changing or locating of the highway. The petition of the voters shall set forth the beginning, course and termination of the highway proposed to be located, changed or vacated, together with the names of the owners of the land through which the highway may pass.

**Source:** *SL 1935, ch 125, § 1; SDC 1939, § 28.0410; SL 1984, ch 208, § 2; 1985, ch 233, § 1.*

#### **Notes of Decisions/Attorney General Opinions:**

##### ***In general***



*To vacate or abandon a section line highway easement, the appropriate governing board must act affirmatively. Millard v. City of Sioux Falls, 589 N.W.2d 217, 1999 S.D. 18, rehearing denied.*

*A part of a section line highway not within the boundaries of a city is not within its jurisdiction, and can only be vacated by the county commissioners in accordance with Pol. Code, §§ 1594-1786. Lowe v. East Sioux Falls Quarry Co., 1910, 25 S.D. 393, 126 N.W. 609.*

**Due Process**

*Townships' vacation of portions of section-line highways were not quasi-judicial decisions, and therefore due process provisions of federal and state constitutions did not apply to administrative proceedings concerning vacation. State, Department of Game, Fish and Parks v. Troy Township, Day County, 900 N.W.2d 840, 2017 S.D. 50.*

**Prospective Application**

*When an administrative board decides to abandon a road or street because it has ceased to be useful to the public, it is acting prospectively. State, Department of Game, Fish and Parks v. Troy Township, Day County, 900 N.W.2d 840, 2017 S.D. 50.*

**Meeting Notice**

*Any violations of statutory notice provisions by townships did not prejudice Department of Game, Fish, and Parks in administrative proceedings concerning vacation of portions of section-line highways, where townships took no action on vacation petitions at special meetings for which notice was not published, and, although notices provided for subsequent meetings did not provide physical mailing addresses for places of meetings, they provided names of locations for which addresses were easily located in a phone book. State, Department of Game, Fish and Parks v. Troy Township, Day County, 900 N.W.2d 840, 2017 S.D. 50.*

**Public Interest**

*Township's decision to vacate portions of several section-line highways was arbitrary; statements made by chairman of township's board of supervisors strongly indicated that township's decision was based not on a determination that vacating the highway segments would have better served the public interest, but rather on a determination that doing so would have better prevented public access to a public resource. State, Department of Game, Fish and Parks v. Troy Township, Day County, 900 N.W.2d 840, 2017 S.D. 50.*

*Statute governing vacation of highways provided townships with discretion to weigh competing public interests and determine which was more important to particular community in determining whether to vacate a highway or portion of highway, and therefore did not preclude vacation that would have denied public access to a public resource. State, Department of Game, Fish and Parks v. Troy Township, Day County, 900 N.W.2d 840, 2017 S.D. 50.*

**Parties**

*United States Forest Service had interest relating to the subject of landowner's action, which appealed county commission's decision to deny request to maintain road providing access to landowner's home, and was so situated that the disposition of the action in its absence could impair its ability to protect that interest, as required for the United States to be indispensable party to the action; determination as to whether county failed to follow the proper procedure for granting easement to the United States in the right-of-way covering the road affected federal government's interest and determined its rights under the easement. Oyen v. Lawrence County Commission, 905 N.W.2d 304, 2017 S.D. 81.*

**Sufficiency of evidence**

*Evidence in action instituted to compel township board to open section line highways between two sections in township, including evidence that section line highway had not been open, improved or traveled and that highway in middle of one section was legally located, but not including evidence that township had acted affirmatively to vacate or relocate section line on highway, was not sufficient to show*

*vacation and relocation of section line highway. SDCL 31-3-1, 31-18-1. Thormodsgard v. Wayne Tp. Bd. of Sup'rs, 310 N.W.2d 157 (S.D. 1981).*

#### **Review**

*A township may vacate a highway provided certain criteria are met, e.g., that doing so would serve the public interest; such decisions are one of policy, and therefore are not quasi-judicial. Surat v. America Township, Brule County Board of Supervisors, 904 N.W.2d 61, 2017 S.D. 69.*

*Townships boards of supervisors' vacation of portions of section-line highways was not "quasi-judicial," and therefore court was precluded by separation of powers doctrine from reviewing boards' decisions de novo, but rather was limited to determining whether boards acted unreasonably, arbitrarily, or manifestly abused their discretion; question decided by the townships was whether the public interest would have been better served by vacating the highway segments, townships did not adjudicate existing rights of specific individuals, and decisions concerning whether to vacate highways were prospective. State, Department of Game, Fish and Parks v. Troy Township, Day County, 900 N.W.2d 840, 2017 S.D. 50.*

#### **Opinions of Attorney General**

*A Board of County Commissioners does not have the authority to vacate, locate or change a county secondary road apart from any procedures set forth in §§ 31-3-36 through 31-3-9, Opinion No. 89-17. The procedures required by § 31-3-6 are mandatory, and are not dispensable for the convenience of the commission or others wishing to change, vacate, or locate public highways, Opinion No. 89-17, 1989 WL 505671.*

**31-3-6.1. Exception – Access to public lands or public waters.** Notwithstanding any other provisions of this chapter, no county or township may vacate a highway which provides access to public lands or public waters embracing an area of not less than forty acres.

**Source:** *SL 1989, ch 253, §1. SL 2012, ch 154, § 1; SL 2018, ch 70, § 1.*

**31-3-7. Public hearing – Notice – Affirmative resolution of board – Order.** In case of the filing of a petition described in § 31-3-6, the board shall, after giving notice of a public hearing, hold a public hearing called for the purpose of receiving public testimony about the action proposed by the petition. The board shall give notice of the public hearing by publication in the official newspaper of said township, if any, otherwise in the nearest legal newspaper of said county, once each week for at least two consecutive weeks. The notice of the public hearing shall state the purpose, date, time and location of the hearing and a legal description of the location of the highway and the action proposed by the petition and how information, opinions and arguments may be presented by any person unable to attend the hearing. The board shall, by resolution, determine whether the public interest will be better served by such proposed vacating, changing or locating of the highway in question, and upon resolution in the affirmative, shall make its order that such highway be vacated, changed or located.

**Source:** *SDC 1939, § 28.0411; SL 1951, ch 138, § 1; SL 1985, ch 233, § 2.*

**31-3-30. Owner opposed to petition to set forth damages in writing--Determination by county commissioners.** At the meeting of the board of county commissioners at which the report of the committee appointed to examine such highway is presented, any person over whose land such highway passes and who is opposed to the petition shall set forth in writing that he or she is damaged by the location, change, or vacation of the highway and the amount of any damage. The board shall determine from the report and the evidence before the board the amount of damages sustained and whether the damages so assessed are greater than the utility of the proposed highway or change., If the board deems the highway of sufficient advantage to the public to warrant the paying of the damages assessed, the board shall declare the highway located, changed, or vacated and all damages declared assessed shall be paid by the county. However, if the board determines that the damages assessed are greater than the advantages of the proposed location, change, or vacation, it shall order the petition dismissed.

**Source:** *SL 1883, ch 112, § 59; CL 1887, § 1319; RPoIC 1903, § 1730; RC 1919, § 8542; SDC 1939, §*

28.0607; SL 2018, ch 168, § 3.

**Cross-References**

*Acquisition of land and materials for highway purposes, Chapter 31-19.*

**Notes of Decisions/Attorney General Opinions:**

***In general***

*Under Comp.Laws Dak. T. § 1208, requiring the viewers in a highway proceeding to make a report “at the next ensuing session” of the county commissioners, a petition for a highway may be acted on at an adjourned meeting of the board. Yankton County v. Klemisch, 1898, 11 S.D. 170, 76 N.W. 312.*

**31-3-23. Proceedings on short highway without usual number of petitioners – Payment of damages.**

Where such public highway proposed to be located is not more than one mile in length, the board of county commissioners shall in all things proceed as provided in §§ 31-3-22 to 31-3-37, inclusive, although the petition for such highway may be by but one or more petitioners and the board of county commissioners shall require the petitioner or petitioners for such highway to pay the damages assessed for the location thereof.

**Source:** *SL 1913, ch 235; 1915, ch 211, § 2; RC 1919, § 28.0602; SL 1919, ch333, § 14; SDC 1939, § 28.0602; SL 1951, ch 139, § 1.*

**Commission Note**

*Sections 31-3-22, 31-3-24 to 31-3-27, 31-3-29, 31-3-32 and 31-3-35, contained in the reference to §§ 31-3-22 to 31-3-37, inclusive, were repealed by SL 1985, ch 233, §§ 10 to 17, 20.*

**Opinions of Attorney General**

*County pays cost of location of highway when petition is signed by usual number of petitioners, Report 1919-20, p. 287.*

**31-3-36. Location by consent.** Public highways may be located without the appointment of viewers, provided the written consent of all owners of the land to be used for that purpose be first filed in the county auditor's office, and if it is shown to the satisfaction of the board of county commissioners that the purposed highway is of sufficient public importance to be opened and worked by the public, it shall make an order locating the same, from which time only shall it be regarded as a public highway.

**Source:** *SL 1883, ch 67, § 1; CL 1887, § 1219; RPoIC 1903, § 1624; RC 1919, § 8546; SDC 1939, § 28.0610.*

**Notes of Decisions/Attorney General Opinions:**

***In general***

*One contracting with the board of county commissioners in regard to the establishment by it of a highway is charged with notice of their powers and authority, and, unless they proceed as prescribed by law, their acts do not bind the county. Meek v. Meade County, 1899, 12 S.D. 162, 80 N.W. 182.*

**Actions**

*Under Comp. Laws, §§ 1189-1260, which provide for the laying out of highways by condemnation proceedings only in counties not having a civil township organization, and for compensation for the land taken, which must be determined by viewers only, after petition for the highway, and other statutory proceedings therefor, except in case all the owners of the land to be used file their written consent thereto in the office of the county auditor, a complaint in an action to recover damages for breach of a contract made by the county commissioners of a county not having a civil township organization, with a landowner, whereby they, as a part of the consideration for the land which they took for a road not located on a section or quarter-section line, agreed to fence the highway where it ran through plaintiff's land, which does not show the precedent statutory requisites to have been complied with, is demurrable on the ground that such contract is ultra vires. Meek v. Meade County, 1899, 12 S.D. 162, 80 N.W. 182.*

**Commission Note**

*Sections 31-3-15 and 31-3-16, contained in the reference to §§ 31-3-14 through 31-3-16, were repealed by SL 1985, ch 233, §§ 6,7.*

**31-3-37. Expenses of survey – Payment by person seeking location of highway.** If a survey of the highway mentioned in 31-3-36 is necessary, the board of county commissioners before ordering such survey shall require the persons asking for the location of such highway to pay the expenses of such survey.

**Source:** SL 1883, ch 67, §2; CL 1887, §1220; RpolC 1903, §1625; RC 1919, § 8547; SDC 1939, § 28.0611.

**Minimum and No Maintenance County Highways**

**31-12-46. Minimum maintenance roads established.** The board of county commissioners may designate any road on the county highway system as a minimum maintenance road if the board determines that the road or a segment of the road is used only occasionally or intermittently for passenger and commercial travel. The board shall identify the beginning and end points of the road designated as minimum maintenance. A minimum maintenance road may be maintained at a level less than the minimum standards for full maintenance roads, but shall be maintained at the level required to serve the occasional or intermittent traffic.

**Source:** SL 1997, ch 176, § 1.

**31-12-47. Posting notification of minimum maintenance road.** The board of county commissioners shall post signs on a minimum maintenance road to notify the motoring public that it is a minimum maintenance road and that the public travels on the road at its own risk. The signs shall be posted at the entry points to and at regular intervals along a minimum maintenance road. A properly posted sign shall be prima facie evidence that adequate notice of a minimum maintenance road has been given to the motoring public.

**Source:** SL 1997, ch 176, § 2.

**31-12-48. Designation of no maintenance highway--Removal of manmade obstruction.** The board of county commissioners may designate a highway as a no maintenance highway. The board shall, by resolution, identify the beginning and end point of the highway designated as no maintenance. The board does not have any responsibility or duty of care on a no maintenance highway, except upon knowledge of a manmade obstruction, to require removal or remediation of the manmade obstruction if needed, to maintain public access.

**Source:** SL 2018, ch 172, § 1.

**Cross-References**

*Change of county highway system – Order of Department of Transportation. § 31-12-2.*

**31-12-49. Posting of signs along no maintenance highway.** The board of county commissioners shall post signs on a no maintenance highway designated under § 31-12-48 to notify the public that it is a no maintenance highway and that no travel is advised, and that the public travels at its own risk. The signs shall be posted at each entry point and at regular intervals along a no maintenance highway. A properly posted sign is prima facie evidence that adequate notice of a no maintenance highway has been given to the public.

**Source:** SL 2018, ch 172, § 2.

**31-12-50. No maintenance highway open to public access--No duty to maintain or improve.** A no maintenance highway designated under § 31-12-48 is any highway that shall remain open to public access, but over which the board of county commissioners has no responsibility for maintenance or improvement.

**Source:** SL 2018, ch 172, § 3.

## **Approval of State Transportation Commission**

Approval of the Department of Transportation must be obtained before any change is made in a county highway system. (SDCL 31-12-2). Every section line road is considered public road mileage of the county. (AGR 1945-46, p. 38).

The department of transportation is the final authority in the changing or altering of a county highway system. In acting upon any highway resolution passed by a county board, the department may go into the merits of the resolution. The resolution is merely the procedure for requesting the consideration and jurisdiction of the department. Although the detailed procedure to invoke the jurisdiction of the Department is not set out by statute, the department requires a uniform procedural plan. (SDCL 31-12-2; AGR 1957-58, pp. 79-81).

Additionally, the department of transportation must prepare for the counties, a standard to govern the method of making surveys, plans and specifications for work upon the county highway systems. Likewise, a standard form for keeping records of the cost of construction and other necessary record forms must be furnished. The department must give advice regarding construction problems and render any reasonable service to aid the counties in the construction, maintenance, or repair of their county highway systems (SDCL 31-2-22). Note, that a change in the county highway system must follow the rules and regulation adopted by the department of transportation. See procedures p. 46.

**31-12-2. Change of county highway system – Order of Department of Transportation.** Except for minimum maintenance roads established pursuant to § 31-12-46, no county highway system may be changed, altered, or modified except by authority of and in accordance with a written executive order of the Department of Transportation. Any such change shall be shown on the map of the county highway system in an office designated by the board of county commissioners on such map in the Department of Transportation.

**Source:** SL 1919, ch 333, § 12; SDC 1939, § 28.0302; SL 1941, ch 129; SL 1997, ch 176, § 3; SL 2013, ch 130, § 1.

### ***Commission Note***

*The Code Commission has substituted “written executive order” in this section for “resolution” to reflect the transfer of the duty from an agency headed by a commission to an agency headed by an executive.*

### ***Cross-References***

*Vacation or change of location of highways, § 31-18-3.*

*County location proceedings—Highways to which applicable, § 31-3-19.*

### **Notes of Decisions/Attorney General Opinions:**

#### ***Liability of county***

*Although road whose construction and maintenance diverted water from another watershed resulting in flooding of farms was no longer a part of the county highway system when the flooding occurred after township had taken road over, county was not relieved from liability to landowners in view of finding that flood was contributed to and caused by county's maintenance of road which resulted in raising its grade which had not been altered when township took over road. SDC 1960 Supp. 28.0302. Heezen v. Aurora County, 1968, 83 S.D. 198, 157 N.W.2d 26.*

#### ***Section lines***

*Section line as depicted on originally approved subdivision plat was still in existence six years later when city annexed the subdivision, where there was no evidence of any county action to vacate section line, namely, a notation on the map of the county highway system in the county auditor's office and on the map in the Department of Transportation. Wildwood Ass'n v. Harley Taylor, Inc., 668 N.W.2d 296, 2003 S.D. 98.*

### **Review**

*In absence of a statute specifically authorizing an appeal to circuit court from an order of highway commission directing a removal of certain mileage of highway from county highway system, the statutes establishing a procedure for the conduct of appeal allowed by statute do not justify an appeal from such order. SDC 28.0302, 33.4201 et seq., 33.4201. Appeal of Hansen, 1947, 71 S.D. 542, 27 N.W.2d 245.*

### **Opinions of Attorney General**

*Cities have exclusive right to vacate, the former highway commission taken under this section, appeal of commission's order directing the removal of four miles of highway from the county was properly dismissed. Appeal of Hansen (1947) 71 SD 542, 27 NW 2d 245.*

**31-2-22. Advice at county's request on maintaining its highway system.** The department shall, at the request of any county, give advice regarding difficult construction questions, pass upon the feasibility of any plan of road construction, improvement, and repair, and in general render any reasonable service to aid the county in the construction, maintenance, or repair of its county highway system.

**Source:** SL 1919, ch 333, §22; SDC 1939, § 28.0208; SL 1953, ch 138; SL 1993, ch 217.

## **Private Roads**

No private road must be constructed or repaired by using or employing county highway equipment. (AGR 1953-54, pp. 51-52)

Any resident may petition the board of county commissioners on whether the county should contract with owners of private roads for the county to provide maintenance on private roads. If authorized by the commissioners, highway superintendents may enter into contracts for the maintenance of private roads at a per hour cost to the landowner which is not less than the county's total cost. No contract may be for more than six hours per year for any one person. If the board of commissioners agrees to maintain private roads, the board may establish a maximum number of hours or miles of road that the board will authorize. (SDCL §§ 31-11-41 through 31-11-45).

**31-11-41. Petition for county maintenance on private roads.** Any resident of a county may petition the board of county commissioners to hold a public hearing on whether the county should contract with owners of private roads within the county for the county to provide maintenance on private roads.

**Source:** SL 1994 ch 238 § 1.

**31-11-42. Hearing on petition for maintenance of private roads – Notice.** If the board of county commissioners receives a petition pursuant to § 31-11-41, the board shall schedule a public hearing to be held within thirty days of receipt of such petition. The board of county commissioners shall publish a notice of such hearing once a week for two successive weeks in the legal newspapers of the county.

**Source:** SL 1994, ch 238, § 2.

**31-11-43. Determination on maintenance contract for private roads – Cost of maintenance.** At a hearing held pursuant to § 31-11-42 and 31-11-44, the board of county commissioners shall take public testimony on the question of whether the county should contract with the owners of private roads within the county for the county to provide maintenance on such roads. If, after the hearing, the board determines that it is in the best interests of the residents of the county for the county to maintain private roads, the board may authorize the highway superintendent to enter into contracts for the maintenance of private roads by the county. The contract may not include a per hour cost of the maintenance which is less than the county's total cost for such maintenance. No contract may be for more than six hours of maintenance per year for any one person.

**Source:** SL 1994, ch 238, § 3.

**31-11-44. Annual hearing on maintenance continuation of private roads.** The board of county commissioners shall annually hold a public hearing on the continuance of the maintenance of private roads by the county. Such hearing shall be pursuant to § 31-11-42.

*Source: SL 1994, ch 238, § 4.*

**31-11-45. Maximum maintenance authorization on private roads.** If the board of county commissioners agrees to maintain private roads pursuant to §§ 31-11-41 to 31-11-44, inclusive, the board may establish a maximum number of hours of maintenance, or miles of road the board will authorize.

*Source: SL 1994, ch 238, § 4A.*

## **County Highways on State, County or City Boundary Lines**

If any portion of a county highway system lies on a state line, the Department of Transportation may confer with the authorities of the bordering state and agree to assign portions of that highway to the counties of the two states for construction and maintenance purposes (SDCL 31-17-1). A city and county may join together in constructing and contributing financially toward road construction so long as the work is done on the basis that each portion is each subdivision's specific project. (AFR 1951-52, pp. 320-321)

**31-17-1. County highway system on state line – Agreements for assignment of responsibility.** If any portion of a county highway system lies on a state line, the Department of Transportation may confer with the authorities of the bordering state and agree upon the assignment of portions of the highway to the counties of the two states for construction, repair, and maintenance.

*Source: SL 1919, ch 333, § 11; SDC 1939, § 28.0701; SL 2010, ch 145, § 105.*

## **Secondary Highways on Township Boundary Lines**

Secondary highways wholly within one county but located on organized township lines must be assigned to the townships as their respective board of supervisors may agree. In case of disagreement, the county commissioners assign these highways between the boards of supervisors in the case of organized civil townships (SDCL 31-17-5, 31-17-6). In case of disagreement between county boards, the Department of Transportation decides the matter after a hearing is held in one of the counties. (SDCL 31-17-3).

**31-17-3. Roads crossing county lines - Appeal to Transportation Commission on division of responsibility.** If boards of county commissioners fail to perform the duty prescribed by § 31-17-2, or in case of disagreement by such boards, an appeal may be made to the Transportation Commission by one of them. The commission shall notify the county auditors of the counties concerned that the commission will, on a day not less than ten days thereafter, at a named time and place within one of such counties, hold a hearing to determine all matters involved. At the hearing the commission shall fully investigate all questions involved, and shall, as soon as practicable, certify its decision to the different boards. The decision is final, and such boards shall comply.

*Source: SL 1925, ch 188; § 2; SDC 1939, § 28.0705; SL 2012, ch 145, § 107.*

### ***Cross-References***

*Contested cases, procedure before administrative agencies, §§1-26-16 to 1-26-37.*

**31-17-5. Secondary highway on county line - Assignment of responsibility.** The secondary highways on county lines shall be assigned to the charge of the boards of supervisors of organized civil townships or the board of county commissioners in the case of unorganized territory as may be agreed upon by the respective boards of county commissioners and in case of disagreement, as determined by the transportation commission.

*Source: PolC 1877, ch 29; § 32; CL 1887, § 1222; RPolC 1903, § 1627; RC 1919, § 8574; SDC 1939,*

§ 28.0703.

**Cross-References**

*Secondary highways on municipal boundaries—Assignment of responsibility, see § 31-17-16.*

**Opinions of Attorney General**

*Agreement between townships of different counties as to maintenance of a bridge not binding on counties, Report 1953-54, p. 15.*

*Counties not responsible for construction and maintenance of secondary road on county line, Report 1945-46, p. 41.*

*County not authorized to spend money on boundary line road unless part of county highway system, Report 1955-56, p. 153.*

**31-17-6. Secondary highways on township line - Assignment of responsibility.** The secondary highways wholly within one county on lines between organized townships shall be assigned to the charge of such townships as the respective boards of supervisors may agree, and in case of disagreement, as the board of county commissioners shall determine; and those on the line between organized civil townships and unorganized territory as the board of commissioners shall determine.

**Source:** *SL 1883, ch 112, § 47; CL 1887, § 1307; RPolC 1903, § 1718; SI 1909, ch 70; RC 1919, § 8573; SDC 1939, § 28.0702.*

**Cross-References**

*Highway on township line—Joint resolution, see § 31-3-13.*

*Township roads, see § 31-13-1 et seq.*

**Notes of Decisions/Attorney General Opinions:**

**Drainage ditches**

*Agreement between township supervisors pursuant to Pol. Code, §§ 1718-1720, dividing highway for purpose of repairs, held not to relieve one township from liability to assessment under Rev. Code 1919, § 8463, for drainage ditch constructed by board of county commissioners which incidentally benefited the highway. Appeal of Clear Lake Township (1925) 48 SD 170, 203 NW 207.*

**Connections Between Roads Crossing County Lines**

Subject to the approval of the Department, county boards of adjoining counties must make proper connections between roads which cross county lines and which afford continuous routes of travel. Adjoining counties may adopt plans and specs for any construction or repair upon county highways which cross their boundary lines and make an equitable division of the cost and work of the plans. The Transportation Commission will make the division if a disagreement occurs. (SDCL 31-17-2).

A county may not spend money on a road between two counties when the road is not a part of the county highway system. (AGR 1955-56, pp. 153-54)

**31-17-2. Roads crossing county lines –Division of responsibility.** Subject to approval of the Department, boards of county commissioners of adjoining counties shall make proper connections between roads which cross county lines and which afford continuous routes of travel; adopt plans and specifications for highway construction, reconstruction, and repairs upon highways along and across county boundary lines, and make an equitable division between such counties of the cost and work of execution of such plans and specifications. In case of disagreement on the division, the Transportation Commission shall make the division.

**Sources:** *SL 1925, ch 188, § 1; SDC 1939, § 28.0705; SL 2010, ch 145, § 106.*



## **Restriction on Use of County Highways**

Local authorities may, by ordinance or resolution, prohibit the operation of vehicles upon any highway under its jurisdiction or impose restrictions as to the weight of the vehicles that may use the highway. Action may be taken when the board determines that the highway, by reason of physical condition, rain, snow, or other climatic conditions, will be seriously damaged or destroyed. The ordinance or resolution is not valid, however, unless signs are erected at each end of the highway designating the provisions of the restrictions. The board may also prohibit, by ordinance or resolution, the operation of trucks or other commercial vehicles or impose limitation as to the weights of these vehicles on designated highways. The prohibitions and limitations must also be designated by signs placed on the highways. (SDCL 32-14-6, 32-14-7)

**32-14-6. Restrictions respecting weight of vehicle -- Duration of period of restriction -- Signs designating restricted area.** Local authorities, including road districts, may by ordinance or resolution prohibit the operation of vehicles upon any highway or impose restrictions as to the weight of vehicles allowed. Such prohibitions or restrictions apply only to vehicles to be operated upon any highway under the jurisdiction of and for the maintenance of which such local authorities are responsible and only if the highway by reason of physical condition, rain, snow, or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles on the highway is prohibited or the permissible weights of the vehicles are reduced. Any local authority enacting any such ordinance or resolution shall erect and maintain or cause to be erected and maintained signs designating the provisions of the ordinance or resolution at each end of that portion of any highway affected by the ordinance or resolution. The ordinance or resolution is not valid unless such signs are erected and maintained.

**Source:** *SL 1929, ch 251, § 42; SDC 1939, § 44.0343; SL 1999, ch 151, § 6; SL 2002, ch 158, § 3.*

### ***Cross-References***

*Reduced load maximums from February fifteenth to April thirtieth, extension of period, changing restrictions, overweight permits, violation as a misdemeanor, see § 32-22-24.*

*County Minimum Maintenance Roads, see § 31-12-46.*

*County No Maintenance Roads, see § 31-12-48.*

**32-14-7. Prohibiting trucks or commercial vehicles from use of designated highways -- Erection of signs.** Local authorities, including road districts, may by ordinance or resolution prohibit the operation of trucks or other commercial vehicles or impose limitations as to the weights of such vehicles on designated highways. The prohibitions and limitations shall be designated by appropriate signs placed on such highways.

**Source:** *SL 1929, ch 251, § 42; SDC 1939, § 44.0343; SL 1999, ch 151, § 7.*

### ***Cross-References***

*County road districts, powers of trustees, see § 31-12A-21.*

*Municipal designations of routes of travel for commercial vehicles, § 9-31-2.*

*Reduced load maximums from February fifteenth to April thirtieth, extension of period, changing restrictions, overweight permits, see § 32-22-24.*

## **Highway Railroad Crossings**

The expense of repairing, replacing and maintaining all railroad and highway crossings and all protection and safety devices is determined by the Department of Transportation on the basis of the proportionate benefit, if any derived by railway companies, and the benefit, if any, to the public authority at interest. (SDCL 31-27-5, 31-27-19.1)

**31-27-5. Expense of eliminating crossings.** The expense of eliminating railroad crossings shall be divided between the railroad company and the state or counties, as the case may be, on the basis of the benefits received by each party.

*Source: SL 1919, ch 333, § 62; SDC 1939, § 28.1102; SL 1980, ch 322, § 115.*

**31-27-19.1. Cost of repair and maintenance of railroad and highway crossings apportioned on basis of benefit.** The expense of repairing, replacing and maintaining all “railroad and highway crossings,” as defined by § 31-27-21, and all protection and safety devices shall be determined by the department of transportation on the basis of the proportion of benefit, if any, derived by railroad companies, and the benefit, if any, to the public authority at interest.

*Source: SL 1974, ch 206; 1975, ch 194; 1980, ch 322, § 119; 1984, ch 207, § 67.*

### **Authority to Designate Stop Intersections**

Certain county highways, or portions of them, may be designated by the county board as preferential or arterial highways and the traffic on them has the right of way. Outside the boundaries of a municipality the county commissioners have the authority to designate any hazardous intersection as a stop intersection and any railroad crossing as a stop crossing. (SDCL 31-28-16, 31-28-17)

**31-28-16. Arterial Highways-- Right-of-way -- Violation as misdemeanor.** The department and boards of county commissioners may designate certain state and county highways, or portions thereof, as preferential or arterial highways. The traffic upon any highway so designated shall have the right-of-way. Failure to comply with the provisions of this section is a Class 2 misdemeanor.

*Source: SL 1927, ch 136, §§ 1,3; SDC 1939, §§ 28.0902, 28.9904; SDCL, § 31-28-18; SL 1967, ch 114; SL 2010, ch 145, § 141.*

#### ***Cross-References***

*Duty to stop when sign posted, § 32-29-2.1*

*Penalties for classified misdemeanors, §22-6-2.*

**31-28-17. Hazardous intersections -- Railroad crossings -- Warning signs -- Violation as misdemeanor.** Except within the limits of a municipality, the department and county commissioners may designate any hazardous intersection as a stop intersection, and designate any railroad crossing as a stop crossing. The intersections and railroad crossings shall be designated by placing a stop sign at the point of stop. The sign to be preceded by a warning sign so as to give warning of stop. Failure to stop at the point of stop of such intersections and railroad crossings is a Class 2 misdemeanor.

*Source: SL 1927, ch 136, §§ 2,3; SDC 1939, §§ 28.0902, 28.9904 SDCL, § 31-28-18; SL 1967, ch 114; 1980, ch 211, § 2; SL 2010, ch 145, § 142.*

#### ***Cross-References***

*Power of Department of Transportation respecting railroad grade crossings, §31-27-1.*

*Crimes, penalties for classified misdemeanors, § 22-6-2.*

*Stops and precautions required at railroad crossings, see §§ 32-29-4 and 32-29-9.*

### **Access to Highway from Adjoining Property**

If in the construction or improvement of any highway under county jurisdiction, the owner of adjoining land is deprived of easy access to the highway, the county must provide the structures as may be necessary for easy access to the highway. The approaches must be kept in repair by the county. They may not be constructed upon private property nor beyond the right-of-way line. (SDCL 31-24-1, 31-24-2, 31-24-5)

One is not ordinarily entitled to more than one farm entrance at county expense on any tract or parcel of land. He may construct other approaches to the highway at his own expense with the written consent of the county board. (SDCL 31-24-3)

An owner of an isolated tract of land containing at least ten acres of land not touched by a passable public highway or smaller tract of land containing at least five acres of land used or intended to be used in whole or in part for residential purposes is entitled to an easement or right of way across adjacent lands to reach a public highway (SDCL 31-22-1). The application and details are acted upon by the county board. (SDCL 31-22-2)

**31-24-1. Duty of highway authorities to provide access to abutting property at public expense – New construction.** If the construction, improvement, and repair of any public highway by the state, or by any county or township, leaves a ditch or elevation along the roadside and deprives any abutting landowner of easy and convenient access from the owner's land to the highway, the highway authority, except as provided by chapters 31-7 and 31-8, shall provide the owner of the abutting tract or farm, as well as each church, school, park, playground, or other public building or ground, with one point of easy and convenient access to a public highway by constructing at the public expense, such grades, approaches, bridges, culverts, or other structures as may be necessary for that purpose. However, the provision authorizing construction of entrances at the expense of the authority having charge of the maintenance only applies to new construction.

**Source:** SL 1921, ch 250; SDC 1939, § 28.0908; SL 1941, ch 132; SL 2010, ch 145, § 113.

**Cross-References**

*Controlled-access facilities, Chapter 31-8.*  
*Interstate highway system, Chapter 31-7.*

**Opinions of Attorney General**

*Neither county nor state required to keep approach from highway to adjoining land free from snow, Report 1931-32, p. 452.*  
*Not liable for additional approaches if all approaches needed at the time of construction are provided, Report 1945-46, p. 397.*  
*Obligation to provide field approach on county highways, limitations on, Report 1963-63, p. 309.*  
*Township grading road along lake required to furnish convenient approach to road for each cottage situated on road, Report 1929-30, p. 198.*

**Collateral-References**

*Department role in access maintenance, S.D. Admin. R. 70:09:03:09.*

*Conversion of conventional road into limited-access highway, abutting owner's right to damages for limitation of access caused by, 42 ALR 3d 13.*

*Limited-access highway or street, abutting owner's right to damages or other relief for loss of access because of, 43 ALR 2d 1072.*

*Power to directly regulate or prohibit abutter's access to street or highway, 73 ALR 2d 652, 689.*

**31-24-2. Approaches necessitated by highway construction – Maintenance.** Approaches required by § 31-24-1 shall be built by the highway authority constructing the highway if the building of such approach becomes necessary as a result of highway construction. In all cases any such structure, culvert, bridge, or approach so constructed shall be maintained and kept in repair by the highway authorities who are charged with the maintenance of the highway.

**Source:** SL 1921, ch 250; SDC 1939, § 28.0908; SL 1941, ch 132; SL 2010, ch 145, § 114.

**Cross-references**

*Department role in access maintenance, see S.D. Admin. R. 70:09:03:09.*

**31-24-3. Limitation on number of farm entrances – Additional entrances at owner's expense.** The owner, as a matter of right, is not entitled under § 31-24-1 to the construction of more than one farm entrance on any one tract or parcel of land at the expense of the public authority whose duty it is to maintain the highway. However, the owner may at the owner's expense upon making application to and receiving written

consent of the authority construct other entrances if the entrances are constructed at the place and in the manner designated by the authority in its written permit.

**Source:** SL 1921, ch 250; SDC 1939, § 28.0908; SL 1941, ch 132; SL 2010, ch 145, § 115.

**31-24-5. Construction on private property prohibited.** No connecting structure or approach described by § 31-24-1 may be constructed by the highway authorities upon private property nor beyond the right-of-way line.

**Source:** SL 1921, ch 250; SDC 1939, § 28.0908; SL 1941, ch 132; SL 2010, ch 145, § 117.

**31-24-7. Interference with drainage--Obstruction of right-of-way.** No entrance may be so constructed pursuant to § 31-24-6 as to interfere with the proper and necessary drainage of the highway. No portion of the right-of-way of the highway other than that necessary for the entrance shall be occupied or used for business purposes.

**Source:** SDC 1939, § 28.0908 as added by SL 1941, ch 132; SL 2010, ch 145, § 119.

**31-24-9. Approaches to highway grade crossings--Failure to perform duty to provide--Petty offense.** Township supervisors, county commissioners, the Department of Transportation, or others having direction of any highway grade shall provide at every place where such grade crosses an intersecting public highway an easy and accessible approach to such grade on each side thereof upon each such intersecting public highway. The approach shall be at least twenty-four feet in width. Any officer or other person charged with the duty of providing approaches at an intersection, as provided in this section, who fails in the performance of the duty, commits a petty offense.

**Source:** SL 1919, ch 218, §§ 1, 2; SDC 1939, §§ 28.0909, 28.9907; SL 2010, ch 145, § 121.

**31-22-1. Right to access from isolated tract to highway.** Every owner of an isolated tract of land containing at least ten acres not touched by a passable public highway or smaller tract of land containing at least five acres used or intended to be used in good faith in whole or in part for residential purposes is entitled to an easement or right-of-way across adjacent lands to reach a public highway, which easement or right-of-way may be secured as provided in this chapter. An isolated tract is further defined as an area which is either inaccessible by motor vehicle because of natural barriers from all other land owned by the owner of the isolated tract or is such an area which is not touched by a passable public highway, which is in use or reasonably usable for motor vehicles. A tract of land adjoining a section line right-of-way for at least sixty-six feet is not an isolated tract if a passable road can be built within the adjoining section line to connect to a passable public highway.

**Source:** SL 1935, ch 179, § 1; SDC 1939, § 28.0801; SL 1955, ch 101; 1970, ch 161, SL 2004, ch 198, § 1.

**Notes of Decisions/Attorney General Opinions:**

***Nature of right of way***

*In determining whether county board of commissioners' grant of right-of-way to owner of isolated tract involves a right-of-way which is private or public in nature, controlling factor is not necessity or the fact of the use but the right to use the right-of-way. SDCL 31-22-1 et seq., 31-22-2. Frawley Ranches, Inc. v. Lasher, 1978, 270 N.W.2d 366.*

***Appraisers***

*In proceeding in which circuit court affirmed county board of commissioners' grant of right-of-way across ranch to isolated tract and award of compensation for land taken for right-of-way, court's decision to effect that both appraiser, who had visited ranch and inspected properties on all sides of it, and appraiser, who had ridden over the land and had used geological survey maps in appraising damages, were qualified to render opinion as to value of land taken was not clearly erroneous. SDCL 31-22-1 et seq. Frawley Ranches, Inc. v. Lasher, 1978, 270 N.W.2d 366.*

**Private roads**

*Right-of-way created under statutory provisions relating to right to access from isolated tract to highway is intended to be a public right-of-way open to all the world. SDCL 31-12-6, 31-12-19, 31-12-24, 31-22-4, 31-22-7, 31-22-8, 31-25-1 et seq. Frawley Ranches, Inc. v. Lasher, 1978, 270 N.W.2d 366.*

**Actions and proceedings**

*Where owner of isolated tract of land having no access to public highway brought action to compel County Commissioners to act upon his petition to lay out an easement or right of way to public highway and owner alleged that only feasible way was over land of specified third party, such third party had an interest in litigation sufficient to allow his intervention therein. SDC 28.0801-28.0804, 28.0807, 33.0102(1), 33.0413. Jackson v. Board of County Com'rs for Pennington County, 1957, 76 S.D. 495, 81 N.W.2d 686.*

**31-22-2. Inability to agree with servient landowner – Application to board of county commissioners – Contents of application – Notice to servient landowner – Contents of notice - Service of notice.** If the owner of such an isolated tract is unable to agree with the owner of surrounding lands for purchase of a right-of-way from such an isolated tracts of land to a public highway, he may apply to the board of county commissioners for relief, making his application in writing and describing the isolated tracts and the surrounding land over which a right-of-way is desired. The county commissioners shall thereupon cause to be served upon the owner or owners of such surrounding land a notice in writing of a time when such board will visit such land and lay out one right-of-way across such surrounding land, and assess the damages therefore, which notice shall be served at least five days prior to the date set for such visit and appraisal.

**Source:** SL 1935, CH 179, § 2; SDC 1939, § 28.0802.

**Notes of Decisions/Attorney General Opinions:**

**Due Process**

*Ranch owner had no cause for a complaint of lack of due process in regard to county board of commissioners' grant of right-of-way across ranch isolated tract, in light of fact that such owner was subsequently afforded full hearing in trial de novo before circuit court. SDCL 31-22-2, 31-22-3, 31-22-5. Frawley Ranches, Inc. v. Lasher, 1978, 270 N.W.2d 366.*

**Intervention**

*Where owner of isolated tract of land having no access to public highway brought action to compel County Commissioners to act upon his petition to lay out an easement or right of way to public highway and owner alleged that only feasible way was over land of specified third party, such third party had an interest in litigation sufficient to allow his intervention therein. Jackson v. Board of County Comrs., Pennington County (1957) 76 SD 495, 81 NW 2d 686.*

**Cattle Ways and Fences Across Highways**

A cattle way may be constructed across or under the jurisdiction of the county if application for it is approved by the county board. It must be constructed in the manner directed by the county and at the expense of the applicant. The grade of the road over the cattle way may not at any point exceed one foot in every ten feet. If the person on whose land the cattle way is constructed fails to keep it in good repair, the county may make any needed repairs and charge the cost to the landowner. (SDCL 31-25-2, 31-25-3)

The county board may, upon petition of a majority of the landowners along any unimproved county, township or section line highway extending across their grazing lands, authorize landowners to erect and maintain fences across such highways. It must hold a hearing on the question and require the auditor to notify all the landowners involved. Gates must be erected so that the public may have access to the highway. (SDCL 31-25-4)

**31-25-2. Cattle ways authorized – Application to highway authority – Designation of construction particulars – Maintenance by landowner.** Upon application to the department of transportation, board of county commissioners or board of township supervisors, by any person for permission to construct a cattle way across or under any public road, such highway authority maintaining the highway described in the application may in its discretion grant the application upon condition that such way shall be constructed in all particulars as directed by such department or board and shall not interfere with public travel. The grade of the road over the cattle way shall not at any point exceed one foot in ten feet. Applicant must construct and agree to keep the same in repair at his own expense.

*Source: SL 1911, ch 221, § 27; RC 1919, § 8570; SDC 1939, § 28.0910.*

**31-25-3. Failure of landowner to maintain cattle way -- Repair by highway authorities -- Recovery of cost.** If any person on whose land a cattle way is constructed pursuant to § 31-25-2 fails to keep the same in repair, the proper board shall cause the same to be repaired and charge the cost thereof to the owner of such cattle way and such cost shall be recovered by a civil action by the state, county, or township against the owner of such land and cattle way.

*Source: SL 1911, ch 221, § 28; RC 1919, § 8570; SDC 1939, § 28.0911.*

**31-25-4. Livestock guards across county or secondary highways authorized – Guards not considered highway obstruction.** The construction and maintenance of livestock guard over or across county or secondary highways so constructed that automobiles and trucks may pass over the same and which will prevent the passage of livestock across such livestock guards is hereby authorized. The construction and maintenance of such livestock guards shall not be considered as creating a barrier or obstruction on such highways.

*Source: SL 1953, ch 154, § 1; 1959, ch 140, § 1; SDC Supp 1960, § 28.0910-1.*

## **Weed Removal Along Highways**

**31-31-1. Weed removal on state or county roads.** The Department of Transportation and board of county commissioners of the various counties shall cut or remove, or cause to be cut or removed, grass, weeds, and brush growing within the right-of-way of all public highways within their respective jurisdiction and over which such department and boards exercise control as to repair and maintenance. A violation of this section is a petty offense.

*Source: SL 1939, ch 295, § 1; SDC Supp 1960, § 62.0201; SDCL, § 31-31-7; SL 1985, ch 15, § 37.*

**31-31-2. Weed removal on township roads--duty of abutting landowner.** The owner or occupant of any land abutting or adjoining upon township roads shall cut, remove, or destroy or cause to be cut, removed, or destroyed, grass, weeds, trees, and brush growing on or in the right-of-way of such roads, provided that such roads are left in such condition that any and all undergrowth thereby or thereon can be cut with a mower. A violation of this section is a petty offense.

*Source: SDC 1939, §§ 62.0201, 62.0202; SL 1939, ch 295, § 1; SDCL, § 31-31-7; SL 1992, ch 204, § 1.*

### **Notes of Decisions/Attorney General Opinions:**

#### **In general**

A township board may not divert part of its road maintenance or snow removal funds for weed control on private lands which are not within any township road right of way if it would be in the best interests of the township. Op.Atty.Gen. Opinion No. 90-05.

**31-31-3. Time for weed removal.** Grass, weeds, trees or brush referred to in §§ 31-31-1 and 31-31-2 shall be cut, removed, or destroyed between the first day of September and the first day of October of each year, or between dates annually fixed by the board of supervisors.

**Source:** SDC 1939, § 62.0201; SL 1939, ch 295, § 1; SL 1983, ch 228, § 1; SL 1992, ch 204, § 2.

## **Responsibility for Repairing Highways**

In case any highway, culvert or bridge is in need of repair to such an extent as to endanger the safety of public travel, the governing body responsible for maintenance shall have substantial safety guards erected over the defect or across the highway within forty-eight hours of the time the notice of the defect is received. Repair of the defective highway must be started within a reasonable time. (SDCL 31-32-10).

The county board has authority to use county highway funds for construction, improvement and maintenance of portions of the county highway system within the limits of municipalities. The municipality is not required to contribute to the support of the county highway within its boundaries. (AGR 1959-60, pp. 132-133).

Although a highway is highly beneficial to a county, the county board may not pay for the removal of poles on a right-of-way when such right-of-way is not part of the county highway system. (AGR 1955-56, p. 35-43).

**31-32-1. Intentionally damaging highway or bridge--Felony.** Every person who intentionally digs up, removes, displaces, breaks, or otherwise injures or destroys any public highway or bridge, or any private way laid out by authority of law, or bridge upon such way, is guilty of a Class 6 felony.

**Source:** PenC 1877, § 686; CL 1887, § 6875; RPenC 1903, § 704; RC 1919, § 4308; SDC 1939, § 13.4515.

**31-32-3.1. Intentional dumping on highway right-of-way prohibited--Violation as misdemeanor.** No person except as provided in § 31-32-3.2 may intentionally dump any load of any material or cargo on or within the highway right-of-way. A violation of this section is a Class 1 misdemeanor.

**Source:** SL 1987, ch 212, § 1.

**31-32-5. Placing barbed wire across traveled road without visible obstruction--Petty offense--Civil liability.** Any person who shall place a barbed wire fence across any traveled road, whether the same be or be not a public highway, without at the same time building an obstruction across said road outside of and not farther away from said fence than two rods, consisting of at least two boards or poles securely fastened to three upright posts, commits a petty offense and is liable to the person injured for all damages sustained.

**Source:** SL 1890, ch 131; RPenC 1903, § 484; RC 1919, § 3993; SDC 1939, § 13.1623.

**31-32-6. Duty to notify where bridge or highway is obstructed.** It shall be the duty of every person who so injures or obstructs any bridge or highway as to render the same unsafe immediately to put up a danger sign and use diligence to notify one or more of the members of the board or commissioners having jurisdiction or supervision over such bridge or highway of such injury or obstruction. A violation of this section is a petty offense.

**Source:** SL 1917, ch 258, §§ 1, 2; RC 1919, §§ 8587, 8588; SL 1919, ch 223; SDC 1939, §§ 28.0912, 28.9908; SDCL, § 31-32-8.

**31-32-7. Destruction, etc., of highway grade or ditch--Violation as misdemeanor.** No unauthorized person may injure any highway by removing, destroying, or otherwise altering the grade constructed for such highway or by filling, obstructing, or otherwise altering the ditch which drains the grade of such highway or otherwise injures such highway in any manner. A violation of this section is a Class 2 misdemeanor.

**Source:** SDC 1939, §§ 28.0912, 28.9908; SDCL, § 31-32-8; SL 1988, ch 235.

**31-32-8. Civil liability for violating § 31-32-3.1, 31-32-6, or 31-32-7—Attorney fees.** Any person violating the provisions of §31-32-3.1, 31-32-6, or 31-32-7, in addition to the judgments authorized by those sections, shall also be liable in a civil action to the township, county, municipality, or other public corporation to which the highway, highway right-of-way, or bridge belonged, in such amount as may be recovered against such township, county, municipality, or other public corporation, including a reasonable amount for attorney's fees, on account of the injury or obstruction referred to in § 31-32-3.1, 31-32-6, or 31-32-7.

**Source:** SL 1917, ch 258, § 2; RC 1919, § 8588; SDC 1939, § 28.9908; SL 2017, ch 126, § 1.

**31-32-9. Duty of governing body to remove obstructions or repair--Recovery of expense from wrongdoer--Temporary obstruction for building purposes.** The governing body or board having charge of any street, road, or highway shall cause rock, stone, glass, or other obstruction placed in the street, road, or highway, to be removed therefrom, or in the event that the same is flooded by irrigation water, the street, road, or highway shall be repaired. The municipality, township, county, or other public corporation is entitled to recover from any person placing the obstruction in the street, road, or highway, or allowing the water to flow upon the same, the amount necessarily expended in the removal or repair, including a reasonable amount for attorney's fees, and the action may be commenced in any court in the county having jurisdiction. This section does not apply to the placing of rock or stone in the streets, roads, or highways temporarily for building purposes.

**Source:** SDC 1939, § 28.0915; SL 1992, ch 60, § 2; SL 2017, ch 126, § 2.

**31-32-10. Duty of governing body to give notice of dangerous road—Time for notice—Guards-Guards along abandoned roadway – Violation as petty offense.** If any highway, culvert, or bridge is damaged by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of receiving notice of such danger, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and shall repair the damage or provide an alternative means of crossing within a reasonable time after receiving notice of danger. The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense.

**Source:** SDC 1939, §§ 28.0913, §§ 28.9910; SL 1951, ch 140; 1990, ch 227.

**Commission Note**

*The Code Commission classified the offense described in this section in accordance with the directions contained in § 43-6, ch 158, SL 1976.*

**Notes of Decisions/Attorney General Opinions:**

***In general***

*Under 1939 revision of statute imposing liability upon counties for damages resulting from defective highway or bridge, county's obligation is confined to specific duty to guard and repair damaged or destroyed highway. SDC 1960 Supp. 28.0913. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.*

*That county procured liability insurance did not create cause of action for wrongful death of decedent who was killed when he allegedly drove his automobile off unmarked, sharp curve on steep hill on county road where none existed in absence of insurance. SDC 1960 Supp. 12.0823, 28.0913. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.*

*What should be done by county to protect the public from injury occasioned by highways, culverts or bridges that are destroyed or out of repair is a question for the Legislature, and courts may only*



determine what duty in such respect the Legislature by statute has imposed on county. SDC Supp. 28.0913. *Lipp v. Corson County*, 1956, 76 S.D. 343, 78 N.W.2d 172.

Counties and townships, being quasi corporations and political subdivisions of the state exercising a part of sovereign power of the state, are not liable for injuries caused by defective highways in absence of statute imposing liability therefor. *Williams v. Wessington Tp.*, 1944, 70 S.D. 75, 14 N.W.2d 493.

### **Common law**

Duties of municipalities as to construction and maintenance of streets are governed solely by statute, rather than by common law; overruling , 70 S.D. 75, 14 N.W.2d 493, , 71 S.D. 35, 20 N.W.2d 873, , 71 S.D. 362, 24 N.W.2d 485, , 74 S.D. 194, 50 N.W.2d 360, , 74 S.D. 402, 53 N.W.2d 616, and , 77 S.D. 322, 91 N.W.2d 606. (Per Zinter, J., with one justice concurring and two justices concurring specially.) *Hohm v. City of Rapid City*, 753 N.W.2d 895, 2008 S.D. 65, rehearing denied.

At common law no right of action existed against county for recovery of damages resulting from defective highway or bridge, and source of liability for damages of that character is statutory. SDC 1960 Supp. 28.0913. *Dohrman v. Lawrence County*, 1966, 82 S.D. 207, 143 N.W.2d 865.

### **Notice of defective condition**

After township erects warning sign, either actual or constructive notice that sign was knocked down can impose duty on township to take additional steps to warn motorists of dangerous condition of road. SDCL 31-28-6, 31-32-10. *Fritz v. Howard Tp.*, 570 N.W.2d 240, 1997 S.D. 122.

What is a sufficient time to afford municipal corporation notice of defective condition in street or sidewalk so as to render it liable at common law for injuries resulting therefrom depends largely upon character of the defect and upon the circumstances. *Williams v. Wessington Tp.*, 1944, 70 S.D. 75, 14 N.W.2d 493.

Liability of township for injury resulting from defective condition in secondary road, being purely statutory, attaches only when township board has had notice of defect at least 24 hours before injury, and giving of instruction permitting recovery if township failed to take proper precautions to protect traveling public within a reasonable time, not more than 24 hours, after notice of defect from a washout, was reversible error. SDC 28.0913, 28.0401. *Williams v. Wessington Tp.*, 1944, 70 S.D. 75, 14 N.W.2d 493.

### **Standard of conduct**

Where statute making county liable for damage resulting from defective highway or bridge prescribed nature and extent of duty imposed on county, standard of care could not be predicated on principles of common-law negligence, and county's liability was determinable from standard of conduct imposed by statute and not standard of reasonably prudent person. SDC 1960 Supp. 28.0913. *Dohrman v. Lawrence County*, 1966, 82 S.D. 207, 143 N.W.2d 865.

### **Failure to install signs**

County did not assume township's statutory duty to maintain double-arrow sign on street when it agreed to maintain the township's roads, and thus, county was not liable to widow of passenger killed in accident when driver of vehicle failed to negotiate a "T" intersection at dead-end road; there was no evidence that county orally agreed to assume full control over township's road maintenance duties. *Foster-Naser v. Aurora County*, 874 N.W.2d 505, 2016 S.D. 6.

Township did not have a duty, under statute requiring a governing body to erect guards when a highway becomes damaged, to erect a sign warning of a sharp turn on township road, even though motorist, who was injured when his car failed to negotiate sharp turn, asserted that township removed a railroad-crossing sign and did not replace it with a sign warning of sharp turn; nothing showed that township road was damaged or in defective condition, and removed railroad-crossing sign would not have warned motorist that sharp turn was ahead. *Bickner v. Raymond Tp.*, 747 N.W.2d 668, 2008 S.D. 27.

Failure of governing board or body to install road sign in first instance does not give rise to cause of action under statutes imposing duty on governing body to warn public of roads out of repair and entitling

*parties injured by failure of such duty to bring suit against governing body. SDCL 31-32-10, 31-32-11. Kiel v. DeSmet Tp., 1976, 90 S.D. 492, 242 N.W.2d 153.*

*Failure to install adequate signs warning of danger incident to sharp curve or steep hill is not violation of duty to guard and repair damaged or destroyed highway within statute imposing liability on county for breach of such duty. SDC 1960 Supp. 28.0913. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.*

*Alleged failure of county to place warning signs on sharp curve of steep hill was at most negligence in construction, maintenance and design of highway and was not sufficient to constitute a nuisance imposing liability on county for death of decedent who drove his automobile off curve. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.*

*A county's failure to install adequate signs, warning of danger incident to sharp curve leading immediately to narrow approach to bridge, and to maintain as substantial guardrail as statute contemplates, did not render it liable for resulting injuries to passenger in automobile under statute imposing duty on county to guard and repair highway which is destroyed or out of repair, as such defects were inherent in design or plan of highway. SDC 28.0913, 28.1412. Reaney v. Union County, 1943, 69 S.D. 392, 10 N.W.2d 762, adhered to on rehearing 69 S.D. 488, 12 N.W.2d*

#### **Destruction of signs**

*Statute, imposing duty on township supervisors to erect substantial safeguards for public where roads become out of repair, contemplates that highway can become out of repair by reason of destruction of the existing road signs; overruling Jensen v. Hutchinson County, 84 S.D. 60, 166 N.W.2d 827. SDCL 31-32-10. Kiel v. DeSmet Tp., 1976, 90 S.D. 492, 242 N.W.2d 153.*

#### **Design or construction of road**

*Statute imposing duty on governing body or board to warn of danger and make reasonably timely repairs upon notice that damaged roadway is creating safety hazard creates no duty to design or construct road safely in first place. SDCL 31-32-10. Wilson v. Hogan, 1991, 473 N.W.2d 492.*

*Statute imposing duty to protect public from highway defects does not impose liability for inherent defects in design or plan of public highway. SDCL 31-32-10. Zens v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 1986, 386 N.W.2d 475.*

#### **Substantial guards**

*Statute imposing upon county, where highways, culverts or bridges are destroyed or out of repair, the duty to erect "substantial" guards over such defects, or across such highway of sufficient height, width and strength to guard the public from accident or injury, used quoted word as meaning having good substance, strong, stout, solid, firm, and statute does not require the use of flares or other illuminating devices in connection with such guards. SDC Supp. 28.0913. Lipp v. Corson County, 1956, 76 S.D. 343, 78 N.W.2d 172.*

*Language of statute imposing upon county, where highways, culverts or bridges are destroyed or out of repair, the duty to erect substantial guards over such defects or across such highway, was so plain and unambiguous as to afford no basis for exercise of judicial powers of statutory construction. SDC Supp. 28.0913. Lipp v. Corson County, 1956, 76 S.D. 343, 78 N.W.2d 172.*

#### **Liability**

*Supreme Court's decision holding that duties of municipalities as to construction and maintenance of streets are governed solely by statute, rather than by common law, established a new principle of law that was not clearly foreshadowed, and thus would apply prospectively only. Hohm v. City of Rapid City, 753 N.W.2d 895, 2008 S.D. 65, rehearing denied.*

*The lapse of time, the independent statutory duty of the township to erect guards and maintain appropriate signs warning of washouts, and the affirmative performance of that duty in an allegedly*

*negligent manner were superseding causes that relieved farmers of their liability for their alleged negligence in breaking the sign warning of the washout, and thus the liability for a motorist's injuries, sustained when he failed to see the sign and drove into the washed out area, shifted to the township. SDCL 31-32-10. Braun v. New Hope Tp., 646 N.W.2d 737, 2002 S.D. 67.*

*State Secretary of Transportation and Director of Highways was not charged with ministerial duty under statute which provides that governing body responsible for maintenance of highway must erect guards over area of highway damaged by "flood, fire, or other cause" within 48 hours of receiving notice of damage, and thus was protected by doctrine of sovereign immunity from suit by motorist injured when her automobile dropped into hole in highway bridge, where hole was caused by ongoing repair work. SDCL 31-32-10. Hansen v. South Dakota Dept. of Transp., 584 N.W.2d 881, 1998 S.D. 109.*

*Statute imposing duty upon public entity to protect public from highway defects did not impose liability for failure to install adequate signs warning of highway dangers or failure to install adequate guardrails, but, once highway warning sign is installed, and warning sign is absent from its designated location, it is question for trier of fact whether absence of sign caused road to become out of repair. SDCL 31-32-10. Zens v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 1986, 386 N.W.2d 475.*

*The duty of county to protect the public from injury occasioned by highways, culverts or bridges that are destroyed or out of repair is a statutory duty, not imposed by doctrine of rules of common-law negligence, and hence the liability of county is determined by applying the standard of conduct imposed by statute rather than the standard of conduct of a reasonably prudent person. SDC Supp. 28.0913. Lipp v. Corson County, 1956, 76 S.D. 343, 78 N.W.2d 172.*

*Cities and towns are generally held liable for injuries sustained in consequence of failure to use due care to keep their streets in a reasonably safe condition for public travel. Williams v. Wessington Tp., 1944, 70 S.D. 75, 14 N.W.2d 493.*

*A county's statutory liability for injuries sustained because of its neglect of broad general statutory duty to maintain reasonably safe highways and specific duty to guard and repair damaged or destroyed highways was abridged by statutory revision eliminating such general duty and retaining only specific duty. SDC 28.0913; Laws 1939, c. 226. Reaney v. Union County, 1943, 69 S.D. 392, 10 N.W.2d 762, adhered to on rehearing 69 S.D. 488, 12 N.W.2d 14.*

#### **Admissibility of evidence**

*In action against county for injuries sustained by truck passenger allegedly as a result of failure of county to erect a sufficient guard across highway on which a bridge was being repaired by county, standard specifications for roads and bridges issued by State Highway Commission, applicable only to contractors performing highway work for state pursuant to plans and specifications, were properly stricken, in absence of showing that such standard specifications were adopted pursuant to statute. SDC 28.0207, 28.0306; SDC Supp. 28.0913. Lipp v. Corson County, 1956, 76 S.D. 343, 78 N.W.2d 172.*

#### **Questions for jury**

*In action against county for injuries sustained by truck passenger in collision at night with caterpillar crawler tractor being used in repairing a bridge on county highway, whether barricade erected across highway at nearby intersection satisfied statutory requirement that county erect a substantial guard across highway was a question for jury under the evidence, though no flares or other illuminating devices were provided. SDC Supp. 28.0913. Lipp v. Corson County, 1956, 76 S.D. 343, 78 N.W.2d 172.*

**31-32-12. Bridges over ditches and canals excepted from notice requirements.** Nothing contained in § 31-32-10 or 31-32-11 shall be construed as imposing any liability upon the county for any injury sustained by reason of any violation of § 46-8-16 relating to bridges over ditches and canals.

**Source:** SDC 1939, § 28.0913 as added by SL 1951, ch 140.

**31-32-16. Objects likely to fall on highway as public nuisance.** Any tree, structure, or other object, that, because of its location and because of its age, infirmity, angle of stance, or other condition, is likely to fall, in whole or in part, upon any public highway within the State of South Dakota, so that any person using the highway at the time of the fall might be injured thereby, is a public nuisance against which the remedies prescribed by § 21-10-5 may be employed.

**Source:** SL 1945, ch 123, § 1; SDC Supp 1960, § 28.0917; SL 2010, ch 145, § 178.

**Notes of Decisions/Attorney General Opinions:**

**Abatement**

*The Board of County Commissioners in bringing action for removal of telephone lines from county highways as a nuisance was without authority to obtain such relief with respect to lines along state highways, since state highway system is under supervision of State Highway Commission. Laws 1945, c. 123; SDC 28.0201 et seq. Board of County Com'rs of Davison County v. Althen, 1949, 73 S.D. 112, 39 N.W.2d 520.*

*Where telephone lines were in a dilapidated condition, constituted a menace to travel on the public highways and were no longer a part of a functioning telephone system, they did not constitute a public utility within primary jurisdiction of Public Utilities Commission, and Circuit Court had jurisdiction to direct removal of telephone lines from public highways as a nuisance. Laws 1945, c. 123; SDC 52.0202, 52.0502. Board of County Com'rs of Davison County v. Althen, 1949, 73 S.D. 112, 39 N.W.2d 520.*

**Review**

*Defendant owner of telephone lines who took appeal to Circuit Court from decision of Board of County Commissioners directing removal of telephone lines as a nuisance without raising jurisdictional objections could not on appeal to Supreme Court question jurisdiction of Circuit Court to order removal of telephone lines as a nuisance, particularly in view of court's authority to abate nuisances upon public highways. Laws 1945, c. 123. Board of County Com'rs of Davison County v. Althen, 1949, 73 S.D. 112, 39 N.W.2d 520.*

**31-32-17. Negotiation with owner for abatement of nuisance.** If it appears to the satisfaction of any department, board, or governing body charged with the duty of the maintenance of any highway in this state, that a nuisance as defined by § 31-32-16 exists along any highway in respect to which highway the department, board, or governing body has the duty of maintaining, the department, board, or governing body shall negotiate with the owner of the property on which the nuisance exists for the voluntary abatement of the nuisance.

**Source:** SL 1945, ch 123, § 2; SDC Supp 1960, § 28.0917; SL 2010, ch 145, § 179.

**31-32-18. Failure of owner to abate nuisance--Civil action--Cost charged against owner.** If the owner of the property referred to in § 31-32-17 or of the nuisance refuses or fails to voluntarily abate the nuisance within a reasonable time, the department, board, or governing body, shall bring a civil action on behalf of the public, in the proper court, to abate the nuisance. If abatement is ordered in the suit, the cost of the action shall be charged against the owner of the land on which the nuisance was maintained and against whom the action in abatement was brought.

**Source:** SL 1945, ch 123, § 2; SDC Supp 1960, § 28.0917; SL 2010, ch 145, § 180.

**Snow Removal**

The county board may, at its discretion, establish a county snow removal reserve fund by the Levy of a tax not to exceed one dollar and twenty cents per thousand dollars of taxable valuation. The fund must be used for snow removal operations on county roads or to repair damages to county roads and bridges caused directly by melting snow. As to the necessity, need and emergencies for snow removal operations and repairs, the county and the

county highway superintendents are the sole judges. Unexpended funds at the end of any fiscal year are allowed to accumulate as a reserve fund. No part of the fund may revert to any county general fund nor shall the fund be used for any other purpose (SDCL 34-5-2 to 34-5-4, 34-5-7). It was the opinion of the attorney general that a county is not subject to a recovery of damages for failure to remove snow from its highways. (AGR 1947-48, pp. 233-234)

The county snow removal reserve fund is earmarked and authorized for special purposes, namely, (1) snow removal operations on county roads; (2) repair of damages to county roads and bridges directly resulting from or caused by melting snow; and (3) purchase of equipment for snow removal and repairs and other specifically named purposes. The intent is to accumulate a continuous and sufficient fund in the counties so as to permit in any year the efficient and immediate snow removal on county roads, for repairs on them caused by melting snow, and the purchase of equipment for snow removal and repairs. (SDCL 34-5-3, 31-13-23)

**Notes of Decisions/Attorney General Opinions:**

*Instead of imposing a special levy for snow removal purposes which must be certified to the county auditor, the township supervisors may pay the expenses of snow removal from the general fund. (SDCL 31-13-22, 31-13-23; AGR 1957-58, pp. 74-75)*

*The snow removal fund is a special fund established for a specialized purpose. The fund is "earmarked" for the purposes outlined by statute. There is no authority to transfer monies from the fund to another fund. (AGR 1957-58, p. 156)*

*Money from the county snow removal fund may not be used in conjunction with regular highway funds in purchasing highway equipment which will be used partially for snow removal. The purpose of the snow removal fund is specific and is only for snow removal operations. (AGR 1959-60, p. 191)*

*The board of township supervisors may establish a township snow removal reserve fund by the levy of a tax up to but not exceeding sixty cents per thousand dollars of taxable valuation within the township, and which levy hereby authorized shall be in addition to all other township tax levies.*

*The costs of snow removal from secondary roads may not be charged to the county snow removal fund since the expenditures from such funds are limited to county roads. (SDCCL 34-5-3; AGR 1959-60, pp. 260-261)*

The board of township supervisors is authorized to contract for the removal of snow, to repair damages to township roads resulting from or caused by melting snow and to purchase equipment for the removal of snow or repair the roads (SDCL 31-13-26). Contracts pursuant to SDCL 31-13-26 are authorized without advertising for bids if the total cost in a winter's season will not exceed thirty-five hundred dollars. If the cost will be less than thirty-five hundred dollars, the township supervisors may make contracts with any person, firm or corporation, including any county, for the removal of snow on its roads, or repair of such roads damaged from or caused by melting snow, either at an hourly or day rate. If it is anticipated that the cost in any one winter would exceed that sum, the snow removal or road repair shall be done by bids as provided by law. In case of such road damage, the work may be undertaken on bids as above specified or upon an hourly or day rate for such work. (SDCL 31-13-27)

**34-5-2. County levy for snow removal and special emergency reserve fund – Collection of levy.** The board of county commissioners may establish a county snow removal and special emergency reserve fund by the levy of a tax up to but not exceeding one dollar and twenty cents per thousand dollars of taxable evaluation within the county. The tax levy authorized by this section is in addition to all other county tax levies. All money collected and received under the provisions of this tax levy shall be remitted at the times and in the manner required by the laws of this state relating to counties.

**Source:** SL 1953, ch 32, §§ 1,5; SDC Supp 1960, § 12.0617-7; SL 1967, ch 15, § 1; 1989, ch 87, § 15A.

**Cross-references**

*State and local property tax levies in addition to limit, see § 31-13-22, et seq.*

*Township snow removal reserve fund, see § 31-13-22 et seq.*  
*Unanticipated disasters, supplemental county budget, see §7-21-21.*

**34-5-4. Determination of necessity for snow removal – Emergency and disaster declared by Governor or county commission.** The board of county commissioners with the county highway superintendent shall be the sole judges as to the necessity, need, and emergencies for snow removal operations and repairs, and shall exercise full discretion with decisions relative thereto. To expend money from said fund as otherwise provided in § 34-5-3, the Governor or the board of county commissioners by a resolution duly adopted must declare that a time of emergency and disaster exists.

**Source:** SL 1953, ch 32, § 3; SDC Supp 1960, § 12.0617-9; SL 1967, ch 15, § 3.

**34-5-7. Accumulation of unexpected balances in fund – Diversion for other purposes prohibited.** Any unexpended balance remaining in the county snow removal and special emergency fund at the end of the fiscal year shall be allowed to accumulate as a reserve fund and available for future use as set forth in § 34-5-3. No part of the fund created under §34-5-2 shall revert to the general funds of the county nor shall any of said fund be used for any other purposes.

**Source:** SL 1953, ch 32, § 4; SDC Supp 1960, § 12.0617-7; SL 1967, ch 15, § 1.

**34-5-3. Purposes for which reserve fund used.** The county snow removal and special emergency reserve fund after the creation thereof shall be used for the following purposes only:

- (1) Snow removal operations on county roads;
- (2) Repair of damages to county roads and bridges directly resulting from or caused only by melting snow;
- (3) Purchase of equipment for such snow removal and repairs thereof;
- (4) Purchase of snow fencing to prevent accumulation of snow;
- (5) To mow and remove grass and weeds along the highway to prevent the accumulation of snow;
- (6) To meet emergency requirements for the public health and safety in the time of disaster and emergency when such requirements may not be made by general or other special appropriations;
- (7) To repay emergency aid grants from the state emergency fund under such conditions as may be provided by law.

**Source:** SL 1953, ch 32, § 2; 1957, ch 30; SDC Supp 1960, § 12.0617-8; SI 1964, ch 23; 1967, ch 15, § 2.

#### **Cross-References**

*Special emergency and disaster revenue fund, disbursements, see §34-48A-28.*

**31-13-23. Intent of snow removal reserve fund law.** The intent of §§ 31-13-22 to 31-13-28, inclusive, is for the accumulation and continuation of a sufficient fund for the use of the respective townships so as to permit and make possible in any year the efficient and immediate snow removal on township roads and for repairs thereon caused by melting snow.

**Source:** SL 1953, ch 480, § 5; SDC Supp 1960, § 58.0515.

**31-13-22. Township snow removal reserve fund – Tax levy.** The board of township supervisors may establish a township snow removal reserve fund by the levy of a tax up to but not exceeding sixty cents per thousand dollars of taxable valuation within the township, and which levy hereby authorized shall be in addition to all other township tax levies.

**Source:** SL 1953, ch 480, § 1; SDC Supp 1960, § 58.0511; SL 1989, ch 87, § 15P

#### **Cross-References**

*County snow removal and special emergency reserve fund, §§ 34-5-1 to 34-5-7.*  
*Maximum rate of township levy, § 10-12-28.*

### **Opinions of Attorney General**

*General fund of township may be used for expenses of snow removal, Report 1957-58, p. 74. Limit of tax levy for snow removal fund, Report 1955-56, p. 381.*

**31-13-26. Contract for snow removal and repair of damages.** After establishment of a township snow removal reserve fund, the board of township supervisors is hereby authorized to contract for the removal of snow on township roads, to purchase equipment for the removal of snow or repair the same, and to repair damages to township roads resulting from or caused by melting snow.

**Source:** *SL 1955, ch 427; SDC Supp 1960, § 58.0512; SL 1969, ch 278, § 1.*

### **Cross-References**

*Performance bonds on highway contracts, Chapter 31-23.*

**31-13-27. Snow removal contracts with or without advertising.** Contracts pursuant to § 31-13-26 are authorized without advertising for bids if the total cost in a winter's season will not exceed thirty-five hundred dollars. If the cost will be less than thirty-five hundred dollars, the township supervisors may make contracts with any person, firm or corporation, including any county, for the removal of snow on its roads, or repair of such roads damaged from or caused by melting snow, either at an hourly or day rate. If it is anticipated that the cost in any one winter would exceed that sum, the snow removal or road repair shall be done by bids as provided by law. In case of such road damage, the work may be undertaken on bids as above specified, or upon an hourly or day rate for such work.

**Source:** *SL 1955, ch 427; SDC Supp 1960, § 58.0512; SL 1969, ch 278, § 1; 1982, ch 223, § 1.*

### **Cross-References**

*Township contracts and purchases, Chapter 8-9.*

## **Maintenance of Streets in a Municipality**

When requested by the governing board of a municipality within the boundaries of the county, the county board may contract the municipality for county maintenance of its municipal streets or alleys. The cost of the maintenance of its municipal work is estimated by the county highway superintendent and charged to the municipality. (SDCL 31-12-41).

The county commissioners have authority to use county highway funds for construction, improvement or maintenance of portions of the county highway system within the limits of municipalities. In this instance the municipality is not required to contribute to the support of the county highway within its boundaries. (AGR 1959-60, pp. 132-133).

**31-12-41. Contracts for county maintenance of streets and alleys in municipalities.** Counties are authorized to contract with municipalities within their respective boundaries for the maintenance of public streets and alleys or any portion thereof within said municipalities. Whenever it shall be made to appear to the board of county commissioners of any county by a resolution of any municipality within the county, duly adopted, copy of which resolution shall be filed in the office of the county auditor of the county of which such municipality is located that it will be to the best interests of such municipality and in the public interest that the municipality enter into an agreement in writing with the board of county commissioner of such county for the maintenance of any public street or alley or any portion thereof, the board of county commissioners may, in its discretion, enter into an agreement in writing with the governing body of such municipality to maintain any such street or alley, to be specifically designated, at and for a price to be paid to the county to be expressed in the agreement for such maintenance. If it shall appear to the board of county commissioners that it will be to the public interest to enter into such an agreement, it shall be lawful for it so to do, and such county, by and through its highway department and with the personnel and equipment thereof, perform, or cause to be performed, for such municipality such maintenance specified in said agreement and such maintenance to be done under the supervision and control of the county highway superintendent. The prices specified in said

contract shall be paid to the said county by the municipality upon estimates certified to by the county highway superintendent in the same manner as other obligations of the municipality are paid.

**Source:** *SL 1945, ch 120, § 1; SDC Supp 1960, § 12.1809.*

## **Drainage of County Highways**

Whenever any person who has charge of a road which is under the jurisdiction of the county notifies the county board that a drainage ditch needs to be constructed to protect the road, it is the duty of the board chairman to notify the owners of the land involved that the board will, from six to sixty days from the issuance of the notice, meet at the site of the proposed drainage ditch to determine whether it should be constructed, and the amount of damages due to the landowners if the drainage ditch is constructed. If the owner of the land in question does not reside thereon, the publication of the notice for two successive weeks in a county newspaper is sufficient notice.

At the time specified in the notice, the county board meets at the proposed drainage ditch site to carefully examine it and to hear any reasons for or against the laying out of the drainage ditch. If it is decided that the ditch should be constructed, it must assess the amount of damages which in its judgment will be equitable compensation to the owner of any land through which the ditch must run. The ditch is laid out upon the line that the owner of the land desires whenever it can be done without extra cost. A written statement of its action must be filed with the auditor. The decision becomes final if not appealed within ten days after the filing. Appeal is made in the same manner as from other decisions of the board. (SDCL 31-21-5 to 31-21-10)

**31-21-1. Affidavit that ditch should be opened – Contents of affidavit – Notice of meeting of board of county commissioners – Examination of premises.** Whenever any officer or person having charge of any road shall file with the chairman of the township board of supervisors or board of county commissioners having jurisdiction of such road, his affidavit stating:

- (1) that such road runs into or through any swamp, bog, or meadow, or other lowland,
- (2) that it is necessary or expedient that a ditch should be opened through land belonging to any person,
- (3) the probable length of such ditch and the width and the depth of the same as near as possible, the point at which it is to commence, its general course, and the point near which it is to terminate,
- (4) the names of persons owning the land, if known,
- (5) a description of the land over which such ditch must pass, and
- (6) that the road at that point cannot be made passable without extraordinary expense unless such ditch is laid out and opened; it shall be the duty of the chairman of such board immediately to make out a notice and fix therein a time not less than six nor more than sixty days from the date thereof when the board of supervisors or board of county commissioners will meet at the place described in such affidavit and personally examine the premises.

**Source:** *SL 1883, ch 112, § 87; CL 1887, §1335; RPoC 1903, § 1740; RC 1919, § 8598; SDC 1939, § 28.1201.*

### **Notes of Decisions/Attorney General Opinions:**

#### ***Injunctions***

*In a suit for injunction against threatened injury to a landowner from a ditch on a state highway, evidence held to show that plaintiff was not only not injured, but was not in danger of any injury, by reason of the ditch or a culvert placed therein, so that defendants were not required to take proceedings under Rev. Code 1919, §§ 8598-8604, to drain an adjoining basin from which plaintiff claimed water would flow through the ditch onto his land. Schmidt v. Norbeck (1922) 45 SD 557, 189 NW 524.*

#### ***Review***

*In considering the sufficiency of evidence on which state highway officers were restrained from constructing a drain in connection with a highway, the appellate court will disregard the effect of the circuit judge's inspection of the premises made before granting the injunction, since the law has made no*



*provision for or provided any method by which the result of such injunction can be reviewed. Schmidt v. Norbeck, 1922, 45 S.D. 557, 189 N.W. 524*

**31-21-4. Return of service – Nonresident landowners – Publication of notice – Posting of notice – Time of publication or posting.** The person serving notice pursuant to § 31-21-3 shall make return thereon to the township clerk or county auditor stating the facts, and if it shall appear from such return that the owner of any such land does not reside in the county and that no occupant resides thereon, such clerk or auditor shall order the publication of the notice once each week for at least two successive weeks in a newspaper printed and published in the county, or if there be no paper printed and published in the county he shall post or cause the notice to be posted in three of the most public places in the county for three weeks prior to the meeting of the township supervisors or county commissioners, and such publication shall be considered as sufficient notice to all parties.

*Source: SL 1883, ch 112, § 88; CL 1887, § 1336; RPoIC 1903, § 1741; RC1919, § 8599; SDC 1939, § 28.1202; SL 1972, ch 236, § 2.*

**31-21-5. Examination of land – Hearing reasons for and against ditch – Decision – Assessment of damages in favor of landowner.** At the time specified in the notice required by § 31-21-1 the township supervisors or county commissioners shall proceed to examine the road and premises over which such ditch must pass and hear any reasons for or against laying out the same, and shall decide upon the application as they deem proper, and shall assess the amount of damages which in their judgment will be an equitable compensation to the owner of any land for the opening of such ditch through his land.

*Source: SL 1883, ch 112, § 89; CL 1887, § 1337; RPoIC 1903, § 1742; RC 1919, § 8600; SDC 1939, § 28.1203.*

#### **Cross-References**

*Acquisition of land and materials for highway purposes, Chapter 31-19.*

**31-21-10. Failure to appeal - Time decision becomes final - Opening of ditch - Landowner's instructions as to line of ditch.** If the order and proceeding under this chapter be not appealed from within ten days from the filing thereof as provided in § 31-21-7, such judgment, order, and finding shall be final, and the officer or person in charge of such road may proceed to open the ditch in accordance with the directions and under the instructions of the board of township supervisors or county commissioners, as the case may be. Any such ditch shall be laid out upon the line that the owner of the land over which it is to pass may desire whenever it can be done without extra cost.

*Source: SL 1883, ch 112, § 89; CL 1887, § 1337; RPoIC 1903, § 1742; RC 1919, § 8600; SDC 1939, § 28.1203.*

## **Transmission Lines Over Highways**

The State Legislature has granted telegraph and telephone owners the right of way and the right to use streets, alleys and highways subject to the control of the proper authorities. The right to use the streets, alleys or highways is a qualified right subject to regulations only. Thus, for example, it would be an abuse of discretion to require removal of the lines and poles unless the road is to be changed or unless the lines and poles would otherwise inconvenience the public. (SDCL 49-32-1; AGR 1959-60, pp. 127-128)

Any person desiring to construct or lay a water pipeline over, across or under public highways for the purpose of providing rural water service in the state of South Dakota shall make application to the board of county commissioners as provided in this chapter. (SDCL 31-26-25).

If an applicant wishes to construct electric transmission lines for rural electrification, countywide authorization of easement may be given upon proper applications (SDCL 31-26-1, 31-26-10, AGR 1959-60, pp. 68-69)

Permission of the county commissioners may be requested to maintain electric and telephone wires and poles along public highways in the county, subject to detailed regulations of the statutes. These permits may be for a period not to exceed twenty years (SDCL 31-26-1). To obtain a transmission line construction permit an applicant must file an application with the auditor. Any applicant who desires to construct a telephone line may submit a petition but may not be required to follow the same procedure. Any action by the county on a telephone application must conform to the orders of the public utilities commission. The auditor presents the application to a regular or special meeting of the commissioners within thirty days after filing, and gives ten days' notice by mail to all interested persons of the hearing. At this meeting a hearing is held to determine whether the application is to be granted. Action must be taken by the commissioners on the application for the construction of lines and poles within ten days after the hearing. If the application is granted, the commissioners may adjust any differences that may arise between the applicant and the owners of any transmission, telephone, or telegraph line affected by the decision. Any interested party feeling aggrieved by the decision on the application may appeal to the circuit court (SDCL 31-26-10 to 31-26-17). Moreover, all lines crossing above the highway must be at least eighteen feet high (SDCL 31-26-19). Any change of route of the power or telephone lines must have the permission of the county commissioners. (SDCL 31-26-18)

**49-32-1. Right-of-way over or under public grounds – Control by public authorities - Acquisition of right-of-way.** The owners of any telecommunications facilities operated in this state are granted the right-of-way over or under lands and real property belonging to the state and the right to use public grounds, streets, alleys and highways in this state, subject to the control by the proper authorities as to which grounds, streets, alleys or highways the lines run over or under, and placement of poles to support the wires. The right-of-way over or under real property in this chapter may be acquired in the same manner and by like proceedings as provided for railroad corporations.

Source: SDC 1939, § 52.1313; SL 1983, ch 341; SL 1987, ch 345, § 85.

**Notes of Decisions/Attorney General Opinions:**

***In general***

*Civ.Code, §§ 554, 563, granting telephone companies the right to erect telephone poles and wires along highways, do not grant telephone companies the power to create public nuisances, or to interfere with the use of highways by maintaining poles and wires at any height from the surface of the ground that it desires, as it will be presumed that the Legislature had in mind the ordinary prevailing method of constructing telephone wires. Snee v. Clear Lake Telephone Co., 1909, 24 S.D. 361, 123 N.W. 729*

***Municipalities***

*Const. art. 10, § 3, forbids the construction of a telephone lines within a city without the consent of the local authorities. Pol.Code, § 1229, subds. 9, 10, 17, confer upon a city the right to control and manage its streets and alleys. Civ.Code, § 554 grants to the owners of any telephone the right to use public grounds, streets, and alleys, subject to the control of the proper municipal authorities as to what streets and alleys such telephone shall run over, and the place where poles shall be set. Held, that Pol.Code, § 1229, subds. 9, 10, 17, is not repealed by Civ.Code, § 554, but both sections must be construed together, and with reference to Const.art. 10, § 3, and that a city was authorized to require as a condition to the grant of a telephone franchise that the company pay annually to the city 10 per cent. of its gross receipts above a sum specified. City of Mitchell v. Dakota Cent. Telephone Co., 1910, 25 S.D. 409, 127 N.W. 582*

*Under Rev.Civ.Code, § 554, authorizing the owners of telephone lines to use public grounds, streets, and highways, subject to control of the proper municipal authorities, etc., a domestic corporation engaged in building and operating a telephone system may construct its lines over public grounds, streets, and highways, subject to control of the proper municipal authorities, except that no telephone line shall be constructed within a city without the consent of its local authorities, as provided by Const. art. 10, § 3, and subject to article 6, § 12, prohibiting the Legislature from conferring an irrevocable grant to telephone companies. Missouri River Tel. Co. v. Mitchell, 1908, 22 S.D. 191, 116 N.W. 67.*

### **Power companies**

*A power company occupying a highway after a telephone company must eliminate interference with the telephone company's lines through conduction and static induction, such matters being open to accomplishment through proper erection and maintenance of the power line and proper balancing of the current. Dakota Central Telephone Co. v. Spink County Power Co., 1920, 42 S.D. 448, 176 N.W. 143.*

*Under Rev. Civ. Code 1903, § 554 (Rev. Code 1919, § 9791), and Laws 1913, c. 369 (Rev. Code 1919, §§ 8591-8594), where a telephone company using a low tension current and the earth as a return circuit first occupied a highway to be followed by an electric power company, whose high tension current interfered with the telephone lines, the power company must bear the expense of installing a metallic return circuit in the telephone lines to eliminate electromagnetic induction of such lines by the power lines, though there is no duty in the power company to remedy faulty construction of the telephone lines. Dakota Central Telephone Co. v. Spink County Power Co., 1920, 42 S.D. 448, 176 N.W. 143.*

### **Liability for injuries**

*Right to use public highway for telephone poles, created by Civ. Code, § 563, does not relieve telephone company from liability for injuries to persons caused by negligence or improper construction or maintenance of line. Unglaub v. Farmers' Mut. Tel. Co., 1917, 39 S.D. 355, 164 N.W. 104.*

*A telephone company maintaining its wires along a public highway must maintain the same in a safe condition, so that they will not become a nuisance or endanger the safety of the traveling public; and, where an injury of the traveler arises by reason of the unsafe mode of maintaining the wires, the company is liable. Snee v. Clear Lake Telephone Co., 1909, 24 S.D. 361, 123 N.W. 729.*

### **Cross References**

*Corporate power to locate lines along watercourses and highways, see § 49-30-7.*

*Highways, location of utility lines along, see § 31-26-1 et seq.*

*Park board consent required for wires or posts in parks or boulevards, see § 9-38-57.*

*School and endowment lands, easement over, see § 5-4-5.*

*School and public lands, right-of-way over, see § 5-4-2.*

*74 Am. Jur. 2d, Telecommunications, §72.*

**31-26-25. Applications for construction of rural water pipeline over, across or under public highways – Countywide authorization.** Any person desiring to construct or lay a water pipeline over, across or under public highways, except state trunk system highways, for the purpose of providing rural water service in the state of South Dakota shall make applications to the board of county commissioners as is provided in this chapter. However, the applicant need not indicate the point or points to which the water pipeline is to be constructed nor the route thereof. Upon application, the board of county commissioners may grant countywide authorization for the construction of rural water service subject to the provisions of this chapter.

**Source:** *SL 1977, ch 244, § 1; 1979, ch 199, §§ 1,2.*

**31-26-1. Application to board of county commissioners to erect poles and wires for electricity and telephone – Period covered by application – Regulation by Legislature.** The board of county commissioners, upon written application designating the particular highway the use of which is desired, may grant to any person engaged in the manufacture or sale of electric light and power, or any municipality authorized by law to purchase electric current, or any person authorized by law to purchase such current from such municipality, or any person engaged in, or about to engage in, the furnishing of telephone service, the right to erect and maintain poles and wires or to bury underground cable for the purpose of conducting electricity for lighting, heating, and power purposes, together with stay wires and braces, and for the purpose of furnishing telephone service, in and along any public highway in its county for a period not to exceed twenty years, subject to the conditions set forth in this chapter and such further reasonable regulations as the Legislature may hereafter prescribe.

**Source:** *SL 1913, ch 369, § 1; 1915, ch 112, § 2; RC 1919, §§ 8591, 8595; SDC 1939, § 28.1001; SL 1939, ch 108, 1953, ch 149, § 1; 1953, ch 150; SL 2003, ch 159, § 1.*

**Notes of Decisions/Attorney General Opinions:**

**Competing Utilities**

Where two utilities are authorized by law to serve the same rural territory consumers therein are free to choose and change their supplier. *Otter Tail Power Co. v. Sioux Valley Empire Elec. Ass'n*, 1964, 81 S.D. 99, 131 N.W.2d 111.

**Removal and relocation of lines and poles**

Where an electric utility has its poles and facilities located within county highway right of way and the county wishes to regrade and improve six miles of this road, the electric utility is responsible for the cost of removal and relocation of poles and lines located within county highway right of way. *Op. Atty. Gen. Opinion No. 90-16*, 1990 WL 596793.

An electric utility is responsible for the cost of removal and relocation of poles and lines located within the county highway rights of way on construction or reconstruction of the highway by the county. *Op. Atty. Gen. Opinion No. 90-16*, 1990 WL 596793

**Collateral References**

*39 Am Jur 2d, Highways, Streets, and Bridges, §§ 258-262.*

*Electric light or power line in street or highway as additional servitude, 58 ALR 2d 525.*

*Liability for damage to highway or bridge caused by size or weight of motor vehicle or load, 53 ALR 3d 1035.*

**31-26-10. Application to county auditor – Telephone lines excepted.** Any applicant desiring to construct a transmission line as provided in § 31-26-1 shall file with the county auditor an application and any applicant desiring to construct a telephone line as provided in § 31-26-1 may, but shall not be required to file an application with the county auditor.

**Source:** *SL 1913, ch 369, § 2; RC 1919, § 8592; SL 1919, ch 221; SDC 1939, § 28.1002; SL 1951, ch 141; 1953, ch 149, § 2.*

**Cross-References**

*County highways, grant of right-of-way for pipelines and gas mains, see SDCL § 7-8-23.*

*Telecommunications service, see SDCL Chapter 49-31.*

**31-26-11. Contents of application – Central plant location – Route – Telephone lines.** In the case of either a transmission line application or a telephone line application under § 31-26-1, the applicant shall state the place where the applicant's central plant is located, the point or points to which the applicant desires to transmit electricity or furnish telephone service, and the route over which the applicant desires to construct such lines or bury underground cable. The application shall state what electric, telegraph, and telephone lines are, at the time of making the application, occupying a part of the highway or highways which the proposed lines are to occupy. Any applicant who hereafter desires to construct a telephone line or bury underground cable shall state whether the applicant has obtained a certificate of convenience and necessity from the Public Utilities Commission.

**Source:** *SL 1913, ch 369, § 2; RC 1919, § 8592; SL 1919, ch 221; SDC 1939, § 28.1002; SL 1951, ch 141; 1953, ch 149, § 2; SL 2003, ch 159, § 5.*

**Cross-References**

*Telephone, telegraph and electric lines, Chapter 49-32.*

**31-26-12. Rural electrification lines throughout county – Definition of rural electrification.** If the applicant in the case of a transmission application, wishes to construct lines or bury underground cable for rural electrification the applicant may state that the applicant wishes to construct lines for rural electrification throughout the county, in which event the applicant need not show the point or points to which the applicant

desires to transmit electricity nor the route, and if the application is granted to such applicant for rural electrification county-wide authorization may be given to such applicant but subject to the other provisions of this chapter. For the purposes of this chapter, a line or underground cable shall be deemed "for rural electrification" if it carries at least one circuit of such voltage as is practical for and customarily used in distributing electricity to farms.

**Source:** SDC 1939, § 29.1002 as added by SL 1951, ch 141; 1953, ch 149, § 2; SL 2003, ch 159, § 6.

#### **Cross-References**

*Rural electric cooperatives, see Chapter 47-21.*

**31-26-13. Application presented to board of county commissioners--Notice of hearing.** *The county auditor shall present an application under § 31-26-1 to the board of county commissioners within thirty days after the filing of the application, at a regular or special meeting called for that purpose. The auditor shall give ten days' notice by mail of the application and the time and place when and where the application will be heard to any public entity having jurisdiction and supervision over the involved highway, and to all persons, firms, or corporations owning or operating electric, telephone, or telegraph lines or underground cable on any part of the highway which the proposed lines may occupy.*

**Source:** SDC 1939, § 28.1002; SL 1951, ch 141; SL 1953, ch 149, § 2; SL 2003, ch 159, § 7; SL 2017, ch 125, § 1.

**31-26-14. Action by board – Period of delay.** It shall be the duty of the board of county commissioners to take immediate action upon an application under §31-26-13 at the time and place noticed for hearing thereon and final action thereon shall not be delayed for a longer period than ten days from the date of meeting set for the hearing.

**Source:** SL 1913, ch 369, § 2; RC 1919, § 8592; SL 1919, ch 221; SDC 1939, § 28.1002; SL 1951, ch 141; 1953, ch 149, § 2.

**31-26-15. Application granted – Adjustment with other utilities – Apportionment of costs –Telephone companies.** If the application for construction or reconstruction of an electric line is granted by the board of county commissioners, it shall be competent for such board to adjust any differences that may arise between any such applicant and any owner or owners of any electric, telephone, or telegraph line or underground cable affected by such decision, in the matter of construction or reconstruction, and such board may adjust and apportion the costs which may be occasioned in order to carry out the plans, methods, or means approved by the board as deemed necessary to avoid or minimize interference or hazard. However, if there is a dispute between two telephone companies such dispute shall be adjusted by the Public Utilities Commission.

**Source:** SL 1919, ch 221; SDC 1939, § 28.1002; SL 1951, ch 141; 1953, ch 149, § 2; SL 2003, ch 159, § 8.

**31-26-16. Conformity to public utilities commission order.** Any action of the county commissioners in the case of an application of a telephone company under §31-26-1 shall enable the applicant to conform to and shall not be in conflict with any order of the public utilities commission.

**Source:** SDC 1939, § 28.1002 as added by SL 1953, ch 149, § 2.

**31-26-17. Appeal by aggrieved parties--Trial de novo--Appeal during vacation.** Any interested party feeling aggrieved by the decision of the board of county commissioners on the matter of an application under §31-26-1, shall have the right of appeal to the circuit court as from other decisions from such board, and on such appeal the circuit court shall hear and determine the matter de novo. The hearing of such appeal may be brought on either in vacation or term time upon ten days' notice to the applicant or appellant.

**Source:** SL 1913, ch 369, § 2; RC 1919, § 8592; SL 1919, ch 221; SDC 1939, § 28.1002; SL 1951, ch 141; SL 1953, ch 149, § 2.

### **Cross-References**

*Appeal from board of county commissioners, §§ 7-8-27 to 7-8-31.*

**31-26-18. Change of route – Change by county board – Appeal – Procedure.** If the board of county commissioners has granted the right to any person to construct lines or bury underground cable for the transmission of electricity as provided in §§ 31-26-1 to 31-26-17, inclusive, and if before constructing such line the applicant desires to change the route designated in the grant, the board may change the route upon application of the person constructing the same subject to the same provisions for placing poles, fixtures, guy wires, braces, and stays or underground cable, as provided by law on original construction.

**Source:** *SL 1913, ch 369, § 3; RC 1919, § 8593; SDC 1939, § 28.1003; SL 1953, ch 149, § 3; 1953, ch 151; SL 2003, ch 159, § 9.*

**31-26-19. Minimum height of utility lines – Liability for damage to lines below minimum height.** It shall be a Class 2 misdemeanor for any person, firm, association, or corporation owning or operating any telephone, telegraph, or electric line, or any part of such line in this state, to extend any telephone, telegraph, or electric wire, any part of which shall be less than eighteen feet from the ground, over or across any public highway. No such person, firm, association, or corporation shall be entitled to collect damages from any person who shall cut, break, remove, or otherwise destroy any such telephone, telegraph, or electric wire over or across a public highway if any part of the same is at any time less than eighteen feet from the ground.

**Source:** *SL 1921, ch 259; SDC 1939, § 28.1004; SL 1965, ch 134.*

### **Commission Note**

*The code commission classified the offense described in this section in accordance with the directions contained in §43-6, ch 158, SL 1976.*

### **Cross-Reference**

*Minimum height of wires, see §§ 49-32-5, 49-32-6.  
Penalties for classified misdemeanors, see § 22-6-2.*

### **Notes of Decisions/Attorney General Opinions:**

#### **Duty of utility**

*Public utility engaged in business of producing and transmitting electricity, although required to exercise degree of care commensurate with danger involved, was not insurer of safety of employee of highway commission who was engaged in surveying proposed relocation of highway across utility's easement, nor was it, in absence of contractual relationship, charged with duty of furnishing commission's employee with reasonably safe place in which to work or duty to instruct him as to hazards of his employment. *Hale v. Montana-Dakota Utilities Co.*, 1951, 192 F.2d 274.*

*Public utility engaged in business of producing and transmitting electricity for light and power purposes, is bound to use reasonable care consistent with practical operation of its business, in construction and maintenance of its lines; such care being that which reasonable man would use under circumstances, taking into consideration the danger which would be incurred by negligence and requirement that care be commensurate with danger involved. *Hale v. Montana-Dakota Utilities Co.*, 1951, 192 F.2d 274.*

*Public utility engaged in business of producing and transmitting electricity was not bound to anticipate that employee of highway commission, while engaged in surveying for relocation of highway across defendant's easement on private property, would raise surveyor's rod and contact high voltage wire which was suspended over fourteen feet from ground and thereby suffer shock, and there was consequently no actionable negligence attributable to such utility. *SDC 28.1004. Hale v. Montana-Dakota Utilities Co.*, 1951, 192 F.2d 274.*

#### **Contributory negligence**

*Where employee of state highway commission engaged in surveying for relocation of highway across easement on private property of public utility engaged in transmission of electricity suffered electrical shock when he raised surveyor's rod and it came into contact with high voltage line suspended over fourteen feet from ground, and commissions' employee admitted knowledge of presence of wires and that he had made no effort to avoid contact, and it appeared that employee was aware of dangerous nature of electricity, employee was guilty of negligence as matter of law which was more than slight and which was contributing cause of injury and could not recover. Laws S.D.1941, c. 160. Hale v. Montana-Dakota Utilities Co., 1951, 192 F.2d 274.*

## **Controlled-Access Highway Facilities**

A controlled-access facility is a highway or street especially designed for through traffic (SDCL 31-8-1). The county authorities, acting alone or in cooperation with the authorities of other political subdivisions, may establish, maintain and regulate the use of control-access facilities (SDCL 31-8-3). Private or public property rights may be acquired by gift, devise, purchase or condemnation for these purposes (SDCL 31-8-7). In connection with the development of a controlled-access facility, the county and other highway authorities are authorized to establish and exercise jurisdiction over local service roads and streets SDCL31-8-14). Special statutory penalties are provided for unlawful use by any person of controlled-access facilities. (SDCL 31-8-15)

The department of transportation, with reference to the highways under its jurisdiction, and local authorities with reference to highways under their jurisdiction, may designate main traveled or through highways by erecting signs notifying drivers of vehicles to come to a full stop or yield before entering or crossing the highway (SDCL 32-29-2). The driver approaching a yield sign must slow down or stop if necessary. He yields the right of way to any pedestrian legally crossing the roadway and to any vehicle in the intersection or approaching on another highway so as to constitute an immediate hazard. If a driver is involved in a collision with a pedestrian in a crosswalk or a vehicle in the intersection after driving past a yield sign without stopping, the collision is deemed prima facie evidence of his failure to yield the right of way. (SDCL 32-29-3)

**31-8-1. Definition of controlled-access facility.** For the purposes of this chapter, a controlled-access facility is defined as a highway or street especially designed for through traffic, and over, from, or to which owners or occupants of abutting land or other persons have no right or easement or only a controlled right or easement of access, light, air, or view by reason of the fact that their property abuts upon such controlled-access facility or for any other reason.

**Source:** SL 1953, ch 155, § 2; SDC Supp 1960, § 28.09A02.

### **Cross-References**

Snowmobiles, operation on interstate highways, see § 32-20A-5.

### **Notes of Decisions/Attorney General Opinions:**

#### **Right of access**

*Truck stop owners had right of access to controlled-access interstate highway, such that state's relocation of highway interchange that removed owners' right of access constituted a taking for which compensation was due under Takings Clause of State Constitution; owners' property had always abutted the highway, part of property had been taken in original condemnation proceeding to construct the highway, state offset compensable severance damages for the property not taken in original condemnation proceeding because of the interchange that the state designated, state subsequently eliminated all access through that designated interchange, and, in original condemnation proceeding, the state indicated that it was providing a "special benefit" to the property through its designation of access at the interchange. Hall v. State ex rel. South Dakota Dept. of Transp., 806 N.W.2d 217, 2011 S.D. 70.*

*Circuity of travel necessary for travelers on interstate highway built near existing highway to reach property on other side of existing highway was not compensable on theory of taking of access to interstate highway. Darnall v. State (1961) 79 SD 59, 108 NW 2d 201.*

## **Review**

*State's contention that truck stop owners did not have right of access to interstate highway and highway interchange because highway was controlled access highway, so that relocation of interchange was not taking of private property that required compensation, was not preserved for appellate review, where issue was not raised before trial court. Hall v. State ex rel. South Dakota Dept. of Transp., 712 N.W.2d 22, 2006 S.D. 24.*

## **Opinions of Attorney General**

*Section line highways, OFFICIAL OPINION No. 87-42, 1987 S.D. AG LEXIS 2; 1987-1988 Op. Atty Gen. S.D. 125.*

## **Collateral References**

*39 Am Jur 2d, Highways, Streets, and Bridges, §§ 7,180.*

**31-8-3. Highway authorities permitted to establish facilities--Local control.** The highway authorities of the state, counties, and municipalities, acting alone or in cooperation with each other or with any federal, state, or local agency or any other state having authority to participate in the construction and maintenance of highways, may plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide controlled-access facilities for public use wherever the authority is of the opinion that traffic conditions, present or future, will justify the special facilities. However, within a municipality that authority is subject to any municipal consent as may be required by law.

**Source:** *SL 1953, ch 155, § 3; SDC Supp 1960, § 28.09A03; SL 2010, ch 145, § 65.*

**31-8-7. Manner of acquiring property or property rights.** For the purposes of this chapter, the highway authorities of the state, counties, or municipalities may acquire private or public property rights for any controlled-access facility and service road, including rights of access, air, view, and light, by gift, devise, purchase, or condemnation as may be authorized by law to acquire such property or property rights in connection with any highway and street within their respective jurisdictions.

**Source:** *SL 1953, ch 155, § 5; SDC Supp 1960, § 28.09A05; SL 2010, ch 145, § 68*

## **Cross-References**

*Acquisition of land and materials for highway purposes, see Chapter 31-19.  
Condemnation under power of eminent domain, see Chapter 21-35.*

## **Notes of Decisions/Attorney General Opinions:**

### **Right of access**

*If after construction of public improvement abutting landowner continues to have reasonable access to his property, he has no compensable complaint, but if right of access is destroyed or materially impaired damages are compensable if injury sustained is peculiar to owner's land and not of kind suffered by the public generally. Hurley v. State, (1966) 82 SD 156, 143 NW 2d 722.*

### **Collateral References**

*Damages, right to, measure, and elements of, for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 13, 148.*

**31-8-14. Local service roads.** In connection with the development of any controlled-access facility the state, county, or municipal highway authorities may plan, designate, establish, use, regulate, alter, improve, maintain, and vacate local service roads and streets or designate as local service roads and streets any existing road or street, and exercise jurisdiction over service roads in the same manner as is authorized over any controlled-access facility under the terms of this chapter, if, in their opinion, the local service roads and streets are necessary or desirable. The local service road or street shall be of appropriate design, and they



shall be separated from the controlled-access facility proper by means of all devices designated as necessary or desirable by the proper authority.

**Source:** *SL 1953, ch 155, § 9; SDC Supp 1960, § 28.09A09; SL 2010, ch 145, § 75.*

**31-8-15. Unlawful use of facilities – Acts constituting.** It is a Class 2 misdemeanor for any person:

- (1) To drive a vehicle over, upon, or across any curb, central dividing section, or other separation or dividing line on controlled-access facilities;
- (2) To make a left turn or semicircular or U-turn except through an opening provided for that purpose in the dividing curb section, separation, or line. No such turn may be made through an opening in the dividing curb section, separation, or line which has been designated and marked for use by maintenance and authorized vehicles only. Maintenance and authorized vehicles may use such openings in dividing curb sections, separation, or lines for parking or turning. Maintenance vehicles include all vehicles used in the maintenance of the highways of this state and authorized vehicles include all law enforcement vehicles, fire vehicles, civil defense rescue vehicles, ambulances and recovery vehicles as defined by § 31-8-15.1 which are responding to a call for assistance;
- (3) To drive any vehicle except in the proper lane provided for that purpose and in the proper direction and to the right of the central dividing curb, separation section, or line;
- (4) To drive any vehicle into the controlled-access facility from a local service road except through an opening provided for that purpose in the dividing curb or dividing section or dividing line which separates such service road from the controlled-access facility proper.

**Source:** *SL 1953, ch 155, § 10; 1959, ch 141; SDC Supp 1960, §§ 28.09A10, 28.9921; SL 1963, ch 165, SDCL § 31-8-17; SL 1972, ch 169; SL 1988, ch 234, § 1.*

**Commission Note**

*The code commission classified the offense described in this section in accordance with the directions contained in §43-6, ch 158, SI 1976.*

**Cross-References**

*Backing prohibited on controlled-access highway, see § 32-30-21.*

*Crimes, penalties for classified misdemeanors, see § 22-6-2.*

*Snowmobiles, restrictions on use of controlled-access highway, see § 32- 20A-5.*

*Traffic rules on divided and controlled-access roads, see §§ 32-26-9 to 31-26-12.*

**31-8-15.1 Meaning of recovery vehicle –** For the purposes of §§ 31-8-15 to 31-8-15.2, inclusive, a recovery vehicle is a motor vehicle which is specially equipped with a boom, winch or wheel lift to tow, haul or push a disabled motor vehicle. The recovery vehicle shall have amber beacon or flashing warning lights which shall be used as provided by § 32-17-10. The recovery vehicle shall also display the company's name in two inch letters on both sides of the vehicle in a location visible to the public.

**Source:** *SL 1988, ch 234, § 2.*

**31-29-2. Obstruction of highway or to vision--Violation as misdemeanor.** It is a Class 2 misdemeanor for any person, corporation, or association, to place or maintain, or cause to be placed or maintained, any advertising sign, device, display, building, or structure on any of the public highways of the state. Except within municipalities, it is a Class 2 misdemeanor for any person, corporation, or association to place or maintain, or cause to be placed or maintained, any device, display, or obstruction to vision, along or adjacent to any of the public highways of the state where the device, display, or obstruction to vision, constitutes a hazard to highway traffic at any main crossing or intersection, horizontal or vertical curve or railroad crossing, as deemed hazardous by the authority in charge of the maintenance of the highway.

**Source:** *SI 1925, ch 186, § 1; SDC 1939, §§ 28.0906, 28.9905; SL 1941, ch 131; SDCL, § 31-29-3; SL 2010, ch 145, § 149.*

**Commission Note**

The code commission classified the offenses described in this section in accordance with the directions contained in § 43-6, ch 158, SL 1976.

**Cross-References**

Commercial advertising on highway prohibited, § 31-28-20.  
Penalties for classified misdemeanors, § 22-6-2.

**Collateral References**

Am Jur 2d, Highways, Streets, and Bridges, § 288.  
Governmental liability for compensation or damages to advertiser arising from obstruction of public view of sign or billboard on account of growth of vegetation in public way, 21 ALR 4<sup>th</sup> 1309.  
Municipal power as to billboards or outdoor advertising, 58 ALR 2d 1314.  
Nuisance, billboards and other outdoor advertising as civil nuisance, 38 ALR 3d 647.  
Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 ALR 3d 564.

**22-6-2. Misdemeanors - Classification - Penalties.** Misdemeanors are divided into two classes which are distinguished from each other by the following maximum penalties which are authorized upon conviction:

- (1) Class 1 misdemeanor: one year imprisonment in a county jail or two thousand dollars fine, or both;
- (2) Class 2 misdemeanor: thirty days imprisonment in a county jail or five hundred dollars fine, or both.

The court, in imposing sentence on a defendant who has been found guilty of a misdemeanor, shall order, in addition to the sentence that is imposed pursuant to the provisions of this section, that the defendant make restitution to any victim in accordance with the provisions of chapter 23A-28. Except in Titles 1 to 20, inclusive, 22, 25 to 28, inclusive, 32 to 36, inclusive, 40 to 42, inclusive, 47 to 54, inclusive, and 58 to 62, inclusive, if the performance of an act is prohibited by a statute, and no penalty for the violation of such statute is imposed by a statute, the doing of such act is a Class 2 misdemeanor

Source: SDC 1939, §§ 13.0105, 13.0607; SDCL § 22-1-5; SL 1976, ch 158, §§ 1-3, 6-2, 6-5; SL 1977, ch 189, § 17; SL 1978, ch 158, § 5; SL 1985, ch 192, § 3; SL 1989, ch 255, § 2; SL 1990, ch 158, § 1; SL 1991, ch 186, § 2; SL 1991, ch 187, § 4; SL 1991, ch 337, § 1; SL 1992, ch 158, § 1; SL 1993, ch 172, § 1; SL 1994, ch 161; SL 1995, ch 120, § 1; SL 1997, ch 126, § 1; SL 1997, ch 143, § 6; SL 2005, ch 120, § 173.

**Notes of Decisions/Attorney General Opinions:****Crimes**

Although petty offenses are not "crimes," misdemeanors are "crimes," whether they are Class 1, carrying penalty of one-year imprisonment and/or \$1,000 fine, or Class 2, carrying 30-day imprisonment and/or \$100 fine. SDCL 22-6-2. Planned Parenthood, Sioux Falls Clinic v. Miller, 1994, 860 F.Supp. 1409, affirmed 63 F.3d 1452, certiorari denied 116 S.Ct. 1582, 517 U.S. 1174, 134 L.Ed.2d 679.

**Probation**

A one-year period of unsupervised probation, upon completion of imprisonment for simple assault, was in excess of the statutory maximum sentence for a class 1 misdemeanor. SDCL 22-6-2, 22-18-1(2). State v. Weaver, 648 N.W.2d 355, 2002 S.D. 76.

**Restitution**

Although prior to defendants' delivery to penitentiary circuit court had jurisdiction to formulate plan of restitution, once defendants entered penitentiary, any plan of restitution had to be created by Board of Pardons and Paroles. SDCL 22-6-1, 22-6-2, 23A-28-5. State v. Hurst, 1993, 507 N.W.2d 918.

**Transfer of Right of Way and Acquiring by Condemnation**

Counties have the authority to convey and transfer to the state any highway right-of-way held by the county without requiring payment for it. The conveyance can only be made after mutual agreement between the grantor

and the grantee. Counties, however, are prohibited from relinquishing or transferring any county highway to a road district. (SDCL 31-12A-5.2). The department of transportation also has the right to transfer any highway right-of-way held by the state to a county (SDCL 31-19-63). Counties also have the authority to acquire private property by condemnation. (SDCL 7-18-9).

**31-12A-5.2. Transfer of jurisdiction over public highway to road district prohibited.** No political subdivision of the state may relinquish or transfer jurisdiction over any public highway to a road district.

**Source:** SL 1999, ch 151, § 13

**31-19-63. Transfer of right-of-way between state and political subdivisions.**

The state, by and through the Department of Transportation may convey and transfer any highway right-of-way to a political subdivision and the political subdivisions may convey and transfer such highway rights-of-way to the state or to each other without requiring payment therefor. Each conveyance shall be made only after mutual agreement between the grantor and grantee. Each conveyance and transfer shall be held by the grantee for public highway purposes.

**Source:** SL 1971, ch 181, § 1; SL 2009, ch 147, § 2.

**7-18-9. Condemnation of private property by county--Resolution of necessity.** The board of county commissioners may condemn private property for public purposes in the manner and to the extent provided by law.

If the board of county commissioners deems it necessary to condemn private property for the purpose of opening, constructing, changing, relocating, maintaining, repairing, or extending any highway or bridge within its county, or for the purpose of erecting, repairing, or extending any courthouse, jail, or other public building, and of acquiring other or additional ground therefor, or for the purpose of providing cut slopes, borrow pits, or channel changes, or to afford unobstructed vision on the highways in the county at any point of danger to public travel, for right-of-way and borrow pit, or for the purpose of making any other public improvement or to acquire private property for any public use authorized by law, the board shall by resolution declare an appropriation necessary to be made and state the purpose and extent of the appropriation.

Nothing in this section may be construed as authorizing county commissioners to condemn property for county courthouse or jail site until a majority of the voters of a county have voted in favor of the erection of a courthouse or jail.

**Source:** SL 1913, ch 152, §§ 1, 2; RC 1919, §§ 5805, 5806; SDC 1939, §12.1806; SL 1957, ch 25; SL 2016, ch 44, § 46.

**Notes of Decisions/Attorney General Opinions:**

***In general***

*Proceedings to take private property by condemnation are special in character and must be conducted in strict accordance with governing statutes, and condemnation proceedings in which statutes have been ignored or in which there has been no substantial compliance with statutes are void. SDC 12.0618, 28.1301; Const. art. 6, § 13; SDC 1960 Supp. 37.4001 et seq. Ehlers v. Jones, 1965, 81 S.D. 351, 135 N.W.2d 22.*

*Where the situs of the county courthouse had previously been established and would not change, no public vote was required prior to the county commissioners initiating condemnation proceedings on the property needed to construct an annex to the existing county courthouse. Op. Atty. Gen. Opinion No. 88-27, 1988 WL 483229.*

***Indian lands***

*Third parties, and in particular states and municipalities, acquire only such rights and interests in Indian lands as may be specifically granted to them by federal government. Bennett County, S. D. v. U.S., 1968, 394 F.2d 8.*

*The Act of 1889 establishing Pine Ridge Sioux Reservation did not give county the authority to construct public highway along section lines of allotted Indian land, without permission from Secretary of Interior or acquisition by condemnation. 25 U.S.C.A. §§ 311, 357; Act of Mar. 2, 1889, 25 Stat. 888. Bennett County, S. D. v. U.S., 1968, 394 F.2d 8.*

*The Treaty of Fort Laramie of 1851 was a recognition of Indian title by United States, and Sioux lands set apart in Treaty were not “public lands, not reserved for public use” within statute granting right-of-way for construction of highways over public lands, not reserved for public use. 43 U.S.C.A. § 932. Bennett County, S. D. v. U.S., 1968, 394 F.2d 8.*

*A treaty between United States and Indian Nation or Nations, relating to uses of certain public lands, removes such area from territory previously regarded as part of public domain. U.S. v. Bennett County, S. D., 1967, 265 F.Supp. 249, affirmed 394 F.2d 8.*

*Section-line easement through Indian reservation or through any land which has been allotted in severalty to any individual Indian under any laws or treaties but which has not been conveyed to allottee with full power of alienation may not be acquired by county in South Dakota without previously granted permission from Secretary of Interior or by like leave, with usual conditions imposed under judgment in eminent domain. Act Mar. 2, 1889, 25 Stat. 888; 25 U.S.C.A. §§ 311, 357; 43 U.S.C.A. §§ 931a, 932; Treaty with the Sioux Indians, 15 Stat. 635; SDC12.1806, 12.1807, 37.4001 et seq. U.S. v. Bennett County, S. D., 1967, 265 F.Supp.249, affirmed 394 F.2d 8.*

*Under Act of 1889, county in South Dakota had no right to construct highway along section line bordering lands, which were located in Indian reservation, and which were allotted to an Indian. Act Mar. 2, 1889, 25 Stat. 888; 25 U.S.C.A. §§ 311, 357; 43 U.S.C.A. §§ 931a, 932; Treaty with the Sioux Indians, 15 Stat. 635; SDC 12.1806, 12.1807, 37.4001 et seq. U.S. v. Bennett County, S. D., 1967, 265 F.Supp. 249, affirmed 394 F.2d 8.*

#### **Opinions of Attorney General**

*Appraisal not required, finding of necessity to be incorporated in resolution, Report 1931-32, p. 445.*

*Condemnation of land in another county authorized, Report 1929-30, p. 101.*

*County parking lot, condemnation or purchase authorized, Report 1967-68, p. 262.*

*Purchase of land to be attempted before bringing condemnation proceedings, Report 1919-20, p. 299; 1967-68, p. 262.*

*Where the situs of the county courthouse had previously been established and would not change, no public vote was required prior to the county commissioners initiating condemnation proceedings on the property needed to construct an annex to the existing county courthouse, Opinion No. 88-27.*

#### **Law Reviews**

*Eminent Domain: Power Site Value as Measure of Compensation for Condemnation of Land Bordering Navigable River, 1 SD Lrev 137 (1956). Condemnation – Damages – Determination of Value, 10 SD Lrev 173 (1965).*

#### **Cross-References**

*Parks, condemnation for, § 41-18-15*

*Uneconomic remnant after acquisition for highway purposes, §31-19-41.1.*

## **Utility Lines Along and Across Highways**

**31-26-25. Construction of rural water or livestock pipeline on public highway--Application--Countywide authorization--Ordinance--Nature of interest.** Any person desiring to construct or lay a water pipeline over, across, or under public highways, except state trunk system highways, for the purpose of providing rural water service, or providing water to livestock on property that is taxed as agricultural land, must make application to the board of county commissioners as provided in this chapter. Upon application,

the board of county commissioners may grant countywide authorization for the construction of rural water service lines or lines that water livestock, subject to the provisions of this chapter. The board of county commissioners may enact ordinances governing pipelines and grant authorization to the highway superintendent to approve rural water service lines without application to the board. County approval of a pipeline authorized under this section creates no ownership interest and is a temporary grant to utilize the highway.

**Source:** *SL 1977, ch 244, § 1; SL 1979, ch 199, §§ 1, 2; SL 2023, ch 96, § 1.*

**31-26-26. Relocation of pipeline--When required.** When any highway along or under which a pipeline approved pursuant to § 31-26-25 has been constructed is changed, removal or relocation of the pipeline is not necessary if the owner or beneficiary of the pipeline and the board of county commissioners agree in writing that removal or relocation is not necessary. However, removal or relocation of a livestock pipeline is required if the board determines it is necessary to improve the highway or otherwise remove the pipeline for any county purpose.

**Source:** *SL 1977, ch 244, § 3; SL 2023, ch 96, § 2.*

**31-26-26.1. Relocation of a livestock pipeline--Request--Approval.** An owner or operator of a livestock pipeline approved pursuant to § 31-26-25 may, at any time, submit a request for the relocation, removal, or change of a livestock pipeline to the highway superintendent. Upon approval of the highway superintendent, the owner or operator may, at their own cost and in accordance with any conditions set by the highway superintendent, relocate, remove, or change the livestock pipeline.

**Source:** *SL 2023, ch 96, § 3.*

**31-26-26.2. Liability on construction or maintenance of pipeline--County recovery--Venue.** Nothing contained in § 31-26-25 or 31-26-26 may be construed to exempt from liability a person who owns, operates, or benefits from a livestock pipeline, for any damage or injury sustained by reason of the faulty or negligent construction or maintenance of a livestock pipeline. A county is entitled to recover, from any owner, operator, or beneficiary of a livestock pipeline, the amount necessary to spend in the removal or repair of the portion of highway or right of way impacted by the faulty or negligent construction or maintenance, including a reasonable amount for attorney's fees. The action may be commenced in any court in the county having jurisdiction.

**Source:** *SL 2023, ch 96, § 4.*

## **Highways Serving Federal Reservations**

**31-9-1. Relinquishment of highways in national parks--Cession of jurisdiction.** The Department of Transportation and the board of county commissioners of an affected county, may relinquish to the United States for use and construction and control of highways by the secretary of interior, acting through the national park service, all of the interest of the state and the county in such portions of public highways lying within the boundaries of national parks and national monuments. The relinquishment of interest in the highways shall operate as a cession to the United States of jurisdiction for highway purposes over such portions of the highways lying within said national parks or national monuments.

**Source:** *SL 1957, ch 140, § 1; SDC Supp 1960, § 28.0241; SL 2010, ch 145, § 77.*

**31-9-2, 31-9-3.** Repealed by SL 2010, ch 145, §§ 78, 79.

**31-9-4. County roads used by National Forest Service--Cooperative agreement for joint construction and use.** The board of county commissioners may enter into cooperative agreements with the Forest Service of the United States Department of Agriculture for the joint construction, maintenance, and use of roads located within the boundaries of the county, where such roads are used by the Forest Service in the protection, administration, and utilization of the national forests and are also used by communities or persons within or adjacent to such national forests in the use and development of the resources thereof or where such roads otherwise serve the needs of the public. Costs incurred by the county pursuant to the provisions of this section shall be appropriated from the county general fund.

*Source: SL 1966, ch 33, § 1; SL 1985, ch 77, § 35.*

**31-9-5.** Repealed by SL 1985, ch 77, § 42

### **Procedures for County Highway System Revisions**

The SD Department of Transportation, Office of Project Development is the official record keeper of the primary "County Highway System" as specified in SDCL 31-12-2. Roads can be added or deleted from this designated system, but must follow the procedures as found at the following link under the "County Highway Systems" section: <http://www.sddot.com/transportation/highways/classification/>

Roads are added or removed at the local county level. The respective county commissioners make these decisions based on their knowledge and public input. They pass a resolution specifying the modification and forward to the SD Department of Transportation for processing. Here the resolution is reviewed to insure the necessary steps have been taken and presented to the South Dakota Transportation Commission. The required resolution can be found at the following link under the "County Highway Systems" section: <http://www.sddot.com/transportation/highways/classification/>