

Opinion No. 98

Auto Pass—State Highway—Public Roads—County Commissioners—Abandonment—Livestock—Statutes—Sections 16-1127, 16-1128, Revised Codes of Montana, 1947.

Held: Whenever the county has installed an auto pass, the same must be maintained in such a condition as to prevent the passage of livestock, as well as to permit the free and unobstructed passage of automobiles, trucks and other conveyances.

It is within the discretion of the county commissioners to abandon a previously constructed auto pass whenever the auto pass no longer enures to the benefit of the general public in the use of public roads.

June 21, 1952.

Mr. J. E. McKenna
County Attorney
Fergus County
Lewistown, Montana

Dear Mr. McKenna:

You have submitted the following questions to me for an official opinion:

1. "Does the county, after installing auto passes, have to maintain the same in such a condition so that they are impassable for livestock, as well as passable by automobiles and trucks?"
2. "Is it within the discretion of the Board of County Commissioners to remove auto passes which have previously been installed?"

Section 16-1127, Revised Codes of Montana, 1947, provides:

"Where a public road or roads connect with a state highway, which state highway is fenced on both sides,

the county commissioners, of the county in which said roads are located, may cause to be constructed and maintained thereon extensions of the fence on both sides of the state highway and across the intersecting road leaving in such fences a pass across which must be constructed a passage which will permit the passage of automobiles and trucks but will prevent and exclude loose livestock from drifting upon said state highway, and there shall also be maintained in said extensions a gate to permit the passage of livestock, wagons and other vehicles." (Emphasis supplied)

For previous opinions pertaining to this statute, see: Vol. 15, Opinions of the Attorney General, Opinion No. 532, at page 367, and Vol. 19, Opinions of the Attorney General, Opinion No. 488, at page 837.

The statute clearly states that the duty of the county is not ended upon the construction of the pass, it specifically provides that such passes be maintained. To read out of the statute by implication the duty to maintain the passes would negate the public purpose of the statute. It is the rule that every word, phrase, and provision of an act must be considered in determining the legislative intent. See, *Stadler vs. City of Helena*, 46 Mont. 128, 127 Pac. 454. Also, relative to the general duty to maintain, *Elliott on Roads and Streets*, Vol. 1, at page 637, states:

"The duty is one, however, that must be performed whenever it is necessary to make reasonably safe for travel a way which the local authorities have thrown open for use."

Section 16-1128, R.C.M., 1947, specifically declares that the erection of auto passes is discretionary with the local boards of county commissioners. It also states that in the exercise of their discretion they are to consider primarily the use and benefit of public roads to the general public. It is to be presumed that in exercising their discretion they were moved by public reasons, as it is always presumed that an official acts within the law. *State vs. Bowser*, 21 Mont. 133, 53 Pac. 179.

The question as to whether a highway should be vacated ordinarily de-

pends, primarily at least, on considerations as to its public utility. See, *Cook vs. Quick*, 127 Ind. 477, 26 N.E. 1007. Consequently, if there is no longer a public benefit from the pass it may be vacated and removed.

It is therefore my opinion that whenever the county has installed such an auto pass, the same must be maintained in such a condition as to prevent the passage of livestock as well as to permit the free and unobstructed passage of automobiles, trucks and other conveyances.

It is further my opinion that it is within the discretion of the county commissioners to abandon a previously constructed auto pass whenever the auto pass no longer enures to the benefit of the general public in the use of public roads.

Very truly yours,
ARNOLD H. OLSEN
Attorney General