

Highways—Abandonment—County Commissioners—Petitions.

In view of the fact that our statutes do not explicitly authorize the board of county commissioners to act on its own motion the board should act on a petition when abandoning a highway.

Seth F. Bohart, Esq.,
County Attorney,
Bozeman, Montana.

December 22, 1928.

My dear Mr. Bohart:

You state that the boards of county commissioners of Broadwater and Gallatin counties recently held a joint meeting to discuss the advisability of closing a road connecting the two counties in the vicinity of the old townsite of Three Forks, which said road crosses two channels of the Jefferson river, and that the two boards are unanimous in their opinion that the road be discontinued, the road being located partly in Broadwater and partly in Gallatin county.

You have requested my opinion as to how to proceed; that is (1) In proceeding to close this road must a petition from the freeholders of the two road districts in question first be presented to the boards or can the boards proceed by first making their decision to close the road, and then proceed with notices and a hearing as required by law? (2) In case a petition is required, must a joint petition to both boards be circulated in the two road districts in the two counties, said petition describing the entire length of road to be closed, or must separate petitions be circulated in the two counties, each petition describing only that part of the road located in that particular county? (3) In case a petition is not required, must the two boards proceed by joint action to post the entire length of road to be closed, or must they act separately within the boundaries of their own county?

In answer to your first question will say that the general law as set forth in 29 C. J. 523 is as follows:

“Except where highway officials are authorized to institute proceedings on their own motion, application for the vacation of a public highway must be made by written petition, signed by the petitioners. * * *”

We are therefore at once confronted with the question of whether our statutes authorize the board of county commissioners to institute proceedings to vacate a road on its own motion.

Section 1614 R.C.M. 1921 provides:

“All public highways once established must continue to be public highways until abandoned by operation of law, or by judgment of a court of competent jurisdiction, or by the order of the board of county commissioners of the county in which they are situated; but no order to abandon any highway shall be

valid unless preceded by due notice and hearing as provided in this act; and no state highway can be abandoned except on the joint order of the board of county commissioners and the state highway commission."

And Section 1622, as amended by Chapter 128, Laws of 1925, further provides:

"The board of county commissioners of the several counties of the state have general supervision over the highways within their respective counties: * * *

"4. They must abolish or abandon in the manner provided in this act such public highways as are not necessary for the public convenience."

Whether these statutes authorize the board to act on its own motion has never been decided by our Supreme Court.

Sections 1614 and 1622, supra, and Section 1635 R.C.M. 1921, which latter section provides for a petition to establish, change or discontinue a highway, are all part of an act enacted as Chapter 72, Laws of 1913, and it is to be noted that in Section 1614 it is provided that "no order to abandon any highway shall be valid unless preceded by due notice and hearing as provided in this act." And the only notice and hearing provided in the act is the notice and hearing provided for upon the filing of the petition under Section 1635, which section of the act has since been repealed. Also, Section 1622 provides that "they must abolish or abandon in the manner provided in this act," and this again must refer to Section 1635.

These observations become important in view of the fact that the courts of California have held that under the statutes of that state, which are somewhat similar to ours, that it is made the duty of the board of its own motion and without hearing evidence, to abandon by proper order such roads as are not necessary for the public use, and thus relieve the county of the expense and burden of their maintenance.

Swift vs. Santa Barbara (Cal.), 116 Pac. 137;

Firth vs. Bohrmaum (Cal.), 175 Pac. 23.

However, Section 2621 of the political code of California, which corresponds to our Section 1614, provides:

"A road laid out and worked, and used as provided in this chapter, shall not be vacated or cease to be a highway until so ordered by the board of supervisors of the county in which said road may be located. * * * ."

And Section 2643 of that code corresponding to our Section 1622 provides:

"The boards of supervisors of the several counties of the state shall have general supervision over the roads within their respective counties. They must by proper order (3) abolish or abandon such as are not necessary."

It is to be noted that in neither of these sections is there any

limitation imposed on the powers of the supervisors as is the case in our statutes.

Prior to 1917 the statutes of Oregon provided for the vacating of a road by petition, and the supreme court of that state held that a petition was necessary in order to give the supervisors jurisdiction.

Cole vs. City of Seaside (Ore.), 156 Pac. 569;

Rynearson vs. Union Co. (Ore.), 102 Pac. 785.

In 1917 Section 4538 L.O.L. of Oregon was enacted which provides that proceedings for the laying out, opening, establishment, alteration, straightening, locating and relocating of county roads shall be instituted in the following manner, to-wit:

1. By petition of freeholders.
2. By resolution of the county board.
3. By grant of owners of necessary right of way.
4. By condemnation proceedings.

This provision shall not preclude the acquirement of public ways by adverse user.

While I do not find where the question has been before the Supreme Court of that state since the enactment of this statute, no doubt the statute was enacted for the very purpose of giving the supervisors the right to act on their own motion. The great weight of authority of other states where the statutes do not grant explicit authority as in the case of the state of California follow the early Oregon decisions and hold that a petition is necessary.

Our Supreme Court has held that a petition is necessary in order to authorize the county commissioners to establish a highway. (State ex rel. McMasters vs. District Court, 80 Mont. 228). In this case the court expressly disapproved of a statement made in the case of Reid vs. Lincoln County, 46 Mont. 31, to the effect that the board could act on its own motion in establishing a highway.

Subdivision 3 of Section 1622, supra, gives the board the same authority to establish highways that Subdivision 4 gives to abandon them, and since the court has held that a petition is necessary in one case it would no doubt require it in the other as far as this statute is concerned, and the same is true as to Section 1635, supra.

Section 1614, supra, (the only statute that we have treating of abandonment that does not also include establishment), as before stated, is part of the same act as Section 1635 and it is very doubtful whether the court will hold that it is explicit enough to grant authority for the commissioners to act on their own motion. And I therefore suggest that in order to be sure that an order abandoning the roads in question will be upheld that a petition should be obtained.

As to your second question, paragraph 228, 29 C. J. 519 laid down the following rule:

“A highway in two counties or towns, located by the commissioners of both counties or towns, acting jointly, cannot be

discontinued, in whole or in part, by one of such boards acting separately. But the mere fact that a highway situated within a county or township in fact forms a portion of a continuous highway originating and terminating at points outside of the boundaries thereof does not divest the board of supervisors of jurisdiction over the highway which is actually situated within the boundaries of the county or township."

It is therefore my opinion that each county should act separately in abandoning that part of the road in their respective counties and that no joint action is necessary in any stage of the proceedings. This also answers your third question.

Very truly yours,
L. A. FOOT,
Attorney General.