

Opinion No. 139.

County Commissioners—Highways,
Abandonment of—Abandonment of
Highways—Notice.

Held: "Due notice," as contemplated by Section 1614, Revised Codes of Montana, 1935, is given when a board of county commissioners notifies by registered mail such persons as may be interested in proceedings for abandonment of a highway not a state highway—i. e., those who have land abutting on the road proposed to be abandoned—and also causes a copy of such notice to be published once a week in the official county newspaper for a period of three weeks prior to the date of hearing on the proposed abandonment. Further, such "due notice" is any notice which will fairly and fully enable all persons who have or might have an interest in the abandonment of the highway to know the abandonment of such highway is to be considered on a day certain, and which will thereby give all persons who have or might have an interest proper and sufficient time in which to prepare and interpose objections to the proposed abandonment.

March 23, 1946.

Mr. W. M. Black
County Attorney
Toole County
Shelby, Montana

Dear Mr. Black:

You have inquired:

What is the correct legal procedure to be followed by a board of county commissioners relative to giving notice, when the question of abandoning a public highway which is not a state highway is before the board?

Section 1622, Revised Codes of Montana, 1935, enumerates the powers and duties of county commissioners respecting highways, and paragraph 4 therein provides the county commissioners "must abolish or abandon in the manner provided in this act such

public highways as are not necessary for the public convenience." Section 1635 declares "any ten, or a majority of the freeholders of a road district, taxable therein for road purposes, may petition in writing the board of county commissioners to establish, change, or discontinue any common or public highway therein." Section 1635 provides for an investigation to be made by the board of county commissioners as to the feasibility, desirability, and cost of granting the prayer of such a petition.

Section 1614, Revised Codes of Montana, 1935, provides as follows:

"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." (Emphasis mine.)

The Revised Codes of Montana of 1935, and amendments thereto, do not set out what shall constitute the "due notice" referred to in the section above quoted. Although the language "as provided in this act" would indicate some specific procedural method was contemplated by the legislators, I am unable to find a method of notice outlined in the code. Nonetheless, I am not willing to assert that, because the legislative assembly failed to point out a specific procedure for giving notice, no notice is therefore required. The section requires "due notice"—in other words, notice which will fairly and fully enable all persons who have or might have an interest in the abandonment of the highway to know the abandonment of such highway is to be considered on a day certain and which will thereby give all persons who have or might have an interest proper and sufficient time in which to prepare and interpose objections to the proposed abandonment.

You state: "It is the present procedure of the board of county commissioners of this county to notify such persons as may be interested in any

abandonment proceedings, i. e., those who have land abutting on the road proposed to be abandoned, by registered mail and also to cause a copy of such notice to be published once a week in the official county newspaper for a period of three issues of said paper prior to the date of hearing on said petition to abandon."

I believe your board of county commissioners has adopted a procedure adapted to the accomplishment of the purpose of the statute. In *Norse v. Granite County*, 44 Mont. 78, 89, 119 Pac. 286, our court used this language:

"... its board of (county) commissioners—its executive body—is a body of limited powers and must in every instance justify its action by reference to the provisions of law defining and limiting the powers . . . If, however, there is no question of the existence of the power to do the act proposed, and the mode of its exercise is not pointed out, the board is left free to use its own discretion in selecting the mode it shall adopt or the course it shall pursue, and the result cannot be called in question if the course pursued is reasonably well adapted to the accomplishment of the end proposed."

It is therefore my opinion that "due notice," as contemplated by Section 1614, Revised Codes of Montana, 1935, is given when a board of county commissioners notifies by registered mail such persons as may be interested in proceedings for abandonment of a highway not a state highway—i. e., those who have land abutting on the road proposed to be abandoned—and also causes a copy of such notice to be published once a week in the official county newspaper for a period of three weeks prior to the date of hearing on the proposed abandonment. Further such "due notice" is any notice which will fairly and fully enable all persons who have or might have an interest in the abandonment of the highway to know th eabandonment of such highway is to be considered on a day certain, and which will thereby give all persons who have or might have an interest proper and sufficient time in which to prepare and interpose objections to the proposed abandonment.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General