

VOLUME NO. 37

OPINION NO. 130

COUNTIES - Notice requirement for road abandonment by county commissioners; effect of invalid notice; COUNTY COMMISSIONERS - Notice requirement for road abandonment by county commissioners; effect of invalid notice; REVISED CODES OF MONTANA, 1947 - Sections 32-4001, 32-4014.

- HELD: 1. County commissioners have no authority to vacate a previous road abandonment on their own initiative.
2. The notice required prior to the abandonment of a county road requires actual notice to all landowners of record affected thereby.
3. An abandonment order is effective only as to interested parties properly notified.

13 April 1978

Margaret A. Tonon, Esq.
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Dear Ms. Tonon:

You have requested my opinion concerning a road closure by the Ravalli County Commissioners. The facts surrounding this closure were as follows:

In January of 1976 the Commissioners were petitioned by twenty-one landowners to hold a public hearing for a road abandonment. The petition was accepted by the Commissioners, notice of the hearing was sent to the names appearing on the petition and published in the local newspaper on February 9, 16, and 23 of 1976. On February 25, 1976, a hearing was held at the courthouse and the Commissioners decided to abandon the road as asked in the petition.

On May 24, 1976, the Commissioners were contacted by an attorney representing a landowner in the area affected by the abandonment requesting the Commissioners to reverse their ruling or hold a new hearing on the petition for abandonment.

The Commissioners vacated their prior abandonment order, held a new hearing, and then signed a new order abandoning the road, with the exception of one section of road which was objected to by the one landowner.

You have asked two questions:

1. Whether the Commissioners had or do now have the authority to vacate a previous road abandonment order on their own initiative?
2. If so, do the Commissioners also have the authority to hold a subsequent public hearing on their own initiative to reconsider the petition for abandonment?

Both of your questions are answered by section 32-4001, R.C.M. 1947, which specifically limits the authority of the Board of County Commissioners in this area, by providing:

(1) Each board shall acquire rights of way for county roads and discontinue or abandon them only upon proper petition therefor. (Emphasis added.)

The board has no authority to act on its own initiative as to opening or abandoning a county road.

Two other questions, however, arise under these circumstances:

1. Whether the objecting landowner was given proper notice of the abandonment proceeding?
2. If not, what effect does this lack of notice have on the proceedings?

Section 32-4014 provides that no abandonment order shall be valid unless preceded by notice and public hearing. In the instant case, the board gave actual notice to the persons signing the petition and also published notice in the local newspaper. However, the objecting landowner was never given actual notice.

Proper notice of the abandonment proceeding was not given to the objecting landowner, assuming he was an owner of record. The United States Supreme Court has held that notice by newspaper publication of the pendency of a proceeding which

will affect an interest in real property is not sufficient as to a person whose name and address are known or are very easily ascertainable. Schroeder v. New York City, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279 (1962); Walker v. Hutchinson, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956). The court stated in Schroeder at p. 211:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

When a county road is being considered for abandonment the interested parties would certainly include the landowners affected thereby. Further, the names and addresses of landowners of record are ascertainable from the county assessor. Under these circumstances, the notice by publication in the newspaper was not effective as to any landowner of record affected by the abandonment of the county road. As stated in Schroeder at p. 213:

Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The final question is what effect the lack of notice to one landowner had on the board's abandonment of the county road. The Montana Supreme Court has addressed this situation in Shaw v. City of Kalispell, 135 Mont. 284, 340 P.2d 523 (1959). The court in Shaw was primarily concerned with whether a landowner properly notified could take advantage of the failure of notice to other parties who had neither protested nor appeared as parties, however, citing with approval authority from other jurisdictions, the court stated at p. 292:

The fact that one or more landowners was not notified will not vitiate the proceedings as to those who were properly notified.

* * *

Where notice is required, it is essential to confer jurisdiction, for without some notice there is no jurisdiction, and the proceedings are void. It is not, however, to be understood that where there is jurisdiction of the subject matter, and

there are many persons interested as owners of different parcels of land, failure to give notice to some of the property owners will vitiate the entire proceeding. In such cases the better opinion is that the proceeding is void only as to those who have not been notified, but valid as to those who have had notice.

Therefore, the board, in effect, reached the proper solution to the problem by invalidating the abandonment as to the landowner objecting to lack of notice. The second hearing, however, was unnecessary and outside the board's authority. The original order of abandonment must stand and will be effective only as to those interested parties properly notified.

THEREFORE, IT IS MY OPINION:

1. County commissioners have no authority to vacate a previous road abandonment on their own initiative.
2. The notice required prior to the abandonment of a county road requires actual notice to all landowners of record affected thereby.
3. An abandonment order is effective only as to interested parties properly notified.

Very truly yours,

MIKE GREELY
Attorney General