

STATE OF SOUTH DAKOTA



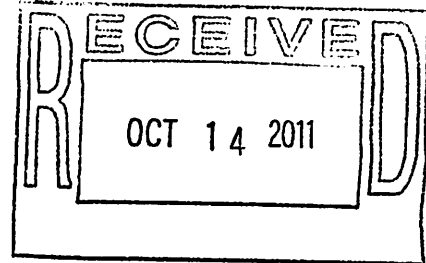
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October 13, 2011



Mr. Jay M. Leibel
Issenhuth and Leibel, LLP
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Madison, SD 57042

RE: Township's Responsibility for Snow Removal

Dear Mr. Leibel:

You have requested an opinion from this office.

QUESTION: Is a township required to perform snow removal on roads?

SUMMARY OF OPINION: Townships have a duty to remove snow to keep their secondary roads not designated as "minimum maintenance" passable. A township has discretion in determining how it performs this duty.

FACTS: Many townships' budgets are strapped due to demands to maintain roads affected by weather. Snow removal on all township secondary roads is creating a financial hardship. Townships understand their duty under SDCL 31-13-1 to maintain secondary roads. There is, however, no specific statute, court decision, or Attorney General opinion that specifically addresses a township's responsibility to remove snow on all roads.

Townships have several unique provisions from which it may be argued snow removal is a discretionary function. See SDCL 31-13-1.1 authorizing the designation of minimum maintenance roads, and 31-13-29, providing townships with the discretionary authority to open snowbound roads to make them passable for school buses and school related traffic. Finally, SDCL 31-13-22

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provides the townships with the discretion to establish a snow removal fund, but does not require the townships to establish such a fund.

IN RE QUESTION:

Providing an opinion on the question raised is difficult given the lack of clarity regarding township snow removal responsibilities. Absent future statutory clarification, a court decision may be needed to ultimately resolve the issue.

SDCL 31-13-1 states:

The board of township supervisors shall construct, repair, and maintain all of the secondary roads within the township. The board shall, at its annual meeting, designate which secondary roads are full maintenance roads and which are minimum maintenance roads. The board of township supervisors shall publish any resolution designating a secondary road as minimum maintenance if such road is a school route. The designation shall be final, after a lapse of thirty days, unless appealed as provided in chapter 31-3.

There is nothing within this provision or elsewhere, however, that specifically requires snow removal as a part of a township's road maintenance duties or specifically creates a duty to remove snow from its secondary roads. Absent clear statutory guidance, your question must be answered by determining whether snow removal constitutes a part of the SDCL 31-13-1 maintenance responsibilities. The first step in answering this question is to determine what constitutes "maintenance" or a duty to "maintain."

Where a term is not defined in a particular chapter, its meaning may be derived from definitions of the term in other statutes. SDCL 2-14-4 states "[w]herever the meaning of a word or phrase is defined in any statute such definition is applicable to the same word or phrase wherever it occurs except where a contrary intention plainly appears."

SDCL 31-5-8.3 requires the State Transportation Commission annually to establish a winter safe highway maintenance plan. Under that statute, snow removal is a maintenance function. Under SDCL 31-4-5, the Legislature has assigned maintenance of

the state trunk highway system to the State Department of Transportation. An exception is made for snow removal, which is assigned to any municipality with a population of over 2,500. The Legislature, in this statute, speaks of snow removal as a part of maintenance. These statutory provisions make sense, since no matter how well maintained a road may be in other respects, it cannot be used if it is clogged with snow. A term's meaning can also be derived by applying a court's interpretation of the term or phrase used in a similar context. In *Bland v. Davison County*, 507 N.W.2d 80, 81 (SD 1993), the Supreme Court interpreted a county's general duty to maintain its roads to include removal of snow and ice. In reaching this conclusion, the Court rejected the County's assertion that snow and ice removal was wholly discretionary because of the provisions of SDCL chapter 34-5 that gave the county discretion to create a snow removal fund and discretion in determining activities on which to expend the fund.

A similar interpretation of a township's duties appears in *Willoughby v. Grim*, 1998 S.D. 68, ¶ 8, 581 N.W.2d 165, 168, where the Court held that a board of township supervisors could be required to maintain the township's roads. The Court in *Willoughby* held that among the mandatory duties of the township supervisors is a duty to keep roads in a passable condition. The Court described that duty as "mandatory and unequivocal." *Id.* at ¶ 11, 581 N.W.2d at 169.

Given *Bland* and *Willoughby*, the fact that townships are given discretion in SDCL ch. 31-13 to establish a snow fund, and to determine what activities to expend those funds on, does not likely alter the conclusion that there is a duty to remove snow to make the road passable. Further, in light of *Bland* and *Willoughby*, I cannot construe SDCL 31-13-29 as making snow removal a purely discretionary activity.

This leaves the issue of whether there is a duty to remove snow from township secondary roads which have been designated as "minimum maintenance" under SDCL 33-13-1.1. It is noted that SDCL 31-13-1.2 provides that, when the township board of supervisors designates a road a "minimum maintenance," it is required to "post signs . . . to notify the motoring public that it is a minimum maintenance road and that the public travels on the road at its own risk." Given this language, and the very fact that the minimum maintenance classification is explicitly allowed, it is my view that the Legislature intended to give the

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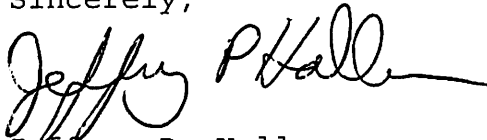
townships even more flexibility as to their maintenance of these designated roads. Therefore, the responsibility to remove snow from roads designated as "minimum maintenance" under SDCL 33-13-1.1 and 33-13-1.2 is likely discretionary.

In conclusion, it is my opinion that for roads not designated as "minimum maintenance" under SDCL 31-13-1.1, townships have a mandatory and unequivocal duty to make them passable by removing snow.

Nonetheless, the Court in *Bland*, *Willoughby* and other cases made clear that a governing body has considerable discretion in its performance of even a mandatory statutory duty. One of my predecessors, in agreement with *Willoughby*, noted that governing boards have considerable discretion in maintaining roads, including determining which roads will be graveled, oiled, and paved. Official Opinion 89-17, Report of the Atty. Gen. 1989-90 at 57, 60.

In sum, although there is a duty to remove snow to make township roads not designated as "minimum maintenance" passable, how that is accomplished is within the discretion of the township board of supervisors. The township board of supervisors has some discretion in determining what snow removal is necessary to keep the road in a passable condition.

Sincerely,



Jeffrey P. Hallem
Assistant Attorney General

JPH/CME/jkp