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#92118

NO.
STATE OF NEBRASKA
OFFICIAL
OCT 14 1992
DEPT. OF JUSTICE

DATE: October 13, 1992

SUBJECT: Whether rest areas are within the definition of highways or buildings.

REQUESTED BY: Allan L. Abbott, Director-State Engineer

WRITTEN BY: Don Stenberg, Attorney General
K. Osi Onyekwuluje, Assistant Attorney General

You have requested our opinion on the question of whether or not State rest areas located on the interstate and other State primary-aid highways are within the definition of "highways" or classified as capital facilities ("buildings") under the State law.

In making your inquiry you have indicated to us that some concern has been expressed suggesting that rest areas should be considered capital facilities (buildings) subject to Chapter 81 of our State statutes. Also, you point out that the Federal Highway Administration is of the opinion that rest areas are part of the federal-aid highways and you cite to 23 U.S.C. §319(a) as basis for that conclusion.

We understand that your question relates to the powers of the Department of Roads (hereinafter "the Department"), to construct or reconstruct rest areas located or to be located along state highways.

In responding to your question, reference is made to Attorney General Opinion No. 92113, dated September 22, 1992. In that opinion, this office responded in the affirmative to the question of whether a highway weighing station is a part of the State highway where it is located as opposed to it being in the nature of a capital facility such as a State office or other State buildings.

It is clear that the Department has the power to acquire lands, etc. for State highway purposes. *See*, Neb. Rev. Stat. §39-1320(1) (Reissue 1988). One such purpose is found in paragraph (g) of subsection (2): "State highway purposes, as referred to in subsection (1) of this section or otherwise in sections 39-1301 to 39-1362, shall include provisions for, but shall not be limited to, the following: . . . . (g) Roadside areas or parks adjacent to or near any highway; . . . ."

A roadside is defined as "the area adjoining the outer edge of the roadway"; and Roadway is defined as "the portion of a highway, including shoulders, for vehicular use." Neb. Rev. Stat. §39-1302(22) and (23) (Reissue 1988). Rest areas, we understand, are located within the State right-of-way in the area adjoining the outer edge of the roadway not for vehicular use. It, therefore, follows that the Department has the authority to acquire land for the highway purpose of erecting rest areas, which may, by statutory definition, be properly classified as roadside areas located adjacent to or near any highway.

Also, it is clear that the Department has the specific authority to construct rest areas as the State statutes are replete with enumerated powers to do so.

Thus, Neb. Rev. Stat. §39-1301 (Reissue 1988) indicates:

> In designating the highway system of this state, as provided by the provisions of section 39-1301 to 39-1362, the Legislature places a high degree of trust in the hands of those officials whose duty it shall be, within the limits of available funds, to plan, develop, construct, operate, maintain, and protect the highway facilities of this state, for present as well as for future uses.
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> . . . .
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> To this end, **it is the intent of the Legislature**, subject to the limitations of the Constitution and such mandates as the Legislature may impose by the provisions of sections 39-1301 to 39-1362, **to designate the Director-State Engineer and the Department of Roads**, acting under his direction, **as direct custodian of the state highway system, with full authority** in all departmental administrative details, in all matters of engineering design, and **in all matters having to do with the construction, maintenance, operation, and protection of the state highway system.**

> The Legislature intends to declare, in general terms, the powers and duties of the Director-State Engineer, leaving specific details to be determined by reasonable rules and regulations which may be promulgated by him. It is the intent of the Legislature to grant authority to the Director-State Engineer to exercise sufficient power and authority to enable him and the department to carry out the broad objectives hereinbefore stated in this section.

(Emphasis added.)

Neb. Rev. Stat. §39-1316 (Reissue 1988) provides: "**The department shall be responsible** for the preparation and adoption of plans and specifications **for the** establishment, **construction,** and maintenance, **of the state highway system.**" (Emphasis added.)

Neb. Rev. Stat. §39-1337 (Reissue 1988) provides: "**The construction,** maintenance, protection, and control **of the state highway system shall be under the authority and responsibility of the department,** except as otherwise provided in sections 39-1339 and 39-1372." (Emphasis added). Section 39-1339 concerns connecting links of State highways through municipalities, and section 39-1372 deals with freeways. These exceptions do not affect the power of the Department to construct or reconstruct rest areas located, or to be located, adjacent to State highways, provided rest areas are part of the highway system.

From the above, it is clear that the Department has the authority for the construction, maintenance, operation, protection and the establishment of the State highway system.[1] What is not yet clear, however, is whether or not rest areas are a part of that system.

State highway system is defined in Neb. Rev. Stat. §39-1302(25) (Reissue 1988), as follows:

> State highway system shall mean the roads, streets, and highways shown on the map provided for in section 39-1311, as forming a group of highway transportation lines for which the department shall be the primary authority. **The state highway system shall include, but not be limited to,** rights-of-way,

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[1]The Department of Roads may not, however, redesignate, relocate, redetermine or recreate the State highway system without the written consent of the State Highway Commission and the consent of the Governor.

> connecting links, drainage facilities, and the bridges, **appurtenances, easements, and structures used in conjunction with such roads, streets and highways.**

(Emphasis added.)

Therefore, for rest areas located on State highways to be considered part of the State highway system, they must be considered either appurtenances or structures used in conjunction with such roads, streets, or highways. This is so because rest areas do not fall under the statutory definition of, and are not considered rights-of-way, connecting links, drainage facilities, bridges, or easements. Id.

In ***Sorensen v. Lower Niobrara Natural Resources District***, 221 Neb. 180, 376 N.W.2d 539 (1985), the court had occasion to define the word "appurtenance" in a case involving the right of an owner of overlying land to use groundwater. There, the court quoted with approval from Black's Law Dictionary 94 (5th ed. 1979):

> *Appurtenance* "signifies something pertaining to another thing as principal, and which passes as incident to the principal thing, which is different, but of a congruous nature." ***City of Lincoln v. Lincoln St. R. Co.***, 67 Neb. 469, 487, 93 N.W. 766, 722 (1903). "A thing is deemed to be incidental or *appurtenant* to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another."

By analogy, rest areas would be deemed to be as incidental to the highways, and the right to use them, an attribute of travel on those highways as the right to use groundwater was found to be an attribute of land use in ***Sorensen***. Therefore, we conclude that rest areas are properly classified as appurtenances to the highways upon which they are located.

Likewise, we conclude that rest areas may properly be considered structures used in conjunction with such highways. As the term "structure" is defined in Neb. Rev. Stat. §39-1302(27) (Reissue 1988), it ". . . shall mean anything constructed or erected, the use of which requires permanent location on the ground or attachment to something having a permanent location." This definition is an all-inclusive one with the sole requirement that the thing constructed or erected have a use which requires permanent location on the ground or attachment to something

permanent. Accord, 83 C.J.S. Structure (1953), 40 Words and Phrases, "Structure", p. 496.[2]

In fact, the term "structure" has been held to mean the same thing as a "building". Id. Therefore, the term "structure" as it is used in defining "highway system" necessarily includes a building such as a rest area. Under this reasoning, rest areas are properly classified as structures. And, as structures used in conjunction with the highways by the traveling public, they are part of the State highway system which the Department has the authority to construct, establish and maintain.

Contrary to the provisions of Chapter 39 of our statutes, the provisions of Chapter 81, which govern the construction of capital facilities, etc., do not appear to affect the authority of the Department over rest areas designated as part of the State highway system. Thus, Neb. Rev. Stat. §81-1108.42 (Reissue 1987), concerns itself with contracts for construction of capital facilities and prohibits payment for such construction, unless a professional engineer or architect files a certificate that all work conforms to the plans and specifications. Also, Neb. Rev. Stat. §81-1108.43 (Reissue 1987), which prohibits any "state agency or department from performing for itself any services normally performed by a professional consulting engineer or architect . . . when the total project cost is one hundred thousand dollars or more . . .", nonetheless, exempts the Department from its reach.

Thus, the Department is clearly exempt from the provisions of Chapter 81 of our State statutes which deal specifically with issues pertaining to the construction of capital facilities as opposed to issues concerning the State highway system.

This is not to say, however, that the Department is, in all respects, exempt from the limitations placed on other State agencies and departments with respect to the **construction of capital facilities**. Far from it, as Neb. Rev. Stat. §39-1355 (Reissue 1988) makes clear:

> The department shall also have authority to lease, purchase, construct, or cause to be constructed, buildings for office accommodations, which are

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[2] *See also*, ***Holsey Appliance Co. v. Burrow***, 281 P.2d 426, 427 (Okla. 1955). (Word "structure" means anything which is constructed or erected and use of which requires more or less permanent location on ground or attachment to something having permanent location on ground.)

> necessary in the administration of the duties of the department, and buildings for the storing and housing of materials, machinery, equipment, and supplies; ***Provided*, that the department may not construct or cause to be constructed any building exceeding a cost of one hundred thousand dollars without the consent of the Legislature.** The maintenance, protection, and control of the materials, machinery, equipment, supplies, tools, and buildings shall be under the authority and responsibility of the department.

In conclusion, we are of the opinion that rest areas located on State highways are part of the State highway system and that the Department has the power to acquire land for them and authority for their construction, maintenance, operation and protection. We are also of the opinion that rest areas located on State highways are not buildings or capital facilities and, as such, are governed by the provisions of Chapter 39 of our statutes, and not Chapter 81. We make this conclusion on the basis of our understanding that rest areas are <u>not</u> substantially equipped and used as office buildings or buildings for storing and housing materials, machines, equipment and supplies.

Sincerely,

DON STENBERG
Attorney General

K. Osi Onyekwuluje
Assistant Attorney General

Approved By:

Attorney General