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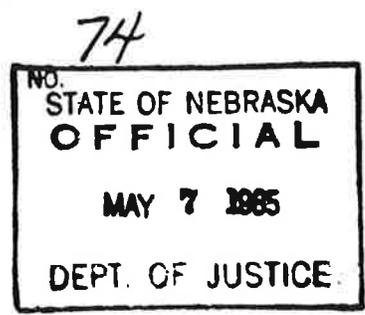
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May 1, 1985



SUBJECT: County roads.

REQUESTED BY: Randall L. Rehmeier, Otoe County Attorney, 1010 Central Avenue, Nebraska City, Nebraska, 68410

OPINION BY: Robert M. Spire, Attorney General; Warren D. Lichty, Jr., Assistant Attorney General.

QUESTION: When a tract of land is isolated from all public roads by a flowing stream, and assuming the stream is of sufficient size to prevent the landowner from crossing it to gain access to the tract of land, when is said tract land considered to be isolated or landlocked under the provisions of Neb.Rev.Stat. §39-1713 et seq. (Reissue 1984)?

CONCLUSION: When, at the hearing provided for in Neb.Rev.Stat. §§39-1714 and 39-1715 (Reissue 1984), the county board makes all the findings required by sections 39-1713 and 39-1716.

If an affidavit, or an affidavit and petition meeting all the requirements of section 39-1713 is formally presented to the board, the board has no discretion in setting the hearing. Thus, the board, at the same board meeting at which the petition is received, should appoint the time and place for the hearing within 30 days thereof, and the board shall also cause the notice to be given in accordance

with section 39-1715, by posting the public notices and mailing the written notices within the required time frame of the section. The only time that the board can decline to set the hearing is when the affidavit or affidavit and petition does not make all the allegations required by section 39-1713.

At the hearing, the first duty of the board is to hear the evidence supporting the petition, and then any evidence opposing. It is up to the applicants to prove that the four allegations required by section 39-1713 are true. If the board or hearing officer finds that any one of those allegations has not been proven by a preponderance of the evidence, it may so find and adjourn the hearing, and in such event the subject land will have been determined not to be isolated land within the meaning of the statute, unless the board's finding is reversed on appeal.

If, however, the board finds that all of the allegations required by section 39-1713 are true, then it must satisfy itself pursuant to section 39-1716, that the isolated land was not isolated at the time it was purchased by the owner, that the isolation of the land was not caused by the owner or done with his knowledge and consent, and that access is necessary for existing utilization of the isolated land.

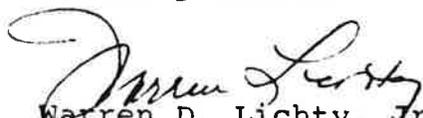
If the board finds these additional things, then the land is isolated land within these statutes.

The next decision the board wants to make then, is whether the road to be provided to the isolated land will be a public or nonpublic road. The language of the statute, as amended by LB 239, Eighty-seventh Nebraska Legislature, Second Session (1982), together with the legislative history of the bill, indicate that all of the accesses are to be considered public accesses, even if serving only one person or family, to alleviate any question about the public nature of the taking, but that this public access can be via either a public or a private road. Whether the road is public or private, would depend in part on the declaration of the county board, but most importantly, whether it met the construction specifications of the Board of Classifications and Standards rules and regulations. In other words, if the board thought that the road was important enough to the general public, it could incorporate the road into the county road system, and build it to the full required standards. On the other hand, if it did not wish to make the road a part of the county road system, economy would probably indicate that it be built to a lesser standard and width, in which case it should not be declared to be a public road.

There is an implication in the legislative history of this bill that the board should give the benefit of the doubt to finding that such tracts of land are isolated, thus enabling the access to be provided, since it is the petitioner who now pays the damages to the intervening owner, including the cost of acquiring the land needed for the road, and if public access was not granted prior to 1982, the petitioner must also pay all engineering and constructing costs in building such access road. And, if the county board's decision is that the road will not be added to the county road system, the petition must pay for all future maintenance of the road. Thus, since the county is relieved of financial burden in connection with providing such a road, it should, upon application, be liberal in finding the land to be isolated.

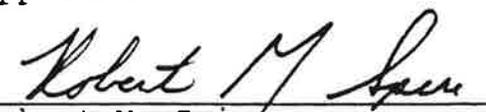
Very truly yours,

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Approved:



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