DON STENBERG
Attorney General

STEVE GRASZ
LAURIE SMITH CAMP
Deputy Attorneys General

JEFFERY T. SCHROEDER
Assistant Attorney General
Chief, Roads Section

OFFICE OF THE ATTORNEY GENERAL

STATE OF NEBRASKA

STATE HIGHWAY BUILDING
1500 HIGHWAY 2
PO BOX 94759
LINCOLN NE 68509-4759
Telephone (402) 479-4611
FAX (402) 479-4375

ASSISTANT ATTORNEYS GENERAL
Robert G. Avey
John E. Brown
William J. Orester
Kenneth W. Payne
Matthew F. Gaffey
Mark D. Raffety

#00027

NO. STATE OF NEBRASKA
OFFICIAL
JUN 2 2000
DEPT. OF JUSTICE

DATE: May 26, 2000

SUBJECT: Authority and responsibility of the Board of Public Roads Classifications and Standards regarding a request to grant a relaxation of minimum design standards on newly designated Banner County roads.

REQUESTED BY: Andrew F. Cunningham, Secretary
Board of Public Roads Classifications and Standards.

WRITTEN BY: Don Stenberg, Attorney General
Jeffery T. Schroeder, Assistant Attorney General

You have requested an Attorney General's Opinion regarding the authority and responsibility of the Board of Public Roads Classifications and Standards' (hereinafter "the Board") to act upon a request from Banner County to grant relaxation from the Board's minimum design standards for 37 county roads. The Board has expressed a concern that the 37 recently established public roads appear to be private "access roads" that should not have been established by the county as public roads. You have requested our advice as to how the Board should handle Banner County's request in light of the Board's concern. As discussed below, we believe that the Board has no authority to dispute the County's decision to establish the roads in question. However, the County's request for relaxation of the minimum design standards, as presently submitted, raises additional issues for the Board's consideration.

Facts

In January of this year, Banner County submitted a written request to the Board for a relaxation of the Board's minimum design standards for 37 recently established public roads. At about the same time, Banner County requested that, pursuant to Neb. Rev. Stat. § 39-2110

> damages are paid, the discretion of the commissioners in opening the road will not be interfered with by the courts.

Cummins v. Sheridan County, 95 Neb. 459, 460, 145 N.W. 975 (1914) (Headnote No. 2). *See also,* ***Stone v. Nebraska City***, 84 Neb. 789, 122 N.W. 63 (1909); ***Throener v. Board of Supervisors of Cuming County***, 82 Neb. 453, 118 N.W. 92 (1908); ***Johnson v. Hanson***, 1 Neb. (Unof.) 609, 95 N.W. 704 (1901). The rule has also been stated as follows:

> The decision of the necessity or expediency of establishing, maintaining, or vacating a public road is committed exclusively to county boards and other like legislative and governmental agencies and is not subject to judicial review.

Stone v. City of Nebraska City, 84 Neb. 789, 122 N.W. 63 (1909).

We are aware of no statutory authority for the Department or the Board to question the decision of the County Commissioners regarding the establishment of a county road. Additionally, it appears to us that there is a legal basis for the County's action. We understand the Board's concern regarding the County's decision. However, we do not believe that the County's actions can be declared "fraudulent" given the limited facts known by the Board. Also, we believe that it is not the providence of the Board to make a determination of fraud in instances such as this. Instead, it can be argued that the 37 roads in question were properly declared to be public roads.

The County claims that the roads have been used by the public and maintained with public funds. The County has now acquired an easement over the lands occupied by its roads and the County has acted to formally designate the roads as public roads. The fact that the roads are not on section lines and end in cul-de-sacs is also not determinative as to the status of the roads. There are several other existing Banner County roads with similar characteristics. There may be a factual question as to whether the roads are beneficial for the public use, however, there is authority to support the County's action.

> If a highway is open for use by all, it is a public use whether advantage is taken of it by few or many persons. . . . [A] highway may be a public use although a much greater benefit will accrue to private persons especially interested than to the public generally, or the proposed street would benefit one property owner more than another. . . .
>
> Common convenience and necessity may demand the construction of a highway as a mere cul-de-sac, and the appropriation of land therefor has been held to be for a public use.

Applying this rule of construction, a request for relaxation can be granted by the Board when strict compliance with the design standards would (1) be infeasible or cause a "special hardship," and (2) results from a **local** situation that is peculiar, special, or unique.

Based on this interpretation, we believe there are several potential questions that the Board should consider regarding Banner County's request. First, the statutory language does not appear to allow a blanket exception from the minimum design standards. The County must therefore provide a factual basis to justify its conclusion that there are special circumstances presented by each of the 37 roads that would justify a relaxation of the minimum design standards. Second, an allegation of lack of funds, without more, would not appear to be a peculiar, special, or unique **local** situation that would justify a relaxation of the minimum design standards. There is no indication in the language of the applicable statutes that general lack of funding is a special or unique circumstance. If general lack of funding is allowed to be the basis for a relaxation of standards, it would appear that a county could make a case for a relaxation of standards in almost any instance. (However, funding may be a proper consideration in many instances. For example, when adherence to minimum standards would cause the construction costs of a highway improvement to be unduly high, due to the unique topography of an area, lack of funds could be a condition for relaxation of standards. Also, when application of minimum standards prevents needed improvements to existing roadways without the premature removal of valuable improvements of significant remaining usefulness, there may be a unique circumstance warranting the relaxation of standards. Special circumstances related to sparse traffic and low speed limits might also be considered.)

There is a further question for the Board to consider when reviewing the County's request. The only road classification lower than that of "local road" is that of "minimum maintenance road." Banner County's request for relaxation of standards could be considered to be a request that these 37 roads be allowed to meet the minimum standards of minimum maintenance roads. However, the rules and regulations of the Board concerning minimum maintenance roads state that a minimum maintenance road:

> "[m]ay not be the only access to an occupied dwelling--a minimum maintenance road shall be reclassified to local or a higher functional classification whenever an existing dwelling or newly constructed dwelling becomes occupied."

428 NAC § 001.07(5). Because the present system of classification of roads by function contemplates that county roads leading to occupied dwellings meet a higher standard than that of minimum maintenance roads, it can be argued that the 37 roads in question should at least carry a functional classification standard of "local" road, the very standard which Banner County is seeking to relax.