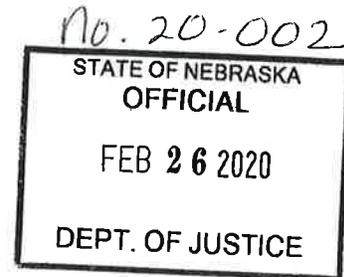




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DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Responsibility for Maintenance of the Part of a County Road Located on State Highway Right of Way

REQUESTED BY: Senator Julie Slama

WRITTEN BY: Douglas J. Peterson, Attorney General
Jeffery T. Schroeder, Assistant Attorney General

INTRODUCTION

You indicate you are considering introducing legislation to make the State of Nebraska, Department of Transportation ("State") responsible for the maintenance of the State highway "right of way." Based on prior discussions with you about this subject, we understand you are asking about the maintenance responsibility for any County road where it intersects with a State highway. Specifically, those discussions have been about whether the State or the County ("County") has the responsibility to maintain the part of any County road located on State highway right of way. You note there has been some disagreement and confusion about this issue between the State and certain County officials.

Your question does not pertain to the State's responsibility to maintain the traveled lanes of the State highway. As discussed below, the State is responsible for the traveled lanes, including the area of the "intersection." By statute, the intersection is the area within "the lateral boundary lines of the roadways of two or more highways which join one another at, or approximately at, right angles" or otherwise expressed as "the area within which vehicles traveling upon different highways joining at any other angle may come in conflict." Neb. Rev. Stat. § 39-101(4) (2016). The "roadway" is the part of a highway used for vehicular travel. Neb. Rev. Stat. § 39-101(11) (2016). The State is also

responsible for maintaining any paved shoulder of the State highway since the shoulder is used in conjunction with the highway traveled lanes.

Although you have asked only about the **maintenance** responsibility for these segments of County roads, maintenance is only one of several duties applying to an entity assigned jurisdictional responsibility over a public road. The other duties, according to Neb. Rev. Stat. § 39-2105 (Cum. Supp. 2018), are design, construction, reconstruction, and operation. While this opinion focuses on “maintenance,” our conclusion also applies to these other duties. Further, when we refer to “maintenance” we mean “the act, operation, or continuous process of repair, reconstruction, or preservation of the whole or any part of any highway, including surface, shoulders, roadsides, traffic control devices, structures, waterways, and drainage facilities, for the purpose of keeping it at or near or improving upon its original standard of usefulness and safety.” Neb. Rev. Stat. § 39-101(6) (2016).

You ask in your letter about the application of the provisions of Neb. Rev. Stat. § 39-1339 (2016) to this issue. Section 39-1339 does not apply because it deals expressly with the allocation of maintenance duties on the portions of State highways located within the corporate limits of a City. Similarly, Neb. Rev. Stat. § 39-1372 (2016) does not apply to your question because it relates solely to the assignment of maintenance responsibilities between the County and the State at County road intersections with State freeways, including the Interstate highway system. Thus, these sections do not assist in resolving the issue raised in your letter.

BACKGROUND

It may not be apparent to a casual observer where an intersecting County road first enters the State highway right of way. This is, in part, because the State typically blended the two roads together in the area of the intersection when the State reconstructed the State highway. To enhance the smoothness of the roadway transition when the County road was unpaved, the State usually paved a short transition from the highway pavement, called a paved return, to improve the connection between the roads. Further, roadway ditches and other topographic features were typically reconstructed to the extent necessary to create a relatively seamless intersection. The vast majority of State highways have been hard surfaced, and the majority of intersecting County roads are not hard surfaced. The State’s long-standing interpretation and practice has been for the County, not the State, to be responsible for operating and maintaining the short County road segment discussed in this opinion. We understand some of your constituent Counties have argued the State should be responsible for “maintaining” all of the 50 to 75 feet of the County road located on State “right of way”.

We are not aware of case law or an Attorney General’s Opinion addressing this issue. There are a few Attorney General’s Opinions that cite or discuss some of the

statutory provisions set out below.¹ There is an Attorney General's Opinion that concluded that a County does not have authority to expend County funds to construct a street within the corporate limits of a City under a statute that expressly states the County has jurisdiction only over roads outside the corporate limits. 1977-78 Rep. Att'y Gen. 310 (Opinion No. 200, dated Feb. 24, 2978). Unlike that Opinion, there is no statute expressly limiting a County's jurisdiction in the area of a State highway intersection with a County road.

STATUTORY FRAMEWORK

In 1969, the Nebraska Legislature sought to reorganize the various roadway systems into "an integrated system of public roads." *See generally* Neb. Rev. Stat. §§ 39-2101 to 39-2125 (2016, Cum. Supp. 2018 and Supp. 2019). The 1969 legislation, as amended, still applies today. In it, the Legislature declared:

Fundamental to the development of an integrated system of public roads is a determination of the function each road segment serves. Through adoption by law of a functional classification system, it is the intent of the Legislature that each segment of public road shall be identified according to the function it serves. Identification of roads according to function then will permit the establishment of uniform standards of design, construction, operation, and maintenance for each classification of road. Such standards will promote the general safety of the traveling public, enhance the free flow of traffic, and provide improved utilization of highway financing.

Responsibility for the various functional classifications of public roads shall be assigned by law to the state, the counties, and the municipalities, as appropriate, such assignments reflecting the general responsibilities of each entity.

Neb. Rev. Stat. § 39-2101, ¶¶ 6 and 7 (2016). Neb. Rev. Stat. § 39-2102 (2016) divides public highways, roads and streets into the following two broad categories: rural highways and municipal streets. Rural highways are defined as "all public highways and roads outside the limits of any incorporated municipality." *Id.* Neb. Rev. Stat. § 39-2103 (Cum.

¹ See 1971-72 Rep. Att'y Gen. 311 (Opinion No. 136, dated July 28, 1972) (Township Roads-Highway Allocation Funds); Op. Att'y Gen. No. 176 (January 8, 1982) (County's duty to maintain County Roads – Insufficient Funds); Op. Att'y Gen. No. 224 (March 23, 1982) (Maintenance of Township Roads); Op. Att'y Gen. No. 87021 (February 11, 1987) (Township Roads – Highway Allocation Funds); Op. Att'y Gen. No. 94040 (May 23, 1994) (Placement of a sign along a State highway within corporate limits of a City).

Supp. 2018) provides nine functional classifications for all rural highways, and identifies the main characteristics of each functional classification.

Under Neb. Rev. Stat. § 39-2105(1) (Cum. Supp. 2018), the State has been assigned jurisdictional responsibility for the “design, construction, reconstruction, maintenance, and operation” of “all roads” that are functionally classified as “interstate, expressway, and major arterial.” Major arterials, according to § 39-2103(3), are highways used for “high-speed, relatively long-distance travel patterns.” Section 39-2105(2) states the various counties have jurisdictional responsibility for “all roads” functionally classified as “other arterial, collector, local, minimum maintenance, and remote residential.” Section 39-2103(5) describes “other arterial” roads as “highways of less importance as through travel routes which would serve places of smaller population . . . not served by the higher systems.” According to these provisions, jurisdictional responsibility for rural roads is assigned based on the function served by each classification, not the ownership status of the property on which the rural road is located.

The Legislature provided each functional classification of rural road should have its own unique standards. In the 1960s and 1970s, the legislature created the Nebraska Board of Public Roads Classifications and Standards (“Board”) and required the Board to “develop minimum standards of design, construction, and maintenance for each functional classification set forth in section 39-2103.” Neb. Rev. Stat. § 39-2113(1) (Supp. 2019). The Legislature directed “such standards shall be such as to assure that each segment of highway, road, or street will satisfactorily meet the requirements of the area it serves and the traffic patterns and volumes which it may reasonably be expected to bear.” *Id.* The design and maintenance standards were developed and continue to apply today to the through traffic “major arterials” (State Highways) and are more stringent than the standards applying to the functional classifications for which the Counties are responsible. See 428 Neb. Admin. Code, ch. 2.

ANALYSIS

Although no single statute provides the answer to your question, we believe the collection of statutes on this subject create a framework from which the issue can be resolved. The Nebraska Supreme Court has stated:

In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the legislature as ascertained from the entire language of the statute considered in its plain, ordinary and popular sense, it being the court’s duty to discover, if possible, the Legislature’s intent from the language of the statute itself. *Curry v. State, ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

Becker v. Nebraska Acct. & Disclosure Comm., 249 Neb. 28, 33, 541 N.W.2d 36, 40 (1995). As explained below, we conclude this statutory framework should be construed to place responsibility for maintaining the part of the County road located on State right of way on the County.

The integrated system the Legislature created in 1969 requires that every public road be evaluated to determine what function it serves for the public. All public roads serving the same function are grouped in the same functional classification. The Legislature determined the State would be assigned the jurisdictional responsibility for “public roads” in functional classifications serving **statewide interests**. Those functional classifications are “interstate, expressway and major arterial.” Neb. Rev. Stat. § 39-2105(1) (Cum. Supp. 2018). These classifications are the through traffic routes providing high speed direct connections between the various communities in Nebraska and connecting Nebraska to surrounding States. See also Neb. Rev. Stat. § 39-2105(3) (Cum. Supp. 2018). Further, the applicable design and maintenance standards reflect the interests of the high speed, long distance traveling public.

Similarly, the Legislature assigned to the Counties jurisdictional responsibility for the public roads in functional classifications serving more **local interests**. The Counties are responsible for the roads classified as “other arterial, collector, and local.” Neb. Rev. Stat. § 39-2105(2) (Cum. Supp. 2018). These roads serve many important local functions such as (a) providing access to all rural parcels of land, (b) serving as a route for rural mail delivery, and (c) providing rural connections to local schools, markets and communities. The applicable design and maintenance standards are unique to these roads and reflect the type of traffic expected to travel along such roads.

The Legislature did not focus on which public entity owned the rights of way on which the various classifications of roads exist. Instead, the Legislature assigned jurisdictional responsibility between the State and the Counties based on the transportation function served by each classification of road. We understand it is somewhat common for a road of the State, County or City to be located on public property owned by one of the other governmental entities. For example, some State highways have been constructed on County road easements along a government section line. Similarly, when the State completes a major reconstruction of a highway, it sometimes needs to realign an intersecting County road to connect into the State highway at a safer location. In those instances, the realigned County road is located on property acquired by the State. Finally, in some communities, the State highway passing through town today occupies a dedicated City street right of way. Responsibility for maintenance in these instances is not related to who “owns” the right of way.

Construing the statutes establishing Nebraska’s integrated system of public roads as a whole, we conclude that the State is responsible for maintenance of the major arterial rural highways regardless of which entity owns the property rights on which those highways are located. Counties, in turn, are responsible for the operation and maintenance of all parts of the County road right up to the paved highway or paved highway shoulder.

CONCLUSION

Nebraska's statutes do not expressly state who is responsible for the maintenance of the part of a County road located on State highway property because jurisdictional responsibility is not based on who owns the land under the highway or road. For the reasons stated above, we concluded that the **State** is responsible for maintenance of the major arterial rural highways regardless of which entity owns the property rights on which those highways are located. The **County** is responsible for the maintenance, and other duties, of all of a County road, even the portion located on State highway property, regardless of which entity owns the underlying property rights. This conclusion is consistent with the Legislature's intent to create an integrated system of public roads.

Sincerely yours,

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Assistant Attorney General

Approved by:



Attorney General

pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature