

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-12

Date issued: June 28, 2000

Requested by: Wade G. Enget, Mountrail County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether additional land subject to a road easement adjacent to a section line easement may be used by a political subdivision for other purposes without the consent of the landowner.

II.

Whether land that is not taxed because it is subject to a road easement would be deemed to be abandoned by the landowner because of the tax exemption.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that land subject to a road easement in favor of a political subdivision may not be used for other purposes without the consent of the landowner or the specific order of a court resulting from a condemnation proceeding under N.D.C.C. § 32-15-03(2).

II.

It is my opinion that land not taxed because it is subject to a road easement will not be deemed to be abandoned by the landowner on the basis of the tax exemption.

- ANALYSES -

I.

It has generally been the law of North Dakota that when a highway is established, the public acquires merely an easement of passage and the fee title remains in the landowner, except where otherwise provided for by statute or the terms of a deed from the owner. See Casey v.

Corwin, 71 N.W.2d 553, 555 (N.D. 1955).¹ A landowner who abuts an open section line retains ownership of the property within the section line easement subject to the public's right to travel. Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994). See Railway Co. v. Lake, 88 N.W. 401, 413 (N.D. 1901) ("the public has only an easement in streets and highways, the fee of the land remaining in the owner, subject to the easement, and he may exercise such acts of ownership and possession as do not interfere with the public use."). Fundamentally, the highway easement only includes those property rights reasonably related to the construction or use of the highway. For example, generally the state may take soil or other materials found within the lines of a highway easement only to the extent that the material is needed in the process of construction or repair; anything else belongs to the adjoining landowner. Minot Sand & Gravel Co. v. Hjelle, 231 N.W.2d 716, 724 (N.D. 1975). See also Donovan V. Albert, 91 N.W. 441, 444 (N.D. 1902) (telephone poles are not highway purposes); Cosgriff v. Tri-State Telephone & Telegraph Co., 107 N.W. 525, 526-528 (N.D. 1906) (same, applied to section line easements); Gram Const. Co. v. Minneapolis, St. P. & S.S.M. Ry. Co., 161 N.W. 732, 734 (N.D. 1917) (addition to railway spur line to street easement is additional, compensable damage to fee owner); Otter Tail Power Co. v. Von Bank, 8 N.W.2d 599, 604-605 (N.D. 1942) (farmer gave county easement for highway, which was all that could have been condemned for highway, but which did not include easement for power line); City of Fargo v. Fahrlander, 199 N.W.2d 30, 34 (N.D. 1972) (eminent domain required to take light, air, access, and view easements from property owners when converting public street to pedestrian mall).

A county may not acquire more than an easement for highway purposes. Railway Co. v. Lake, *supra*; Otter Tail Power v. Von Bank, *supra*. The North Dakota Supreme Court determined that a deed purporting to grant fee simple title to a county which acquired an additional strip of land adjacent to a sectionline easement would be interpreted to grant only an easement for highway purposes. Lalim v. Williams County, 105 N.W.2d 339, 344 (N.D. 1960). The court stated:

The deed from the Ryans to Williams County is on its face a grant.

"A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended." Section 47-1013, NDRC 1943.

¹ To the extent it states otherwise, 1981 N.D. Op. Att'y Gen. 204 (July 13 to Orrin Lovell) is overruled.

This is not a conclusive presumption. We examine the deed to determine whether or not the parties intended that the deed should pass a fee simple title or a lesser estate. In doing so, we first look to the face of the deed itself which discloses that it conveys strips of land seven feet wide lying adjacent to an easement for highway purposes along section lines and over land to which the grantors owned the fee simple title, which the grantors excepted and retained. The deed further shows that the strips of land constitute two parcels which are part of a federal aid project and that the parcels are shown on a plat. The plat was already of record in the office of the register of deeds when the deed was given. Reference to that record indicates that it was a blueprint right of way plat containing the identical descriptions of the two parcels that are set forth in the deed and shows that the two 7-foot strips were additions to the right of way for the highway already established along the section lines. Thus the deed and the plat to which it refers fairly give rise to the question as to whether the parties, and particularly the grantors, intended to convey a fee simple title to the 7-foot strips or merely an easement like and in addition to that already established and used for highway purposes. Under such circumstances the estate or interest conveyed by the deed must be determined primarily, in the absence of intervening rights of innocent parties, by the intention of the parties to the deed if such intention can be ascertained.

Id. at 344-45. The North Dakota Supreme Court further noted that if the seven-foot strips used to widen the highway were construed to convey a fee title to the county, then the seven-foot strips would completely divide the grantor's fee title to the 33-foot strips within the section line easement from the fee title to the rest of their land which is not subject to the highway easement. Id. at 346-47.

Counties may acquire land for highway purposes under N.D.C.C. § 24-05-09 "for the present use, either temporary or permanent." Nowhere in Chapter 24-05 is it specified whether the county may acquire more than an easement, nor does this chapter state that the county is prohibited from obtaining fee title. N.D.C.C. § 24-05-09 was first enacted in 1935 and was purposefully not considered by the Lalim court. Lalim, 105 N.W.2d at 344. See also 1935 N.D. Sess. Laws ch. 121. Although the decision in Lalim was based on the county's general powers as a political subdivision, specifically including the powers presently contained in N.D.C.C. ch. 32-15 governing eminent domain, nothing in N.D.C.C. § 24-05-09 implies a different result would be obtained. Lalim at 344, 346-47. However, under the general

eminent domain chapter, the public may only take an easement if it is for highway purposes. N.D.C.C. §§ 32-15-03(2), 32-15-03.2. For purposes other than highways, the condemnor must allege the need for fee simple title and, in order to obtain fee simple title, the court must grant the request by order. N.D.C.C. § 32-15-03(2).

Therefore, it is my opinion that land subject to a highway easement in favor of a political subdivision may not be used for other purposes without the consent of the landowner or the specific order of the court resulting from a condemnation proceeding under N.D.C.C. § 32-15-03(2).

II.

All property, real or personal, in North Dakota has an owner. N.D.C.C. § 47-01-09. In addition to being the owner of all property lawfully appropriated or dedicated to its own use, the state is the owner of all property of which there is no other owner. N.D.C.C. § 47-01-10. In speaking to a member of my staff, you said that several individuals who own land subject to an additional highway easement which is adjacent to a section line easement are concerned about the potential to lose their remaining fee interest in the land. They are under the impression that if the land subject to the highway easement is not taxed because of the exemption under N.D.C.C. § 57-02-10, that this fact will be construed as an abandonment of their fee ownership.

Proof of abandonment generally requires "clear and unequivocal evidence of acts demonstrating and indicating abandonment or extinguishment." Royse v. Easter Seal Society 256 N.W.2d 542, 546 (N.D. 1977) (concerning contractual easement). See also Harry E. McHugh, Inc. v. Haley, 237 N.W. 835 (N.D. 1931). There are two statutorily recognized methods by which rights of ownership in real property may be inadvertently lost or abandoned. The first is establishment of a public road by prescription under N.D.C.C. § 24-07-01 and the second is by adverse possession under N.D.C.C. ch. 47-06. Neither would result in abandonment under the circumstances you describe.

N.D.C.C. § 24-07-01 provides:

All public roads and highways within this state which have been or which shall be open and in use as such, during twenty successive years, hereby are declared to be public roads or highways and confirmed and established as such whether the same have been laid out, established, and opened lawfully or not.

The North Dakota Supreme Court has held that when a road is acquired by prescription, the public acquires merely an easement of passage and the fee title remains in the landowner. Casey v. Corwin, 71 N.W.2d at 555. In the situation presented by your question, the public has already expressly obtained an easement for highway purposes. Therefore, the landowners will not lose further rights under N.D.C.C. § 24-07-01 because the highway easement rights have already been obtained, to the maximum extent possible, by the express terms of the highway easement itself.

The title to real property may also be obtained by adverse possession. Adverse possession is addressed by N.D.C.C. § 47-06-03, which provides:

A title to real property, vested in any person who has been or hereafter shall be, either alone or including those under whom he claims, in the actual open adverse and undisputed possession of the land under such title for a period of ten years and who, either alone or including those under whom he claims, shall have paid all taxes and assessments legally levied thereon, shall be valid in law. Possession by a county under tax deed shall not be deemed adverse. A contract for deed shall constitute color of title within the meaning of this section from and after the execution of such contract.

(Emphasis supplied.)

Two observations may be made concerning the county's use of the highway easement in relation to the possibility of claiming ownership of the landowner's remaining fee title. First, the public's use of the highway easement for highway purposes is not adverse to the landowner's remaining fee interest because this use is not inconsistent with the landowner's residual fee interest. See Cranston v. Winters, 238 N.W.2d 647, 653 (N.D. 1976). Thus, an adverse possession may not be deemed to have occurred based on this fact alone. Id. Second, and more importantly concerning the effect of the tax exemption, N.D.C.C. § 47-06-03 relates to the payment of taxes and assessments "legally levied thereon." Any taxes levied upon land subject to a highway easement in violation of N.D.C.C. § 57-02-10 would not be legally levied.

Therefore, it is my opinion that land not taxed because it is subject to a road easement will not be deemed to be abandoned by the landowner based on the tax exemption.

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- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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