

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-17

Date issued: October 6, 2000

Requested by: Tom Henning, Stark County State's Attorney

- QUESTION PRESENTED -

Whether an easement for highway purposes granted to a township "so long as [it] is used for a public highway" was extinguished or released when the township dissolved over 50 years ago and no provision was made to transfer the road easement to the county or any other governmental entity.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the easement in question was extinguished or released when the township dissolved and did not make any disposition of the easement to any other entity that would hold the easement and use it for highway purposes. It is my further opinion that it is a question of fact whether actual use of this easement for highway purposes after the township dissolved has created a road by prescription.

- ANALYSIS -

In 1925 several landowners granted a public easement "for highway purposes to the use of said Heart River Twp; to have and to hold the same . . . so long as the above described premises is used for a public highway." The Stark County State's Attorney's Office described the easement as an eastward deviation from a north and south road around a failed bridge to a point on the Heart River that can be crossed, and noted that there was a concrete crossing at that point. Information was also supplied that this road and easement are not along a section line and that the Stark County State's Attorney believes it is not a part of the official county road system; that the township dissolved at some point during the 1930s; that no record can be found concerning the disposition of township property; that no record in the county register of deeds office indicates a subsequent transfer of this public easement by the township to any other entity; and that no other governmental entity has undertaken the maintenance and control of any roadway along this easement. Further information added that the county maintains a road up to the easement from both

the north and the south, but does not maintain the easement itself. It was also noted that there have been occasional uses of this easement by the public but the present property owners have fenced the land and are seeking to prohibit traffic along the easement.

The disposition of property when a township is dissolved has been addressed by statute:

If a majority of all votes cast at the township meeting are in favor of dissolution, the township ceases to be a corporation on the first day of January next succeeding the time of holding such meeting. The property belonging to the township, after the payment of its debts and liabilities, must be disposed of in the manner directed by a majority of the voters of the township at any special meeting. All of the records of the township must be turned over for preservation and safekeeping to the county auditor of the county within which the township lies.

N.D.C.C. § 58-02-28. No records could be found showing the disposition of this township's property and there is nothing to indicate that the township transferred this easement to another political subdivision, to the state, or to a private party. Although one does not wish to presume that the important duty of disposing of the township's assets upon dissolution was not performed, "[t]hat which does not appear to exist is to be regarded as if it did not exist." N.D.C.C. § 31-11-05(21). Unless further proof is found regarding the disposition of assets or a transfer of title, these easements must be treated as if there was no disposition made of them at the time the township dissolved.

After dissolution of a civil township, the board of county commissioners is to place the territory of the dissolved township in an assessment district for the county. N.D.C.C. § 58-02-30. After discharging all of the debts and liabilities of the dissolved township, the balance remaining in the assessment fund is to be used in the construction of roads and bridges within the assessment district to which the dissolved township has been attached. Id. The terms of both deeds granting a public easement for highway purposes which you supplied to this office state that the land is granted and conveyed for highway purposes so long as it is used for a public highway.¹ Language such as this creates a condition subsequent to the

¹ This opinion does not address whether the terms of the grant could have been fulfilled by a transfer of the easement from the dissolved township to the county (either directly or indirectly) and the county maintaining a highway on the easement because those acts apparently did not occur.

grant, which implies that the estate granted to the township will be forfeited by failure to comply with the condition by failing to use the land for a public highway. Griswold v. Minneapolis, St. P. & S.S.M. Ry. Co., 97 N.W. 538, 540 (N.D. 1903). Because the township affirmatively dissolved but did not make any disposition of the land to continue its use for highway purposes, the terms of the grant imply that the easements were extinguished or released.

Further, an additional reason to conclude that the easement has been extinguished or released is because the highway easement may have been abandoned. State law provides:

Any road or part thereof laid out by authority of a board of county commissioners or a board of township supervisors, and not opened to public use within ten years from the time when it was laid out, or which thereafter is abandoned and not used for ten years, hereby is declared vacant.

N.D.C.C. § 24-07-31. This statute would imply that the highway located along the easement involved in this instance may be vacant because the township which constructed and maintained the highway easement dissolved without making provision for the highway, and therefore abandoned the highway. It is a question of fact whether the abandoned highway was not used for a ten year period, which is also a requirement for the highway to be vacated under this statute.

It was also indicated that some use has been made of this highway easement for purposes of public travel from time-to-time since the township dissolved. The public's use of this land for highway purposes as a matter of right was abandoned by the dissolution of the township under the terms of the original grant. However, the public's continued use of the highway in opposition to the rights of the grantors or their successors may have created a public road by prescription. A public road may be created by prescription if the public has used the land as a road or highway during 20 successive years without regard to whether the land had been laid out, established, and opened lawfully as a public road. N.D.C.C. § 24-07-01.² Whether a public road by prescription has been established over this land is a question of fact on which this office may not issue an opinion. See e.g., 1997 N.D. Op. Att'y Gen. L-71 (June 18 to William Binek).

² In 1995 N.D. Op. Att'y Gen. L-121, L-122 (May 19 to Ann Mahoney) the basic elements for establishing a road by prescription were set out:

1. General, continuous, uninterrupted, and adverse use of the road;
2. By the public under a claim of right; and
3. For a period of twenty years."

Therefore, it is my opinion that the easement in question was extinguished or released when the township dissolved and did not make any disposition of the easement to any other entity that would hold the easement and use it for highway purposes. It is my further opinion that it is a question of fact whether actual use of this easement for highway purposes after the township dissolved has created a road by prescription.

- 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 question presented is decided by the courts.

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