

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-16

Date Issued: August 6, 1996

Requested by: Merle Torkelson, McLean County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a section line easement recognized and included in a recorded subdivision plat is subject to the state laws regarding section lines.

II.

Whether a county commission has the duty to authorize or prohibit obstructions on a section line easement that is recognized in a subdivision plat approved by the county commission and properly recorded pursuant to N.D.C.C. ch. 40-50.1 or former N.D.C.C. ch. 40-50.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a section line easement recognized and included in a recorded subdivision plat is not subject to the state laws regarding section line easements for travel; however, it is my further opinion that a road indicated along a section line in a properly recorded subdivision plat is held in trust for public use.

II.

It is my opinion that a county commission has the duty to authorize or prohibit obstructions on a section line easement that is recognized in a subdivision plat approved by the county commission and recorded pursuant to N.D.C.C. ch. 40-50.1 or former N.D.C.C. ch. 40-50.

- ANALYSES -

The questions are in regard to two subdivision plats that were approved by the county commission and recorded pursuant to N.D.C.C.

ch. 40-50.1 or former N.D.C.C. ch. 40-50. The relevant facts are as follows:

The plats relate to land located in the county and outside of city limits. The issue involves land within 33 feet of a section line which is included on the plats and apparently recognized as the public's section line easement to be used for public travel. On one part of the 33 feet, private party "A" has apparently begun the foundation for a building; the topography of this parcel prohibits vehicular use of the land. Another private party, "B", has planted trees on another portion of the area within 33 feet of the section line.

"A" is asking the county commission to give him permission to have an obstruction, in the form of a building, on the area in the plat which is within 33 feet of the section line, or he wants some assurance that he is not going to be required to remove the building in the future. The sons of the original owner of the property whose land was subdivided want the county commission to require both "A" and "B" to remove their respective obstructions.

In 1866, the United States Government made an offer of section line easements on public land, and that offer was accepted in 1871 by the Dakota Territory. See Ames v. Rose Township Bd. of Township Supervisors, 502 N.W.2d 845, 847-48 (N.D. 1993). See also Walcott Township of Richland County v. Skauge, 71 N.W. 544, 546, (N.D. 1897); Faxon v. Lallie Civil Township, 163 N.W. 531, 532 (N.D. 1917); Hillsboro Nat'l Bank v. Ackerman, 189 N.W. 657, 659 (N.D. 1922); DeLair v. County of LaMoure, 326 N.W.2d 55, 59 (N.D. 1982). The North Dakota Supreme Court has stated, "[h]ighways once established over the public domain under and by virtue of this act [of offer and acceptance of section line easements], the public at once became vested with an absolute right to the use thereof, which could not be revoked by the general government" Walcott Township of Richland County v. Skauge, 71 N.W. 544, 546 (N.D. 1897). See also Wenberg v. Gibbs Township, 153 N.W. 440, 441 (N.D. 1915); Faxon v. Lallie Civil Township, 163 N.W. 531, 533 (N.D. 1917); Small v. Burleigh County, 225 N.W.2d 295, 298 (N.D. 1974); Burleigh County Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 627 (N.D. 1994). "We very much doubt the power of the Legislature to waive a right of way granted by Congress in 1866 and accepted in 1871, especially as the state did not own said right of way, but merely held as trustee for the public. . . ." Wenberg v. Gibbs Township,

153 N.W. 440, 442 (N.D. 1915). See also Small v. Burleigh County, 225 N.W.2d 295, 298 (N.D. 1974); Saetz v. Heiser, 240 N.W.2d 67, 72 (N.D. 1976). "[T]he right of passage on open section lines belongs to the public and cannot be alienated by the State, which holds the section lines as trustee for the public." Burleigh County Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 627 (N.D. 1994).

N.D.C.C. ch. 40-50.1 provides the manner of laying out a subdivision of land. The land must be surveyed and a plat made of the land. N.D.C.C. § 40-50.1-01. "All . . . public highways, streets, and alleys of record must be correctly located and plainly shown and designated on the plat." N.D.C.C. § 40-50.1-01(7). In determining whether to approve a plat, the board of county commissioners shall determine if appropriate provisions are made for streets and other public ways. N.D.C.C. § 11-33.2-12(3). No streets in connection with a subdivision may be laid out, constructed, opened, or dedicated for public use or travel except in accordance with a plat as finally approved by the board of county commissioners. N.D.C.C. § 11-33.2-12(1). "The land intended to be used for the streets, alleys, ways, or other public uses in any jurisdiction or addition thereto must be held in the corporate name of the jurisdiction in trust for the uses and purposes set forth and expressed and intended." N.D.C.C. § 40-50.1-05. "Upon final approval of a plat under section 11-33.2-11 . . . , the subdivider shall record the plat in the office of the register of deeds of the county where the plat is located." N.D.C.C. § 40-50.1-04.

It would appear that a road shown within 33 feet of a section line on a plat simply recognizes the public easement for travel. However, N.D.C.C. § 24-07-03 must be considered since it can be interpreted to surrender a section line easement if the section line is included within the limits of a subdivision plat recorded pursuant to chapter 40-50.1.

N.D.C.C. § 24-07-03 provides, in part:

In all townships in this state, outside the limits of incorporated cities, and outside platted townsites, additions, or subdivisions recorded pursuant to sections 40-50.1-01 through 40-50.1-17 or recorded prior to July 1, 1987, under former chapter 40-50, the congressional section lines are public roads, open to the width of thirty-three feet [10.06 meters] on each side of such section lines.

The North Dakota Supreme Court, when considering the meaning of N.D.C.C. § 24-07-03 and other state laws, stated, "[w]e cannot derive therefrom any intention that the rights and the property in the section lines, as highways, should be surrendered." Faxon v. Lallie Civil Township, 163 N.W. 531, 534 (N.D. 1917). See also Walcott Township of Richland County v. Skauge, 71 N.W. 544, 546 (N.D. 1897); Wenberg v. Gibbs Township, 153 N.W. 440, 442 (N.D. 1915); Small v. Burleigh County, 225 N.W.2d 295, 298 (N.D. 1974); Burleigh County Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 627 (N.D. 1994).

However, the North Dakota Supreme Court has also determined that if a section line easement is within the limits of an incorporated city as indicated by N.D.C.C. § 24-07-03, it is not a public road. DeLair v. County of LaMoure, 326 N.W.2d 55, 58-60 (N.D. 1982). Considering N.D.C.C. § 24-07-03 and DeLair, the necessary implication would appear to be that if a section line is within the limits of a subdivision plat recorded pursuant to N.D.C.C. chapter 40-50.1 or former chapter 40-50, it is not a public road. However, in this instance, the subdivision plat itself appears to be recognizing the 33 foot easement for public travel along the section line.¹

Consistent with DeLair, it is my opinion that if a section line easement is recognized and included within the limits of a subdivision plat recorded pursuant to chapter 40-50.1 or former chapter 40-50, the 33 foot section line easement under N.D.C.C. § 24-07-03 is no longer recognized and there exists no section line road in the subdivision and the state laws regarding section line easements for travel do not apply. (State laws regarding section line easements for travel include N.D.C.C. §§ 24-07-03, 24-06-28, 24-06-29, 24-06-30, and 24-12-02(4).) However, it is my further opinion that if a road is indicated along a section line in a properly recorded subdivision plat, the road is held in trust for public use. See N.D.C.C. § 40-50.1-05.

II.

¹ A dedication to the public, on a recorded subdivision plat, of an easement to travel over the part of the plat that constitutes a section line easement is not necessary; the public already owns the 33 foot easement for travel. In addition, acceptance of such a dedication is not needed, although it is required for other dedications to the public. See, e.g., Ramstad v. Carr, 154 N.W. 195 (N.D. 1915); Hille v. Nill, 226 N.W. 635 (N.D. 1929); City of Grand Forks v. Flom, 56 N.W.2d 324 (N.D. 1952).

N.D.C.C. § 24-12-01 provides, "[n]o person may willfully dig up, remove, displace, break, or otherwise injure or destroy any public highway, [or] right of way . . . without first securing permission from the person or governing body having jurisdiction and control thereof." (Emphasis supplied.) In addition, N.D.C.C. § 24-12-02 provides, in part:

No person may:

1. Obstruct any public highway in any manner with intent to prevent the free use thereof by the public; [or]
2. Willfully and knowingly obstruct or plow up, or cause to be obstructed or plowed up, any public highway or right of way, except by order of the officials having jurisdiction over such highway for the purpose of working or improving the same;

(Emphasis supplied.) Any person who violates any provision of title 24, including N.D.C.C. §§ 24-12-01 and 24-12-02 is guilty of a class B misdemeanor. N.D.C.C. § 24-12-05.

Thus, when asked to authorize or prohibit an obstruction over the area in a subdivision plat that is held in trust for road purposes, the county commission has the duty to either authorize or prohibit the obstruction.² Despite N.D.C.C. §§ 24-12-01 and 24-12-02(1),(2), the use of a highway right of way by an abutting landowner who does

2 The North Dakota Supreme Court, in DeLair v. County of LaMoure, 326 N.W.2d 55 (N.D. 1982), determined that "N.D.C.C. § 24-12-02 is not applicable to the undisputed facts of this case because these facts indicate that the fence and gate [over the section line easement] where the impact took place, were not in an area outside the limits of an incorporated city, and therefore in accordance with § 24-07-03, the area in question is not 'considered public roads'" DeLair, 326 N.W.2d 55 at 61. N.D.C.C. § 24-07-03 states that section lines outside city limits and outside platted subdivisions are public roads. Although DeLair would suggest that section lines inside platted subdivisions are not public roads, the subdivision plat itself in this case recognizes the 33 foot easement as a public easement for travel. Thus, DeLair does not prevent the conclusion in this instance that the area within 33 feet of the section line is a "public highway or right of way" under N.D.C.C. §§ 24-12-01 and 24-12-02.

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not injure or obstruct the right of way does not constitute interference with use of the right of way for highway purposes and is not enjoined. See Hjelle v. J.C. Snyder & Sons, 133 N.W.2d 625, 630 (N.D. 1965). See also Burleigh County Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 627-629 (N.D. 1994). Thus, if the county commission authorizes the obstruction, it should make clear that the road is held in trust for public use pursuant to N.D.C.C. § 40-50.1-05 and the obstruction will have to be removed if the public exercises its right to actually use the road for travel and the obstruction interferes with such use.

An obstruction may also constitute a public nuisance as defined in N.D.C.C. §§ 42-01-01 and 42-01-06. State law provides for specific remedies against a public nuisance and action against the public nuisance may be taken by either a private or public party. See N.D.C.C. §§ 42-01-07 through 42-01-10; City of Jamestown v. Miemietz, 95 N.W.2d 897 (N.D. 1959). State law also provides for a penalty for maintaining a public nuisance. See N.D.C.C. § 42-01-15. "No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right." N.D.C.C. § 42-01-14. However, "[n]othing which is done or maintained under the express authority of a statute shall be deemed a nuisance." N.D.C.C. § 42-01-12.

In addition, because the road is held in trust for public use, the county commission may take action to prevent trespass over the platted road. See N. Pacific Ry. Co. v. Lake, 88 N.W. 461, 463 (N.D. 1901). See also City of LaMoure v. Lasell, 145 N.W. 577 (N.D. 1914).

If lots in a subdivision plat have been sold, any part of the plat, such as that part which is within 33 feet of the section line, may be vacated "by all owners of the lots in the plat joining in the signing of the instrument declaring the vacation." N.D.C.C. § 40-50.1-16. Consistent with the line of North Dakota Supreme Court cases indicating that section line easements are held in trust for the public and cannot be alienated by the state, if the area within 33 feet of the section line is ever properly vacated from the plat pursuant to N.D.C.C. § 40-50.1-16, it will once again be considered a section line road pursuant to N.D.C.C. § 24-07-03 and all of the state laws regarding section lines will again apply.

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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.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Leah Ann Schneider
Assistant Attorney General

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