

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-21

Date issued: November 5, 1996

Requested by: Representative Ole Aarsvold

- QUESTIONS PRESENTED -

I.

Whether a county or township abandons a section line easement if it ceases to maintain an improved road located within the section line easement.

II.

Whether a county or township may be held legally liable for injuries to persons using a portion of a public road which the county or township has improved in the past, but has since closed or converted to a minimum maintenance road pursuant to statute.

III.

Whether the decision to close a county or township road is a discretionary function as described in N.D.C.C. § 32-12.1-03(3).

IV.

Whether there is a conflict between the standards adopted by the director of the Department of Transportation for minimum maintenance roads pursuant to N.D.C.C. § 24-07-36 and the Manual on Uniform Traffic Control Devices which the director adopted as the standard for road signs in North Dakota pursuant to N.D.C.C. § 39-13-06.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a county or township may cease maintenance of an improved road located within a section line easement without abandoning the section line easement.

II.

It is my opinion that a county or township is not legally liable for injuries to persons using a portion of a previously designated

improved road which has been closed pursuant to statute where the governing body has taken precaution not to create an unreasonably dangerous condition for drivers exercising ordinary care, nor is a county or township legally liable to travelers on minimum maintenance roads maintained according to N.D.C.C. § 32-12.1-03(6).

III.

It is my opinion that the decision to close a county or township road is a discretionary function as described in N.D.C.C. § 32-12.1-03(3).

IV.

It is my opinion that there is no conflict between N.D.C.C. § 24-07-36, which requires the director of the Department of Transportation to establish standards for minimum maintenance road signs, and 39-13-06, under which the director adopted the Manual on Uniform Traffic Control Devices as the standard for road signs in North Dakota.

- ANALYSES -

I.

The United States offered easements for travel on section lines to the Dakota Territory in 1866; this offer was accepted and has not been surrendered. See Ames v. Rose Township Bd. of Township Supervisors, 502 N.W.2d 845, 847 (N.D. 1993). The congressional section lines are public roads in all townships of this state outside the limits of incorporated cities and outside platted and duly recorded townsites, additions, or subdivisions, and are open for travel to the width of 33 feet on each side of such section line. N.D.C.C. § 24-07-03. The laws passed by the North Dakota Legislative Assembly concerning roadways vary and are often conflicting, and many of them relate to highways which are to be built on private lands and not on section lines. Small v. Burleigh County, 225 N.W.2d 295, 297 (N.D. 1974). Therefore, care needs to be taken not to generalize too broadly from the wording or language used in one statute addressing roadways when interpreting other statutes addressing roadways. See Saetz v. Heiser, 240 N.W.2d 67, 72 (N.D. 1976) (statute permitting fencing of section lines is completely inconsistent with statutes relating to section lines incorporated into interstate, state, county, and township roads).

Congressional section lines outside the limits imposed by N.D.C.C. § 24-07-03, unless closed by proceedings permitted by statute, are open for public travel without the necessity of any prior action by a governmental agency, even if the easement has not been improved or surfaced. See Small, 225 N.W.2d at 300. However, there is no duty on the part of the government to provide an improved road on the section line easement. DeLair v. County of LaMoure, 326 N.W.2d 55, 60-61 (N.D. 1982). The right of travel on a section line easement is distinct and separate from the decision whether to improve a section line easement by creating a gravel or hard-surfaced roadway. Therefore, a county or township decision to discontinue an improved roadway on a section line easement does not affect the public's right to travel on the section line.

N.D.C.C. § 24-07-03 permits a section line to be closed to travel under specific circumstances. However, the right of passage on open section lines belongs to the public and cannot be alienated by the state, which holds the section lines in trust for the public. Burleigh County Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 627 (N.D. 1994). The closure of a section line road contemplated by N.D.C.C. § 24-07-03 provides only for the temporary closure of the section line easement for purposes of travel, and the section line easement may subsequently be reopened for travel pursuant to N.D.C.C. §§ 24-07-04 and 24-07-05. 1994 N.D. Op. Att'y Gen. L-134.

The Attorney General has previously addressed the authority to close a section line road that has been improved and included in a township road system:

If the board of township supervisors has the authority to add to the township road system, then it surely has the commensurate authority to delete therefrom. However, deletion from the system of township roads does not prohibit public travel on section line rights-of-way absent closure procedures under N.D.C.C. § 24-07-03.

Letter from Attorney General Nicholas Spaeth to Charles D. Orvik (September 11, 1986). N.D.C.C. § 24-07-05 generally does not apply to section line roads. 1981 N.D. Op. Att'y Gen. 207. However, the procedures in that section may be used to improve a section line road and add it to a township road system. 1983 N.D. Op. Att'y Gen. 91. Similarly, a petition under N.D.C.C. § 24-07-05 could be used to remove an improved section line road from a county or township road system.

Therefore, it is my opinion that a county or township may cease maintenance of an improved section line road without abandoning or closing the section line easement.

II.

Before a county or township may be held legally liable for negligence, it must be found that the county or township had a duty to protect the plaintiff from injury, failed to discharge that duty, and that there was an injury proximately caused by the breach of that duty. Diegel v. City of West Fargo, 546 N.W.2d 367, 370 (N.D. 1996). "If no duty exists on the part of the alleged tortfeasor, there is no actionable negligence." Id. A local governing body's duty to travelers on its roadways involves a determination whether the condition of the street is unreasonably dangerous for a driver exercising ordinary care. Id. at 372. Such a condition may be found where a street contains a pitfall, trap, or snare which constitutes a dangerous condition for a prudent driver. Id. at 373. Compare DeLair, 326 N.W.2d 55 (N.D. 1982) (t-intersection controlled by a stop sign was not a dangerous or unusually hazardous condition to a driver exercising ordinary care within the limits of the law) and Belt v. City of Grand Forks, 68 N.W.2d 114 (N.D. 1955) (jog or turn at intersection is not a pitfall, trap, or snare dangerous to travelers even in absence of barriers, lights, or warning signs where the jog did not constitute a dangerous situation to a prudent driver) with Trihub v. City of Minot, 23 N.W.2d 753 (N.D. 1946) (pit at end of unprotected t-intersection presented triable issue of negligence).

If an improved roadway has been created and is subsequently closed or no longer maintained, then the political subdivision having jurisdiction over the roadway may become liable to any person traveling upon the roadway if the deteriorated condition creates a pitfall, trap, or snare constituting a dangerous condition for a prudent driver. The determination of whether a roadway creates a pitfall, trap, or snare is an individual factual issue. See Diegel, 546 N.W.2d at 371-373; Belt, 68 N.W.2d at 122-123. Under appropriate circumstances, warning signs or protective barricades may be sufficient to prevent prudent drivers from entering a closed or unmaintained road. See Trihub, 23 N.W.2d at 754-756 (question for jury whether allowing barricades to deteriorate was negligence by city).

Generally, when a statute speaks of opening a public street or highway, the term is intended to mean placing the highway in condition for use or at the service of the public, as distinguished from the purchase of a right-of-way which is not given over to actual

highway use. Small, 225 N.W.2d at 302-303 (Johnson, J., dissenting). However, as previously noted, all section lines, whether improved or not, are open to the public for travel except where closed by statutory authority. Conversely, the closure of a road or highway means to prohibit the public from using the road or highway. For example, N.D.C.C. § 24-07-03 provides that the board of county commissioners may close a section line road which is unused or is intersected by an interstate highway causing the road to become a dead end. Once closed, N.D.C.C. § 24-07-03 provides that the section line may be farmed by the adjacent land owners or tenants.

The only statute permitting closure of the public's right to travel over a section line easement is N.D.C.C. § 24-07-03. This statute is specific to section lines. N.D.C.C. §§ 24-07-04 and 24-07-05 provide for the jurisdiction and procedure for laying out, altering, or discontinuing roads generally. N.D.C.C. § 24-07-04 applies, "[e]xcept as otherwise provided in this title." Therefore, the general procedures found at N.D.C.C. §§ 24-07-04 and 24-07-05 do not apply to the closure of a section line road. N.D.C.C. § 1-02-07.

North Dakota statutes limit a political subdivision's liability regarding traffic on an improved roadway maintained in less than normal condition if the roadway has been designated a minimum maintenance road pursuant to N.D.C.C. §§ 24-07-35 through 24-07-37. In order to avoid liability for claims based on an act or omission in the designation, repair, operation, or maintenance of a minimum maintenance road, the political subdivision having jurisdiction must make that designation in accordance with N.D.C.C. §§ 24-07-35 through 24-07-37 and must maintain the road "at a level to serve occasional and intermittent traffic." N.D.C.C. § 32-12.1-03(6).¹ There is no exception from liability if an improved roadway is not adequately maintained and traffic is permitted on the roadway.

Therefore, it is my opinion that a county or township is not legally liable for injuries to persons using a portion of a previously designated improved road which has been closed pursuant to statute where the governing body has taken precaution not to create an unreasonably dangerous condition for drivers exercising ordinary care, nor is a county or township legally liable to travelers on

¹ Former N.D.C.C. § 32-12.1-03(7) was redesignated as subsection 6 of the same section by 1995 N.D. Sess. Laws ch. 329, § 8. This amendment may become ineffective, and subsection 6 may be redesignated as subsection 7, depending upon the outcome of certain future events. 1995 N.D. Sess. Laws ch. 329, § 22.

minimum maintenance roads maintained according to N.D.C.C. § 32-12.1-03(6).

III.

Political subdivisions and their employees are not liable for claims resulting from the decision to perform or the refusal to exercise or perform any discretionary function or duty. N.D.C.C. § 32-12.1-03(3)(c). This language was apparently adopted from the Federal Tort Claims Act. Olson v. City of Garrison, 539 N.W.2d 663, 665 (N.D. 1995). The purpose of the discretionary function exception is to preserve the separation of powers between the branches of government and to prevent judicial second guessing, through tort actions, of legislative and administrative decisions grounded in social, economic, and political policy. Id. (citing Berkovitz v. United States, 486 U.S. 531, 536-537 (1988)). The discretionary function exception only becomes an issue if the political subdivision owes a duty to the injured person. See Diegel, 546 N.W.2d at 373.

Two inquiries are made in analyzing whether particular governmental conduct falls under the discretionary function exemption. First, the court examines the nature of the challenged conduct to determine whether the action is a matter of choice for the acting employee or whether a statute, regulation, or policy specifically prescribes a course of action for the employee to follow. Olson, 539 N.W.2d at 666-67. Second, even if the challenged conduct involves discretion, the court must determine whether that discretion is of a kind that the discretionary function exemption was designed to shield, specifically whether the actions taken concern an analysis of public policy, including social, economic or political considerations, or are based upon objective standards, for example, scientific, engineering or technical considerations. Id. at 667-68. "When properly construed, the exception should shield only governmental action based on public policy considerations." Id. at 667.

The distinction between a statute or regulation imposing a mandatory duty and one which only creates an advisory or discretionary duty is not helpful in determining whether the functions involved are discretionary functions for purposes of liability. Sande v. City of Grand Forks, 269 N.W.2d 93, 97 (N.D. 1978). A substantial amount of discretion is permitted in determining how a duty is exercised even where the duty is mandatory. Id. However, if a statute, regulation, or policy statement specifically prescribes a course of action which is mandatory, then the government has restricted its own discretion

and the matter is removed from the discretionary function exemption from tort liability. Olson, 539 N.W.2d at 666.

Although a county or township has the duty to maintain its roads in a reasonably safe manner, the means chosen to fulfill this duty are left to the discretion of the governing body in the absence of specific mandatory standards. The court in Diegel observed that the City of West Fargo had no duty to alter a street or post warning signs in the absence of evidence that the scene of an automobile accident was unreasonably dangerous or hazardous for drivers exercising ordinary care. 546 N.W.2d at 373. The court indicated through its analysis that evidence relevant to showing that the street was unreasonably dangerous or hazardous included the number of accidents incurred at that location over a period of years in relation to the amount of traffic at the location. Id. at 372. In Olson, a water main broke allegedly causing the plaintiff's damages, and the evidence showed that there had been one previous break and also that no ordinary maintenance would have prevented the plaintiff's damage. 539 N.W.2d at 664. The City of Garrison's decision concerning maintenance or repair of the water main was a policy decision shielded by the discretionary function exemption. Id. at 668. The court continued, however, that not every maintenance decision is or should be shielded, and that the court need not here "define with precision every contour of the discretionary function exception." Id. (quoting United States v. S.A. Empresa de Viaco Aerea Rio Grandense, 467 U.S. 797, 813 (1984)).

The decision to discontinue an improved section line involves many considerations, such as expense, traffic flow, number of adjacent landowners, and availability of other roads. Therefore, it is my opinion that the decision to close a county or township road is a discretionary function involving the analysis of public policy including social, economic, or political considerations. Once that decision has been made there is a duty to take action which will prevent the closed road from becoming a pitfall, trap, or snare constituting a dangerous condition for a prudent driver. The specific means of exercising that duty, however, are within the discretion of the governing body except where specified by controlling law or scientific, engineering, or technical considerations.

IV.

A governing body designating a minimum maintenance road is required to provide notice that the road is a minimum maintenance road by posting signs which conform to standards adopted by the director of

the Department of Transportation at the beginning of the road and at regular intervals along the road. N.D.C.C. § 24-07-36. The director has adopted standards concerning minimum maintenance road signs. N.D. Admin. Code ch. 37-07-01. A political subdivision is not liable for claims based on acts or omissions in designation, repair, operation, or maintenance of a minimum maintenance road if the designation has been made pursuant to N.D.C.C. §§ 24-07-35 through 24-07-37 and if the road has been maintained at a level to serve occasional and intermittent traffic. N.D.C.C. § 32-12.1-03(6).

N.D.C.C. § 24-07-36 is not the only statute addressing standards for road signs. As a general matter, N.D.C.C. § 39-13-06 requires that the director of the Department of Transportation adopt a uniform system of specifications for traffic control devices which must correlate, so far as possible, with the most recent edition of the manual promulgated as a national standard by the Federal Highway Administration. The director has adopted the Federal Highway Administration's Manual on Uniform Traffic Control Devices (MUTCD).

Whenever a general provision in a statute conflicts with a special provision in the same or a different statute, the two must be construed to give effect to both provisions if possible. If the conflict between the two provisions is irreconcilable, the special provision will prevail and be construed as an exception to the general provision unless the general provision is enacted later and it is the manifest legislative intent that the general provision shall prevail. N.D.C.C. § 1-02-07.

The standards for minimum maintenance road signs adopted by the director at N.D. Admin. Code ch. 37-07-01 pursuant to N.D.C.C. § 24-07-36 are consistent with MUTCD Paragraph 2C-41, and, therefore, are consistent with N.D.C.C. § 39-13-06. MUTCD Paragraph 2C-41 provides that warning signs different from those specified in MUTCD may be required under special conditions. Since the minimum maintenance road signs are intended to provide "adequate notice of the road's status as a minimum maintenance road," N.D.C.C. § 24-07-36, the minimum maintenance road signs would fall into the category of warning signs. Although minimum maintenance road signs are not one of the examples of warning signs contained in MUTCD, MUTCD does specifically acknowledge that other warning signs than those contained in MUTCD may be appropriate.

Therefore, it is my opinion that there is no conflict between N.D.C.C. § 24-07-36, which requires the director of the Department of Transportation to establish standards for minimum maintenance road

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signs, and 39-13-06, which adopts the Manual on Uniform Traffic Control Devices as the standard for road signs in North Dakota.

- 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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