

LETTER OPINION
96-L-87

May 6, 1996

The Honorable Layton Freborg
District 8
PO Box 677
Underwood, ND 58576

Dear Senator Freborg:

Thank you for your April 22, 1996, letter asking several questions about an organized township's responsibilities regarding the construction of a road on a section line. In your letter, you describe a situation where "one adjoining landowner to the section line wants to build a road on the section line while the other landowner adjoining the section line opposes the road." Your questions relate to the township's duties and obligations concerning construction of this section line road. Your specific questions are addressed in order.

1. As long as open access along the 66 foot easement to the public is maintained along a section line, does the board of township supervisors have an obligation to allow construction of a road along a section line, when one adjoining landowner requests the road and the other adjoining landowner opposes the road, particularly when the existing 66 foot easement can be easily traveled on?

Outside of the limits of incorporated cities, all congressional section lines are considered public roads to the width of 33 feet on each side of such lines, and it is not necessary for the township to acquire ownership of this easement in order to construct a road on the section line within those boundaries. See Lalim v. Williams County, 105 N.W.2d 339, 344 (N.D. 1960). See also N.D.C.C. §§ 24-07-03, 24-07-17. However, the dedication of an easement or right-of-way permitting the public to travel on the section line does not require that the section line must be maintained as an improved road or highway. The North Dakota Supreme Court has held that "[a] county or a township does not have a duty to maintain an improved road on each section line, nor do we believe a county or a township

can be held legally liable for injuries to persons using a portion of a designated public road which the county or township has not undertaken to improve." DeLair v. County of LaMoure, 326 N.W.2d 55, 61 (N.D. 1982). See also 1983 N.D. Op. Att'y Gen. 91. Therefore, it is my opinion that a board of township supervisors is not obligated to construct a road along a section line upon the request of an adjoining landowner.

2. Does it make any difference as it relates to the township's authority if the one landowner who wants the road volunteers to pay for the construction of the road and the maintenance of the road? In other words, just because a landowner agrees to pay for a section line road, is the township obligated to approve the road?

The fact that someone has offered to pay for the costs of a road or its maintenance does not obligate a township to approve construction of the road. Private individuals may be granted the right to construct or improve a public highway upon proper authorization from the appropriate public authority, including the right to make improvements at their own expense. Zueger v. Boehm, 164 N.W.2d 901, 906-07 (N.D. 1969). However, any private individual who performs the work becomes an agent of the public authority and the public authority remains subject to all statutory provisions applicable to the improvement as if it were constructed by the public authority under its own power. Id. Therefore, it is my further opinion that a township may take into consideration that the landowner requesting construction of a section line road volunteers to pay for the construction and maintenance of the road, but that such payment or performance does not relieve the township of its responsibilities concerning the road.

The remaining questions are interrelated and will be considered together.

3. Does the fact that a landowner agrees to pay for construction of the road absolve the township of its duty or liability to see that the road is constructed and maintained properly?
4. Are townships immune from liability if the board of township supervisors allows construction of a road on a section line by one adjoining landowner, but the resulting construction and maintenance results in

damages to the other adjoining landowner (i.e., improper drainage, requires moving of his irrigation system to accommodate a wider road for future development, taking of more fill from his side of the road that results in a deeper ditch, inadequate maintenance, etc.)?

5. If residential development is planned or may occur in the future at the end of the section line road by the owner who wants the road, may the board of township supervisors impose its road standards for right-of-way, width, depth, maintenance, drainage, etc. that the county and they have adopted for development of residential areas?
6. Can a landowner adjoining a section line who wants a road, tear up the 33' right-of-way under public easement that belongs to the adjoining landowner, and build a road ditch on the 33' right-of-way of the adjoining landowner to support a road on the section line, particularly if the ditch inhibits the adjoining landowner's access on the section line and use of his property?

The board of township supervisors has general supervision of roads and highways throughout the township. N.D.C.C. § 24-06-01. Although a township is not liable for loss suffered by a landowner which occurs solely from the improvement of a highway in the ordinary manner without negligence, a landowner may obtain an injunction requiring the township to meet its obligations regarding improvement of the highway. Rynestad v. Clemetson, 133 N.W.2d 559, 565 (N.D. 1965). Also, a township is not absolved of its duty to see that a road is constructed and maintained properly, nor relieved of any potential liability for failure to construct and maintain the road properly, by the fact that a private party has constructed or paid for the construction of the road instead of the township. See Zueger v. Boehm, 164 N.W.2d 901, 906-07 (N.D. 1969). Because a private individual may only build a section line road as agent of the township, see id., the township is responsible for the construction specifications of the roadway.

However, the existing highway easement limits a landowner's claim of damages. If a landowner has fenced or otherwise obstructed the section line, the landowner may be required to remove the obstruction at the landowner's expense. N.D.C.C. §§ 24-06-28, 24-06-29, 24-06-30, 24-07-19. Willfully obstructing or plowing up the public's

The Honorable Layton Freborg
May 6, 1996
Page 4

right of way along an unimproved section line is a criminal offense. N.D.C.C. §§ 24-12-02, 24-12-05. An obstruction may include placement of an irrigation system. See State v. Silseth, 399 N.W.2d 868, 871 (N.D. 1987) (Gierke, J. dissenting).

A property owner has a right of access to abutting highways and streets, and when governmental action impairs existing access to private property, the landowner may have an inverse condemnation claim against the government. Boehm v. Backes, 493 N.W.2d 671, 673-674 (N.D. 1992). However, if the landowner has free and convenient access to the property, and the means of ingress and egress are not substantially interfered with, the landowner has no cause of complaint. Id. at 674. A township when constructing a road must comply with N.D.C.C. § 24-06-11:

Whenever a township constructs a ditch or drain in connection with road building, and such ditch, drain, or road interferes with the ingress or egress of any owner of adjoining land, the township shall install crossings at such point or points as will afford the owner or owners of the premises suitable ingress thereto or egress therefrom.

There must be an adequate number of crossings to permit the adjoining landowner access to his or her property, however the required number and location of the crossings are questions of fact which would need to be determined for each parcel of land.

It is my opinion that townships are not immune from liability relating to the construction and maintenance of a section line road by the fact that the road is constructed or maintained by a third party such as a landowner. The township remains responsible to the adjoining landowner for damages resulting from negligent acts in the construction of the road, but may seek to recover damages from the party who actually constructed or maintained the road. It is my further opinion that the township may require any section line road be built to appropriate standards whether that road is constructed by the township or by a third party who has been authorized to do so by the township.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

The Honorable Layton Freborg
May 6, 1996
Page 5

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