

LETTER OPINION
96-L-224

November 22, 1996

Mr. Jeffrey J. Peterson
Burke County State's Attorney
PO Box 39
Bowbells, ND 58721

Dear Mr. Peterson:

Thank you for your letter asking various questions regarding the application of N.D.C.C. § 24-05-23. Your questions are based upon facts that assume a fence is encroaching upon a county road by its location on the road right-of-way.

N.D.C.C. § 24-05-23 provides:

A landowner who encroaches upon a county road or its ditches or approaches must be given notice by the board of commissioners for that county that the encroachment has been discovered. If the landowner fails to remedy the encroachment within twenty days after receiving the notice, that landowner is liable to the county for damages resulting from the encroachment. The board of commissioners for that county shall issue to the landowner written notice of the amount of damages determined to be a result of the encroachment. If the landowner fails to pay the county for the damages, the expense of the repair must be charged to the land of the landowner. The expenses charged become a part of the taxes to be levied against the land for the ensuing year and must be collected in the same manner as other real estate taxes are collected, and placed to the credit of the county that incurred the expense of the repair.

You first question is whether N.D.C.C. § 24-05-23 authorizes the Board of County Commissioners to remove the encroaching fence if the land owner fails to timely respond to the notice that the encroachment has been discovered. Section 24-05-23 provides that if the landowner fails to timely remedy an encroachment after receiving proper notice, the landowner is liable to the county for damages

Mr. Jeffrey J. Peterson
November 22, 1996
Page 2

resulting from the encroachment. A fence on a county road right-of-way would constitute an encroachment. Black's Law Dictionary 527 (6th ed. 1990). The likely remedy for a fence encroaching on a right-of-way is removal of the fence. See N.D.C.C. § 24-06-30 (fence obstructing section line to be removed and costs assessed against the property). If the fence caused other damage to the right-of-way, correcting that damage would also constitute remedying the encroachment. Thus, if a landowner fails to remedy an encroachment within 20 days after receiving the required notice, the Board of County Commissioners may remedy the encroachment, in this case, remove the fence.

You next question what damages are contemplated by N.D.C.C. § 24-05-23. As generally used, damages are pecuniary compensation for harm or injury resulting from a particular act. Black's Law Dictionary 389 (6th ed. 1990). Under N.D.C.C. § 24-05-23, damages would typically be the expense of removing any encroachment and repairing any harm to the land caused by the encroachment. The expense of repair would include the cost of material and resources as well as time and labor. The American Heritage Dictionary 1047 (2d coll. ed. 1991); Black's Law Dictionary 577 (6th ed. 1990). Thus, if damage is caused to the right-of-way by an encroaching fence, the expense of repair could include both the removal of the fence and restoring the right-of-way to the condition it would have been in had the encroaching fence not been placed on the right-of-way. In other words, as the terms are used in N.D.C.C. § 24-05-23, the "damage" to the encroached property would typically be synonymous with the "expense" of remedying the encroachment and restoring the property to the condition it would have been in had the encroachment not occurred.

The expense incurred by the county in remedying the encroachment (removing an encroachment and repairing the land) must be charged to the landowner. This is done by the expenses becoming a part of the taxes to be levied against the land for the ensuing year. Such taxes are to be collected in the same manner as other real estate taxes are collected.

In conclusion, it is my opinion that the terms "damages" and "expense of the repair," as used in N.D.C.C. § 24-05-23, include the cost of removing an encroachment and restoring the encroached property to the condition it would have been in had the encroachment not occurred.

Sincerely,

Mr. Jeffrey J. Peterson
November 22, 1996
Page 3

Heidi Heitkamp
ATTORNEY GENERAL

DAB/tmb