

LETTER OPINION
98-L-111

August 25, 1998

Mr. Austin G. Engel
New Salem City Attorney
P.O. Box 358
New Salem, ND 58563-0358

Dear Mr. Engel:

Thank you for your June 23, 1998, letter asking whether the city or the landowner is responsible for repairing or replacing a retaining wall located on the landowner's property. You state in your letter that the city initially constructed the retaining wall when it re-graded the streets in New Salem. The retaining wall is necessary because the re-graded streets are below the level of the landowner's property. Without the wall, there is a danger of the land sliding into the street or the house being damaged.

N.D.C.C. § 47-01-18 gives a property owner the right to "the lateral and adjacent support which his land receives from the adjoining land" The North Dakota Supreme Court has interpreted N.D.C.C. § 47-01-18 to apply only to land in its "natural state," i.e., without buildings. Hermanson v. Morrell, 252 N.W.2d 884, 888 (N.D. 1977). However, property owners with buildings on their property still enjoy a common law right to lateral support. Id.

Since the landowner has a right to lateral support regardless of whether there is a building on the property, the municipality's removal of that lateral support would constitute a taking, subjecting the municipality to liability for any damages resulting from the excavation. Northern Pac. Ry. Co. v. Morton County, 131 N.W.2 557, 567 (N.D. 1964). See also N.D. Const. art. I, sec. 16 ("Private property shall not be taken or damaged for public use without just compensation . . . for the owner.").

Where incidental to and part of the improvement of a street a municipality appropriates part of the abutting property, with or without the owner's consent it cannot assess abutting property to pay for the erection of a retaining wall on that property. This is true even if the wall is made necessary for lateral support by reason of the removal of the natural soil of the street.

McQuillin Mun. Corp. § 38.21 (3rd ed.) (footnotes omitted). As the Minnesota Supreme Court stated, "[t]he city may not divest the

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land-owner of what he is entitled to enjoy as a natural right, and then tax upon him the cost of replacing what has been thus taken away." Armstrong v. City of St. Paul, 30 Minn. 299, 15 N.W. 174 (1883).

Since the landowner has a right to lateral support, the city's failure to repair or replace the retaining wall it built during the excavation and construction of the city's streets would subject the city to liability for any damages resulting from the wall's deterioration. Accordingly, it is my opinion that the city is responsible for repairing or replacing the retaining wall.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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