

OPINION
62-265

August 6, 1962 (OPINION)

TOWNSHIP

RE: Authority to Raise Grade and Install Culverts

This will acknowledge receipt of your letter under date of July 31, 1962, in which you say that a township raised the grade of a road about two feet three years ago and did not place a culvert in the road because, at that time, there was no water problem, but that this year the grade of the road causes the water to back up, and that "in the instance of one individual he has some foot and a half of water in the granary."

You say in your letter it is your understanding "that the township board cannot change any grade without approval of the local drain board." You say that you "felt that the changes in the law some two years ago gave the drain board control over the entire county as far as drainage and water were concerned and that anyone would have to get permission from them before they could make a move."

When a highway is constructed, whether by the State Highway Department or by a county or township, adequate culverts must be placed so as to allow surface waters to flow, as nearly as circumstances will permit, as such water flowed in a state of nature. In other words, surface water must be permitted to flow, as nearly as may be, as it flowed before the road was built.

In the early case of Carrol v. Township of Rye, 13 N.D. 458, 101 N.W. 525, it was held that a "township is not liable for loss suffered by a landowner for increased flow of surface water upon his land resulting solely from improvement of a highway in the ordinary manner without negligence."

But in the comparatively recent case of Viesters v. Arthur Township, 78 N.D. 1029, 54 N.W.2d. 573, the Supreme Court held that "an owner of land over which natural drainage has been unlawfully obstructed by road embankments was entitled to injunction against the township supervisors directing them to provide an outlet for surface water."

And in Schutte et ux uv. State, 22 N.W.2d. 691, the Supreme Court of Nebraska said that "failure to make proper provision for flow of water under bridge or culvert constructed by the state in highway imposes therein liability for resulting damage to land by flood waters, though bridge or culvert was constructed according to approved engineering principles."

It is the opinion of this office that the same rule of law applies to a county or township except that a township probably cannot be held liable if it used reasonable and ordinary care in placing culverts in its highways. But as stated hereinbefore, a township can be enjoined from blocking the flow of water by constructing a road that acts as a

dam.

It is our opinion, Mr. Lewis, that neither the State Highway Department nor a county or township is required to first obtain the permission of the board of drain commissioners before placing culverts or bridges in highways under the respective jurisdiction thereof. As a matter of policy, it may sometimes be advisable to confer with the drain board as to the proper location of culverts in highways, but no law has been enacted requiring such consultation.

We shall not answer the questions asked in your letter in the order therein stated.

1. a. Question: "Did the township have the right to grade the road and raise the grade without supplying an outlet for water which would be blocked?"
b. Answer: It is the opinion of this office that the township had the right to raise the grade of the road to any height needed to make the road suitable for travel in any kind of weather, but that it was the duty of the township, when it improved the road, to install therein culverts of sufficient capacity to cause surface water to flow through the road as it would have flowed in a state of nature subject to whatever hinderances to such flow as a road would naturally be.
2. a. Question: "Does the township now have to obtain permission from the drain board before they can put in a culvert in reducing the grade to the level maintained prior to the raising of the road?"
b. Answer: It is our opinion that it is the legal duty of a township to install a culvert or culverts in the road so as to permit surface water to flow as nearly, as may be, as it flowed before the road was built.

The township is not required to cut down or reduce the grade of the road. And whether the township board should confer with the board of drain commissioners as to the proper location or placement of culverts is a matter resting within the discretion and judgment of the township board of supervisors.

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