OPINION
63-150

March 18, 1963 (OPINION)

HIGHWAY DEPARTMENT

RE: Eminent Domain - Unity of Use

This will acknowledge receipt of your request for an opinion from this office as to the obligation of the State Highway Department to pay for severance damage to separated tracts of land where it is shown that there is unity of use.

Although there is no specific statute or decision by the North Dakota Supreme Court on this matter, it is the opinion of this office that it is the law of North Dakota that when a parcel of land is taken by eminent domain, severance damages for noncontiguous parcels, no part of which are actually taken, must be paid when there is a unity of ownership and a unity of use.

Nicols on Eminent Domain states that "actual contiguity between two separate parcels is ordinarily essential to merit consideration as a unified tract. Actual physical separation by intervening space between the two parcels belonging to the same owner is ordinarily ground for holding that the parcels are to be treated as independent of each other, but it is not necessarily a conclusive test. If the land is actually occupied or in use, the unity of use is the chief criteria." 4 Nichols, Eminent Domain, Sec. 14.31(1) pp. 717-720 (1962).

In American Law Reports, 2d Edition, the unity of use rule is stated as follows: "Even if the owner's land is divided into parts in such manner as might otherwise raise the issue of separateness, if he is devoting the parts to a single use, and they lie in such proximity as to be in effect united by that use into a single property, they would be regarded as a whole for the purpose of assessing damages for the taking of a part." 6 ALR 2d, 1202. See also 10 RCL 157.

In the federal courts it has been held in the case of Stockton vs. MIles & Sons, Inc., 2165 Fed. Supp. 554 that "it seems well established that unity of use is the controlling factor" and rejected a requirement of contiguity. See also the case of Baetjer vs. U.S. 143 Fed. 2d 391; Cole Investment Co. vs. U.S., 258 Fed. 2d 203; Slattery Co. vs. U.S. 231 Fed.1d 37; U.S. vs. Waymire, 202 Fed.2d, 550 and Sharp vs. U.S., 191 U.S. 341.

For other cases in state courts holding that parcels of land making up a unit need not be contiguous, see State Highway Comm. vs. Fortune, S.D. 1958, 91 N.W.2d 675; Morris vs. Commissioner, 367 Pa. 410, 88 A.2d 762 (1951); Essex Storage Elec. Co. vs. Victory Lumber Co., 93 Vt. 437, 108 A.426 (1919); Ives vs. Kansas Turnpike Authority, 334 P.2d 339; and Cent. Ill. Light Co. vs. Nierstheimer, Ill., 185 N.E.1d 891.

It is the opinion of this office that where the facts disclose a unity of ownership and a unity of use, contiguity is not a

requirement.

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