OPINION
63-52

December 9, 1963 (OPINION)

CITIES

RE: Streets - Control of Boulevards

This office acknowledges receipt of your letter of November 26, 1963, which reads as follows:

> The City Council of the City of Ellendale has asked that I secure an opinion from your office regarding the following City matter:
>
> The City of Ellendale has boulevards along the streets and in the residential district of Ellendale. There is of course no question that pursuant to ordinance these boulevards, although abutting the property owners' property, belong to the City of Ellendale, and it would appear that under Ch. 40-32 the City can make a property owner who has boulevards abutting his property, at his own expense and cost, make an improvement of said boulevards, such as planting trees, sowing grass, etc. See 40-32-01.
>
> The question that comes up is that assuming, such as we have done in Ellendale, these boulevards are all planted with trees, who has the obligation of taking care of the trees, removing them when they become dangerous to life and property, such as when they become rotten, or when they should be trimmed or cut?
>
> I can find nothing that specifically covers this, but it would seem to me that if the City can designate as to what shall go on there and force the person to put it on at his own cost and expense, the City would be primarily liable on this just as they are on the sidewalks; however, I can find nothing that specifically sets out the liability of the City.
>
> I would therefore appreciate receiving from you an opinion as to who has the obligation to remove, cut and trim trees on these boulevards and at whose expense this should be done, the City or the property owner; and has the City primary liability for injury that might occur on these boulevards as a result of the trees planted thereon?"

Section 40-32-01 of the North Dakota Century Code reads:

> CONSTRUCTION AND MAINTENANCE OF BOULEVARDS - NOTICE TO OWNER - CONTENTS OF NOTICE. The governing body of any city, whenever it shall deem it necessary to construct boulevards, or to plant trees or sow grass seed thereon, or to trim trees or cut grass growing thereon, or to water or otherwise maintain or preserve any such improvement, shall give written notice to each owner and occupant of any lot or parcel of land adjoining the

> improvement deemed necessary requiring him to make the improvement designated at his own expense and subject to the approval of the street commissioner. The notice may be general as to the owners of the lots or parcels of land, but it shall be specific as to the description of the lands. The notice shall specify the improvement required to be made and the time within which the same shall be commenced or completed."

There appears to be no doubt but that the city has control over its streets including the boulevards thereon. In the comparatively recent case of Dacotah Hotel Company v. City of Grand Forks, 111 N.W. 2nd 513, our Supreme Court held that determination by municipality that safety and convenience of public would be served by removal of certain trees and an island in which they were growing even though trees furnished shade and ornamentation to abutting property, and served convenience and safety of patrons seeking access to abutting hotel, was not an unreasonable exercise of discretion. In that case the court held that "A City has the statutory power to lay out, establish, open, alter, repair, clean, widen, vacate, grade, pave, park, or otherwise improve and regulate the use of streets and prevent and regulate obstructions and encroachments thereon." Section 40-05-01(8), North Dakota Century Code.

In Murphy, et al v. City of Bismarck, 109 N.W. 2nd 635, May 29, 1961, our Supreme Court said:

> A right of way for a city street is an easement, and an abutting lot owner * * * * owns the fee to one-half of the street; that is, adjacent lot owner owns a fee in the half of the street which is contiguous to his property. However, the City has certain powers and privileges incident to such right of way, including the right of city to remove or trim trees planted or maintained by an abutting lot owner, when it is reasonably necessary for improvement of the street." (Emphasis supplied).

Though there are some cases holding to the contrary, a clear majority of the decisions hold that the boulevard is part of the street, and that the city has control over the area included in the boulevard. A South Caroline case holds that the :

> Parkway or grass plot between sidewalk and curb of street in city is part of the 'street' within meaning of statute providing that any person who shall sustain injury or property damage by reason of defect in any 'street', by reason of defect or mismanagement of anything under control of corporation within limits of any city or town may, if not contributorily negligent, recover against municipality amount of actual damages so sustained." Floyd v. Town of Lake City, 99 S.E. 2nd 181, 185, 231 S.C. 516.

It seems clear to us that under the provisions of section 40-32-01 and section 40-05-01(8) of the North Dakota Century Code the city may by ordinance prescribe rules and regulations for the laying out and maintenance of boulevards on which trees, grass and flowers may be planted, grown and nurtured. Without such an ordinance, the city could enforce the provisions of chapter 40-32, and if the abutting

lot owner does not comply with the proper resolution or order of the governing body, the city may go in and accomplish the purpose of chapter 40-32 and assess the cost against the lot owner. Of course, chapter 40-32 contains certain conditions and exceptions which must be met in following the procedure outlined therein. It is our opinion that the lot owner has the primary responsibility for maintaining the boulevard and the city is charged with the ultimate responsibility should the lot owner neglect to discharge his obligation.

With reference to liability for injuries that might occur as a result of the negligence of the lot owner and the city in the care of the boulevard, we call your attention to a statement by McQuillin which reads as follows:

> A municipality is liable, in case of negligence, to persons in a street injured by the falling of tree being cut down by its employees; or, according to a more prevalent rule, by the falling of a decayed tree or limb thereof where it had notice of the dangerous condition and sufficient length of time. In some states, however, liability is denied on the theory that the duty to remove dead trees or limbs is a governmental duty, but it is to be noticed that the states in which liability is denied are those where it is held that there is no common-law liability for defective streets and the only liability is that imposed by statute. However, in any case, there is no liability unless the municipality had actual or constructive notice of the condition of the tree." See McQuillin Municipal Corporations, Third Edition, Vol. 19, Sec. 54-71.

Cited under Section 54-71 is the case of City of Montgomery v. Quinn, (Quinn was plaintiff in court below) an action against the city for the death of a child caused by falling of rotten limb from a tree growing between sidewalk and (street) curb where it appeared that the city had assumed control and sought to discharge the duty of making safe the adjacent and overhanging trees along the sidewalks and ways. One of the defenses of the city was that of governmental immunity, but the Alabama Supreme Court said:

> We are of the opinion that under the pleading and evidence before us the City of Montgomery was engaged in a governmental function, relieving it from liability for the tort;* * *." City of Montgomery v. Quinn, 19 So. 2nd 529.

In North Dakota, the opposite conclusion might have been reached because in this state the theory of governmental immunity is followed. However, it is our opinion that chapter 40-42 of the North Dakota Century Code takes actions of this nature out of the realm of governmental immunity. We quote from section 40-42-01 of the North Dakota Century Code:

> Any claim against a municipality for damages or injuries alleged to have arisen from the defective, unsafe, dangerous, or obstructed condition of any street crosswalk, sidewalk, culvert, or bridge of the municipality or from the negligence of the municipal authorities in respect to any such street sidewalk, crosswalk, culvert, or bridge, shall be filed in the

> office of the city auditor or village clerk, as the case may be, within ninety days after the happening of such injury.* * * *." (Emphasis supplied). See Maloney v. City of Grand Forks, 73 N.D. 445, 15 N.W. 2nd 769 and cased cited therein.

Therefore, we are of the opinion that it is a duty incumbent upon a city to maintain its boulevards in a reasonably safe condition, and a city is answerable in damages for the lack of ordinary and reasonable care in so doing.

HELGI JOHANNESON

Attorney General