

**OPINION  
66-109**

May 26, 1966 (OPINION)

Mr. Walter R. Hjelle

Highway Commissioner

RE: Highways - City Owned Utilities - Cost of Relocating

This is in response to your inquiry of May 25, 1966, wherein you have requested this office to give its opinion on the following proposition, after setting forth the factual background.

\* \* \* (I)s the Highway Department obligated to the city for payment of the cost of relocating the governmentally owned utility facilities located on their right-of-way, when they agree to acquire the right-of-way for the new construction project?"

Section 14 of the North Dakota Constitution provides for and makes obligatory the payment of just compensation to the owner of property taken or damaged for a public use. Under this particular section, the city's property interest in their own right-of-way and the utility facilities located upon that right-of-way would constitute private property within the contemplation of Section 14.

Section 14. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner. \* \* \*

Having recognized the property interest of the municipality, we turn next to the question of the agreement. Section 24-01-03 of the North Dakota Century Code provides that the highway commissioner can enter into an agreement with any municipality for the construction, maintenance, and operation of the state highway system and he shall be authorized to enter into a cooperative agreement with any municipality for the construction, maintenance, or repair of any urban connecting street.

The jurisdiction control and duty of the state and municipality with respect to such urban connecting streets shall be as follows:

- a. The commissioner shall have no authority to change or establish any grade of any such street without approval of the governing body of such municipality;
- b. The municipality shall at its own expense maintain all underground facilities in such streets, and shall have the right to construct such additional underground facilities as may be necessary in such streets;
- c. The municipality shall have the right to grant the privilege to open the surface of any such street, but all damage occasioned thereby shall promptly be repaired by

said municipality at its direction and without cost to the department;

- d. The municipality shall have exclusive right to grant franchises over, beneath and upon such streets."

Section 40-22-06 of the North Dakota Century Code, as amended, grants authority to the municipal officials to enter into an agreement with the State Highway Department for the improvement of streets.

40-22-06. Municipality may enter into agreement with highway department or county for certain improvements. Any municipality in this state, through its governing body, may enter into an agreement with the highway department of the state of North Dakota, or with the board of county commissioners of the county in which such municipality is located, or both, for the improvement of streets, sewers, and water mains, or of any of such facilities, under the terms of which the contract for such work is to be let by the state highway department or by the board of county commissioners, or by both jointly, and for this purpose may create a special improvement district or districts.\* \* \*"

Section 24-01-34 of the North Dakota Century Code pointed out by you in your request would not alter this conclusion.

24-01-34. Authority of local units to consent - The highway authorities of the state, or any county, or municipality are authorized to enter into agreements with each other, or with the federal government, respecting the financing, planning, establishment, improvement, maintenance, use, regulation, or vacation of controlled-access facilities or other public ways in their respective jurisdictions."

While this section sanctions intergovernmental cooperation by the federal, state, county and local levels, its provisions do not regulate the effect of Section 14 of the State constitution and its requirements of just compensation. Rather, it is permissive legislation, similar in nature to Sections 24-01-03 and 40-22-06.

Since the legislature has granted the cities and the highway department the authority to enter into a cooperative agreement for the improvement of a street within a municipality subject to certain restrictions, the question resolves itself into one of contract. It is axiomatic that in any contract the agreement must be supported by consideration.

9-05-01. 'Good consideration' defined. - Any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not entitled lawfully, or any prejudice suffered or agreed to be suffered by such person, other than such as he, at the time of consent, is lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise."

Thus, in your question, the city has no obligation to remove its utility facilities from the right-of-way which it owns. It is a

property interest and if the highway department is desirous of causing its removal for clearing the right-of-way, it has the constitutional authority under Section 14 to do so. To do so, however, requires the payment of just compensation to the owner of such facilities.

Since the city's interest in its own utility facilities constitutes a private property interest under Section 14 of the Constitution, the city would be free to negotiate the question of the amount of just compensation to the city for the taking or damaging of its property interests. Both parties would be free to negotiate this item as they deemed feasible under the circumstances and conditions of the taking.

If, in the agreement, the Highway Department agrees to share in the cost of removal of such facilities, it would be my opinion that such a promise forms an integral part of the consideration for the entire agreement. Since the Highway Department has the constitutionally imposed duty to pay just compensation for taking private property, this requirement must be fulfilled by the agreement in absence of direct payment. The city, in turn, has in effect agreed to forbear from bringing an action under Section 14 for the taking of their property interests. The result of such forbearance is that the city is giving up its right or cause of action under Section 14 for just compensation, and in return for the relinquishment of such right, the Highway Department promised to share in the cost of the removal of such facilities.

Therefore, by virtue of the agreement, it would be my opinion that the city is entitled to participation in relocation costs according to the terms of the agreement between the Highway Department and the municipality.

Your second question was identical to the first inquiry, with the exception that the utility facilities were located outside of the geographical limits of the municipality. In such an instance, municipally owned facilities would be treated no different than any other private property interest. Section 14 of the North Dakota Constitution requires the payment of just compensation for the taking or damaging of such a property interest and there is nothing in our law that provides for treating such an interest in any other manner.

HELGI JOHANNESON

Attorney General