

**OPINION
68-293**

August 22, 1968 (OPINION)

Mr. Vincent A. LaQua

State's Attorney

Wells County

RE: Roads - Right-of-Way - Easement

This is in reply to your letter of July 26, 1968.

You inform us that the county, in the process of rebuilding and blacktopping a county road project, is attempting to acquire additional land greater than the 33 feet of public right-of-way. I assume your reference is to the 33 feet on each side of the section line.

You inform us that the county has procured its additional right-of-way by purchase and receiving a deed from the owners to the additional land and recording same. You enclose a copy of the deed form which apparently described the tract of land to be taken, though it does not specify in the form submitted that only an easement is to be taken.

Your question is stated as:

"In view of Section 32-15-03.2, can the County obtain fee simple ownership of land for right-of-way or only an easement by virtue of this form of deed?"

Section 32-15-03.2 of the North Dakota Century Code was extensively considered by the Supreme Court of this state in Wallentinson v. Williams County 101 N.W.2d. 571, (February 29, 1960) with regard to both section line (33 foot), right-of-way and lands taken by eminent domain. From the language of that decision, we believe it quite clear that the court did hold that said section 32-15-03.2 was effective to reconvey lands in excess of the easement provided for in such statute back to the owner from which such land was originally taken, or to the heirs, executors, administrators or assigns of such owner. We know of no reason why same would not be equally effective to prevent the state's political subdivisions from, after the effective date of such statute, acquiring an estate greater than an easement. On such basis, your question must be answered to the effect that only an easement for right-of-way can be obtained for basically highway purposes.

We are not, of course, suggesting that the same form of deed you have been using in the case of a proper purpose, such as public buildings, could not convey a greater estate, or in a proper case could not convey the right of entry upon and occupation of lands and the right to take therefrom such gravel, earth, stones, trees and timber as might be necessary for a public use. We would suggest that the limits of the property rights to be conveyed to the county, i.e.,

easement, right-of-way etc., be properly described in any instrument conveying same to county highway department.

HELGI JOHANNESON

Attorney General