

**OPINION
69-285**

April 15, 1969 (OPINION)

Mr. Raymond R. Rund

Steele County State's Attorney

RE: Roads - Culverts - Furnished by county

This is in reply to your letter of 9 April 1969 with regard to culverts and whether same are to be furnished by county or township.

You enclose a copy of a survey made by the State Highway Department as of September, 1967, with a column for the question of "Does County Supply Culverts to the Organized Townships." You indicate that the answers to this question range from a flat "No" to something in between and all the way to "Reimbursed in Full."

You state that you would like to know whether the county commissioners have any authority to limit the size of culverts requested by the townships if they are required to furnish any such culverts, and secondly, when and to what extent the county through the board of county commissioner's action is obligated to furnish the culverts or reimburse any township for any culverts they purchased and seek reimbursement from the county. Also in what instances can the county seek reimbursement from the township for furnishing any such culverts as some counties apparently are doing.

You call our attention to Sections 24-08-02.1, 24-08-01, 24-08-02, 24-06-26.1, 24-06-01, 24-03-06, 58-03-07(13), 57-15-19 and 57-15-20 of the North Dakota Century Code and to the decisions of our Supreme Court in Caterpillar Tractor Co. v. Detman Township, 62 N.D. 465, 244 N.W. 876.

Looking over the copy of survey you forwarded we would suspect that at least a part of the reason for possible variances in some of the answers might be traceable through the legislative history of what is now Section 61-21-32 of the North Dakota Century Code back through Section 61-2136 of the North Dakota Revised Code of 1943.

Section 62-2136 of the North Dakota Revised Code of 1943 provided:

"CONSTRUCTION OF BRIDGES AND CULVERTS; COST OF. The board shall construct such bridges or culverts over or in connection with a drain as in its judgment may be necessary to furnish passage from one part to another of any farm or tract of land intersected by such drain. The cost of the construction thereof shall be charged as part of the cost of constructing such drain, and such bridge or passageway shall be maintained under the authority of the board of county commissioners or the board of township supervisors, as the case may be, and the necessary expense thereof shall be deemed a part of the cost of keeping such drain open and in repair. Whenever any such bridge is to be erected on a section line, and the cost of construction shall exceed one hundred dollars, such bridge

shall be constructed and maintained by the board of county commissioners as provided by Sections 24-0801, 24-0802, and 24-0803. Whenever the expense of constructing any such bridge or culvert on a section line shall be less than one hundred dollars, such expense shall be borne by the township in which such bridge or culvert is located."

Section 61-21-32 of the North Dakota Century Code provides:

"CONSTRUCTION OF BRIDGES AND CULVERTS - COST. The board shall construct such bridges or culverts over or in connection with a drain as in its judgment may be necessary to furnish passage from one part to another of any private farm or tract of land intersected by such drain. The cost of the construction thereof shall be charged as part of the cost of constructing such drain, and such bridge or passageway shall be maintained under the authority of the board of drainage commissioners, and the necessary expense thereof shall be deemed a part of the cost of keeping such drain open and in repair. Whenever any bridge or culvert is to be constructed on a county or township highway system over and across or in connection with a drain, and the cost thereof shall exceed five hundred dollars, the cost of constructing such bridge or culvert shall be shared in the following manner: The state water conservation commission may, if funds are available therefor, participate in the portion of the cost thereof that exceeds five hundred dollars in accordance with such rules and regulations as it may prescribe. The remaining cost thereof shall be borne on the basis of forty per cent by the county and sixty per cent by the water conservation and flood control district or the drainage district which has created the need for such construction. If, however, moneys have not been made available to the commission for such participation, then and in that case, forty per cent of the cost of a bridge or culvert costing in excess of one hundred dollars shall be paid by the county and sixty per cent shall be charged as cost of the drain to the drainage district. Whenever any bridge or culvert costing one hundred dollars or less is needed on any such road the cost of such bridge or culvert shall be charged on the basis of sixty per cent to the water conservation and flood control district or the drainage district and forty per cent shall be borne by the township in which such bridge or culvert is located.

In the case of such bridge or culvert construction where there is federal financial participation, if there are costs exceeding the amount of such federal participation then the excess balance shall be borne by the water conservation and flood control district, drainage district, county, or township, according to the foregoing provisions of this section, as the case may be."

We might mention in passing that the word "Board" as used in the above quoted statutes means board of drain commissioners, or board of drainage commissioners as the case may be under Section 61-2101 of the North Dakota Revised Code of 1943 and Section 61-21-01 of the North Dakota Century Code. We might also mention in passing that the latest amendment to Section 61-21-32 (quoted above) was adopted as of

the year 1957. The latest amendment to Section 24-08-02.1 was adopted as of the year 1953. Thus to the extent there may be a conflict in the provisions of these statutes Section 61-21-32 being later in time would govern.

We do feel, however, that said Section 24-08-02.1 should be considered in proper context. Section 24-08-01 adopted in original form in the year 1890 (amended subsequently) provided in effect that whenever a majority of the freeholders of a civil township or a majority of the freeholders living within a 3 mile radius of a proposed location petitioned for a bridge costing more than one hundred dollars the board of county commissioners should view and investigate the situation and in a proper case build or have the bridge built. Section 24-08-02 provided that the expense of the bridge so built should be borne by the county bridge fund if the bridge is accepted and approved by the board of county commissioners. In this context it seems quite logical that with increasing use of culverts, the legislature in the year 1953 made sure that the statutory provisions included use of culverts on township roads "in accordance with Sections 24-08-01 and 24-08-02" and there we have the provisions of Section 24-08-02.1.

In this same context we feel Section 61-16-46 of the 1967 Supplement to the North Dakota Century Code is of interest. Same provides:

"DRAINS ALONG AND ACROSS PUBLIC ROADS AND RAILROADS. Drains may be laid along, within the limits of, or across any public road or highway, but not to the injury of such road. In instances where it shall be necessary to run a drain across a state or federal highway, the state highway department, when notified by the board of commissioners to do so, shall make necessary openings through such road or highway at its own expense, and shall build and keep in repair all such culverts or bridges. In instances where drains are laid along or within the limits of such roads or highways, such drains shall be maintained and kept open by and at the expense of the water management district concerned. A drain may be laid along any railroad when necessary, but not to the injury of such railroad, and when it shall be necessary to run a drain across such railroad, the railroad company, when notified by the board of commissioners to do so, shall make the necessary opening through such railroad, shall build the required bridges and culverts and keep them in repair."

You might also see in this regard Section 61-07-04 of the North Dakota Century Code.

In specific response to your questions it would appear that the primary distinction between whether the culvert will be paid for by county or township is dependent on whether or not the culvert in question exceeds a cost of one hundred dollars. It would seem possibly practical for a county to purchase all culverts for use in its territory, charge for culverts of a value less than in excess of one hundred dollars and furnish ones of greater value without charge.

We note with interest your comment in regard to the decision in Lemer v. Koble (N.D.) 86 N.W.2d. 44, 46, citing Caterpillar Tractor Co. v.

Detman Township, 62 N.D. 465, 244 N.W. 876. In this same general regard we note the comment of our Supreme Court in Brenna v. Hjelle, 161 N.W.2d. 356, 360, as follows:

"Courts have almost universally held that bridges and culverts are a part of highways. (* * * citing numerous cases)

"The mere fact that bridges or culverts are necessary and required because of the construction of a drain, rather than because of the presence of a regular watercourse or rough spot in the terrain, would not, in our opinion, alter the fact that such bridges or culverts would be a part of the highway. And, since they are a part of the highway, moneys spent to construct or maintain them, as required by Section 61-21-31, North Dakota Century Code, would not be spent in violation of the provisions of Article 56, Amendments to the North Dakota Constitution."

Considering the culverts to be such part of the road it would seem logical that the general jurisdiction given the township board over township roads would include in a proper case the right to determine necessity of culverts, size of culverts and in a proper case furnish the culvert. Likewise, it would seem this same type of principle could extend to the county's determination of the size of the culvert to be used on a county road, and in a proper case furnish the culvert.

HELGI JOHANNESON

Attorney General