

**OPINION
71-173**

May 20, 1971 (OPINION)

Mr. Walter Hjelle

Commissioner

State Highway Department

RE: Highways - Billboards - Vacation of Right of Way

This is in response to your letter in which you set forth a resolution passed by the Highway Corridor Board as follows:

Mr. Newman moved that all rights acquired by the State of North Dakota for the use and benefit of the State Highway Department pertaining to the right and control over the erection, location, or maintenance of billboards, signs or any form of advertising within 660 feet from the nearest edge of the right of way of the State Highway System shall be vacated pursuant to Sections 24-01-28 and 24-17-09 of the North Dakota Century Code on those areas which would be available for outdoor advertising under the existing interim policy governing outdoor advertising. Seconded by Mr. Reirson. Motion carried."

You state that the rights referred to in the motion are rights to control outdoor advertising adjacent to Interstate Highway Number 94 from Dawson west to the Montana border and certain segments of Interstate Highway Number 29. These advertising rights were acquired pursuant to an agreement between the Highway Department and the United States of America executed on May 18, 1961. (For information you attached a copy of the agreement.)

You all call to our attention certain provisions found in Title 23 Section 131 of the U.S. Code and the regulations adopted thereunder.

You then ask:

In view of the motion of the Highway Corridor Board and the other facts and documents set forth in this request, I would like to know if I am legally obligated to follow the directive of the Highway Corridor Board as set forth in the motion or in the alternative, legally obligated to adhere to the Agreement executed between the Highway Department and the United States of America."

You also ask:

Should your office find that I am obligated to follow the directive of the Highway Corridor Board, I would like to have your Opinion as to whether or not the Highway Department must seek the return of those moneys paid to the various landowners in acquiring the easement controlling outdoor advertising, prior to returning the various rights to the adjacent landowners."

You also ask:

Secondly, if it is determined that I am required to follow the directive of the Highway Corridor Board, what obligations does this Department have with respect to the United States of America under the terms of the Agreement, with respect to other moneys received pursuant to Title 23, Section 131, subsection e of the U.S. Code?"

We have examined these various provisions and find that the agreement is in accordance with 23 USC 131 and the rules promulgated thereunder.

We also note that the agreement contains executory provisions. We are informed that these executory provisions have now been carried out and are part of the fully executed contract.

Generally, the constitutional prohibitions against the impairment of contracts or legal obligations applies to agreements entered into between the State Highway commissioner on behalf of the state of North Dakota and the United States of America. In brief, the contract is between the state of North Dakota and the United States.

The Highway Corridor Board was created by Chapter 24-17 of the North Dakota Century Code by Chapter 291 of the 1967 Session Laws and was after the execution of the contract in question.

We note that Chapter 24-17 in several instances makes specific reference to Title 23 Section 131 of the U.S. Code and in Sections 24-17-01 and 24-17-03 specifically incorporates 23 USC 131 as part of Chapter 24-17. This is significant in construing the provisions relating to the duties of the Highway Corridor Board.

It is also significant in construing the duties and powers of the Highway Corridor Board to note the provisions in Section 24-17-01 which is entitled Declaration of Policy provides as follows:

DECLARATION OF POLICY. * * * It is the intention of the legislature in this chapter to provide a statutory basis for the reasonable regulation, but not the prohibition, of outdoor advertising through zoning principles and standards consistent with the public policy relating to the areas adjacent to the state highway system pursuant to title 23, United States Code, section 131 and section 319 and rules and regulations promulgated thereunder. It is further declared to be in the public interest to review all rights now acquired by the state of North Dakota for the use and benefit of the state highway department pertaining to the right and control over the erection, location or maintenance of billboards, signs or any form of advertising adjacent to the state highway system, to determine and designate such areas adjacent to the state highway system as are necessary for the restoration, preservation and enhancement of scenic beauty and to vacate to the owner such property rights acquired in areas not so determined and designated."

This language suggests that the review is to determine which rights are no longer required and also which rights should be acquired to restore, preserve and enhance scenic beauty. The latter provision seems to go beyond the basic minimum requirements of 23 USC 131. The specific duties and powers of the board are set out in Section 24-17-09 and as is pertinent to the question subsection 3 thereof provides as follows:

3. The board shall review all rights now acquired by the state of North Dakota for the use and benefit of the state highway department pertaining to the right and control over the erection, location or maintenance of billboards, signs or any form of advertising within six hundred and sixty feet from the nearest edge of the right of way of the state highway system, and should the board determine that such rights previously acquired are not necessary to accomplish the purpose of this chapter then such rights shall be vacated pursuant to section 24-01-28 of the North Dakota Century Code." (Emphasis ours)

The underscored language is subject to construction. We do not believe that the Legislature specifically and deliberately incorporated into Chapter 24-17 the provisions of 23 USC 131 and then deliberately authorized the Corridor Board to disregard those provisions. This language taken separately could lean to such result, but the language must be read in contact with the entire act. The determination must be based upon whether or not it is within "the purpose of this chapter." As pointed out earlier Chapter 24-17 has incorporated into its provisions the provisions of 23 USC 131. This forces the conclusion that the above quoted provision as found in Subsection 3 of Section 24-17-09 does not grant plenary or independent authority to the board in its review. The review by the board is limited to determine whether or not the acquired rights are needed to satisfy the requirements not only of Chapter 24-17 but also of Title 23 Section 131 of the U.S. Code and regulations thereunder.

After having examined and taken into account the various provisions the thought is suggested that the Legislature wished to provide for a review board to determine whether or not the state had acquired a greater amount of rights than what is needed to satisfy and comply with the federal statutes and regulations. We cannot accept the concept that the Highway Corridor Board will conduct such review on standards independent of 23 USC 131 and regulations adopted thereunder.

We do note that the board has the authority to set up zoning regulations or to create zoning districts but in doing so, it must proceed under the provisions of Section 24-17-13 and 24-17-14. Its decisions in creating such districts are appealable to the district courts and to the North Dakota Supreme Court. The resolution adopted does not constitute the creation of a zoning district as contemplated by the aforementioned provisions of law.

We also note that the resolution does not set forth any basis for its adoption.

In direct response to your first question we are of the opinion that

you are obligated to follow the decisions of the Highway Corridor Board as such decisions and conclusions are within the authority granted to the board. However, in this instance we do not have sufficient information to determine whether or not the board acted within the scope of 23 USC 131 and the regulations adopted pursuant to such statutory provision. Before we could make any such determination, the board would have to set up and adopt findings of facts upon which a legal conclusion can be drawn. We have strong reservations about the legality of the resolution as stated. We are, however, satisfied that the board do not have plenary authority to simply state that certain rights acquired by the state of North Dakota shall be vacated.

As to question Number 2, if proper procedures are followed and if the determinations of the Highway Corridor Board are in accordance with law, the Highway Department would be required to accomplish a fair settlement between the state of North Dakota and the persons from whom the easements were obtained. These persons who were the original owners, or are still the owners of land upon which easements were obtained, could take a position that contracts or agreements have been entered into which were valid and that subsequent legislation or action cannot compel them to accept payments less than those set forth in the agreement or easement. In this respect the impairment of legal obligations and the resulting damages therefrom would be a definite factor. However, the Highway Department should attempt to negotiate a settlement.

As to question Number 3, the agreement with the United States provides that if the conditions of the contract are not fulfilled the United States government will require the return of the payment funds furnished by the United States government. Therefore, the return of funds obtained by the United States government as well as the constitutional provision against the impairment of legal obligations would require accord and satisfaction with the United States government.

HELGI JOHANNESON

Attorney General