

**OPINION  
74-118**

July 10, 1974 (OPINION)

Mr. Charles E. Crane  
Attorney at Law, State's Attorney  
105 East Third Street  
Mott, ND 58646

Dear Mr. Crane:

This is in answer to your letter of May 22, 1974, in which you state the following:

"The County Commissioners of Hettinger County have asked me to request an opinion as to the following questions:

I. Statement of Facts:

In 1920 Hettinger County acquired highway right-of-way by purchase, which right-of-way consisted of 8 acres for which the County paid \$60.00 per acre. The County acquired title by Warranty Deed and not by easement. The right-of-way taken was located on the centerline of the Section and not on the section line. This right-of-way was originally part of State Highway No. 8, long since abandoned by the state, and has always been a part of the County road system.

The County Commissioners are now relocating this part of the highway and are building a new road to replace the same, and for this reason, have withdrawn this mile of discontinued old highway from the County road system.

The County desires to sell or trade the discontinued mile of road to the present adjacent landowner who is also asked to give the County right-of-way for the new portion of the highway to be constructed. This adjacent landowner wishes to put the old right-of-way back into production. Another landowner objects to this destruction of the old roadway as he must continue to use the same for access to one of his fields.

I. Law and Statutes Applicable and My Conclusion:

From a reading of the North Dakota case, Lalim v. Williams County, 105 N.W.2d. 339, I conclude that since in our case the County acquired the right-of-way by Deed of Grant, paying therefore a good price per acre, and since the highway was not on the section line, a fee simple title thereto, passed to the County, instead of the lesser estate of an easement or more right-of-way, which was the holding of the Williams County case. Thus, it would appear to me that the County could sell or transfer this deeded tract to the adjoining landowner, unless, the public as acquired a legal right to continue the use of this long established roadway.

In this regard I find Section 24-07-31 which provides that 'any road or part thereof layed out by authority of a Board of County Commissioners . . . which thereafter shall be abandoned and not used for ten years, hereby is declared vacant'. It does not appear to me that this Section nor the entire Chapter 24-07 entitled Opening and Vacating Highways applies to our case as this Chapter has generally to do with opening and vacating highways on section lines.

It is therefore my opinion that the County may lawfully sell or transfer this 8 acre tract to the adjoining landowner even against the desire of another farmer to use this continued portion of highway for his own purposes.:

Section 24-07-01 of the North Dakota Century Code provides:

"PUBLIC ROADS BY PRESCRIPTION. All public roads and highways within this state which have been or which shall be open and in use as such, during twenty successive years, hereby are declared to be public roads or highways and confirmed and established as such whether the same have been laid out, established, and opened lawfully or not."

It is further provided in Section 24-07-02 that:

"ESTABLISHED ROADS ARE PUBLIC HIGHWAYS. Every road laid out by the proper authorities, as provided for in this Chapter, from the laying out of which no appeal has been taken within the time limited for taking such appeal, hereby is declared a public highway to all intents and purposes, and all persons having refused or neglected to take an appeal, as provided for in this Chapter, shall be debarred forever from any further redress."

You state that the proposed discontinued portion of the highway was purchased by the County by warranty deed and the same has been in use since 1920. The precise language of the deed is not indicated and, therefore, this office does not have sufficient facts to ascertain whether or not the original conveyance made was in fee simple. A review of *Lalim v. Williams County*, 105 N.W.2d. 339 (1960) would indicate that the language of the deed is crucial for that determination. As was stated on page 345, "it is the general rule that the right acquired by the public in land for highway purposes is ordinarily an easement for passage and rights incidental thereto rather than a fee title."

Thus, if the instrument did not specifically convey a title in fee simple, the presumption of easement would prevail where the property was purchased for highway purposes. While there may be a question concerning the extent of the grant, we do not deem it of controlling importance here.

The most important facts be be considered are (1) the property was acquired by the County for highway purposes, (2) said property was delegated to the public use over a long period of time and (3) a discontinuation or alteration of that use is now presently sought.

There is no question that if the road were on a section line, the procedures for closing such road would be determined by the application of Chapter 24-07. Since, however, we are concerned with property of different origin, that which appears to be a quarter line, it is necessary to examine Chapter 24-07 to determine its applicability.

We conclude that the road in question is a public road regardless of its geographic location or quality of purchase. Referring to Section 24-07-01, it is clear that a public road has been established. Public use has continued in excess of twenty years and such road has also been confirmed and established by the County. Although the headnote of this Section appears to limit the general wording of the statute to prescription, we conclude that the establishment of a public road or highway could come about in other manners or forms. In this extended interpretation of Section 24-07-01, prescription is not the only means for establishing a public road or highway. This Section was interpreted in *Berger v. Berger*, 88 N.W.2d. (1958), to mean that if prescription were the mode relied upon by the user, the elements of prescription would have to be established, including an adverse use for the statutory twenty year period. However, when the general public has used the road as a public right, it becomes an acknowledged public highway. *Berger*, page 103. This is also consistent with Section 24-07-02 which provides for the establishment of a public highway when laid out by the proper authorities.

Based on the foregoing, the road in question is a public highway and its vacation or alteration is subject to the provisions of Chapter 24-07. This is consistent with the holding in *Morton County v. Forester*. 168 N.W. 787 (N.D. 1918), in which the Court stated:

"Ordinarily, the power of vacation is conferred upon the appropriate officers of local governmental subdivisions. And where the statute confers general authority upon a board to vacate public highways, the power extends to all public highways, regardless how they originated." (p. 788)

It is therefore our opinion that the County Commissioners can vacate the highway, over the objection of one landowner who desires that it remain open; however, such vacation can only be done in accordance with the authority conferred upon them by law.

I trust that the foregoing sufficiently answers your inquiry.

Sincerely yours,

ALLEN I. OLSON

Attorney General