

OPINION
75-201

November 28, 1975 (OPINION)

Mr. John A. Zuger
City Attorney
P.O. Box 1695
Bismarck, ND 58501

Dear Mr. Zuger:

This is in reply to your letter of November 14, 1975, in which you set forth the following facts and questions:

"A section line falls on the line between the city and township or county.

"Section 24-07-03 provides that all townships in the state, outside the limits of incorporated cities, the congressional section lines shall be considered public roads to be opened to the width of two rods on each side of each section line, where the same have not been opened already upon the order of the board having jurisdiction.

"Section 24-07-04 deals with the jurisdiction of the various boards to open a highway outside the limits of an incorporated city.

"Chapter 40-39 deals with the opening and vacating of streets in the city.

"I would appreciate your opinion as to whether or not a city would have exclusive jurisdiction of the property lying within 33 feet of the section line and lying within the city, or stated conversely, whether the county or township would have any jurisdiction over the 33 feet lying within the incorporated limits of the city as far as opening of a road is concerned."

As you have noted, Section 24-07-03 of the North Dakota Century Code provides in part, "In all townships in this state outside the limits of incorporated cities, the congressional section lines shall be considered public roads to be opened to the width of two rods on each side of such section lines. . ."

Section 24-07-04 of the North Dakota Century Code specifies the jurisdiction of the various governing bodies with respect to opening and vacating highways under certain situations. The situation in which the section line forms the boundary between the city and the township is not referred to therein.

The history of Section 24-07-03 of the North Dakota Century Code has been discussed in several decisions of the North Dakota Supreme Court, see, e.g., *Small v. Burleigh County* 224 N.W.2d. 295 (N.D. 1974) and *Faxon v. Lallie Civil Tp.* 163 N.D. 531 (N.D. 1917). In the latter case the Court clearly indicated that the acceptance by Chapter 33 of the Laws of 1870-1871 of the right-of-way for the

construction of highways on public lands granted by Act of Congress related back to and became effective from the date of the grant and has not been revoked by Sections 3 and 22 of Chapter 112 of the Session Laws of 1897 and Section 3 of Chapter 97 of the Session Laws of 1899.

The 1897 enactment did not contain the phrase "outside the limits of incorporated cities." That phrase was included in the statute by the 1899 enactment. In any event we construe your question as being related only to jurisdiction and not to the question of whether a right-of-way for public travel exists along a section line included within the limits of an incorporated city.

Insofar as jurisdiction is concerned, the federal enactment in 1866 did not specify the political entity, other than the State, which was to have jurisdiction and we therefore conclude the State Legislature has the authority to specify the political subdivision which has jurisdiction of the right-of-way in question. The Legislature has not done this specifically with regard to the situation outlined in your letter. They have done so, pursuant to Section 24-07-04, in instances in which other political subdivisions have a joint boundary along a section line. While not a direct holding, we note the decision of the North Dakota Supreme Court in *City of Grafton v. Otter Tail Power Company* 86 N.W.2d. 197 (N.D. 1957) wherein the Court stated, page 204 of the reported case:

"The city contends that the part of the section line road lying east of the section line which bounds the grounds of the State School on the west constitutes a street or highway over which the City authorities have control, and that the Board of Administration has no right to construct, operate or maintain its highline over that portion of the road without consent of the city authorities* * * *

"While the record in this case is not too clear with respect to the control of a part of the road by the city, we will assume for the purposes of this discussion that the city has the same control over the part of the highway that lies east of the section line as it does over a city street and go directly to the question of whether the city has the right to control the use of the highway as against the state acting through an agency exercising governmental powers." See also, *Casey v. Corwin* 71 N.W.2d. 553 (N.D. 1955).

Because the Legislature has limited the authority over section lines to townships outside the limits of incorporated cities, we believe that the city, rather than the township, has jurisdiction over that portion of the section line right-of-way lying within the incorporated limits of the city and that the township would not have any jurisdiction over the portion of the right-of-way lying within the incorporated limits of the city insofar as the opening of a road is concerned.

Sincerely yours,

ALLEN I. OLSON

Attorney General