

**OPINION**  
**76-49**

July 15, 1976           (OPINION)

Mr. Ronald G. Splitt

LaMoure County States Attorney

19 First Avenue North

LaMoure, ND 58458

Dear Mr. Splitt:

Recently you requested this office to give its opinion concerning the county's authority to regulate the use of the right of way adjacent to its various county highways, when that use is for a nonhighway function. Specifically, your question stated:

"\* \* \* \* does the securing of highway easements by LaMoure County enable us to prevent and halt the farming of the land contained in the easement?"

Accompanying your request for the opinion was a copy of the easement utilized by the LaMoure County Commissioners in securing additional right of way beyond the 33-foot strip already dedicated for highway purposes. The easement contains language authorizing LaMoure County to " \* \* \* \* enter upon and to construct, improve and maintain a highway over, across and upon as the same may be surveyed, platted or staked, \* \* \*".

The county's authority to acquire right of way for the construction of its highway system is very broad, both as to the manner in which the property may be acquired and as to the quantity and necessity of the acquisition.

"24-05-09. Purchase or condemnation of right of way. - The board of county commissioners of any county of the state, by resolution or order, as part of the cost of constructing, reconstructing, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining, any highway in said county, may purchase, acquire, take over, or condemn, under the right and power of eminent domain, for such county, any and all lands which it shall deem necessary for the present use, either temporary or permanent, and to provide adequate drainage in the improvement, constructing, reconstructing, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining of any highways in said county, and by the same means it may acquire said lands notwithstanding the fact that the title thereto is vested in the state or any of its subdivisions. \* \* \* \*"

The county, in acquiring property rights to "construct, improve and maintain a highway", under the terms of the easement, would obtain a right that extends the full width of the right of way. The word "highway" connotes a description encompassing property of a greater

quantity than just that particular area of land which is devoted to the roadway proper. The definition of a highway is given in Section 24-01-01.1, subsection 20 of the N.D.C.C., wherein it states:

"'Highway, street, or road' shall mean a general term denoting a public way for purposes of vehicular travel, including the entire area within the right of way. A highway in a rural area may be called a 'road,' while a highway in an urban area may be called a 'street.'"

Having concluded that the acquisition under the terms of the easement encompassed the entire breadth of the right of way, the question becomes one of determining of the interest so acquired. In Nichols on Eminent Domain, Volume 3, Section 9.2, the question is answered thus:

"Extent of the interest acquired. The general rule is that only such an estate in the property sought to be acquired by eminent domain may be taken as is reasonably necessary for the accomplishment of the purpose in aid of which the proceeding is brought. \* \* \*"

In Section 9.2(1), Nichols, supra, the author of that works notes with clarity that the Legislature has the authorization and power to modify the general rule.

"Statutory authorization of interest to be acquired. Unless there is a constitutional inhibition upon the power of the legislature in this respect, the latter has the sole power to determine what shall be acquired both as to quantum and quality of estate. Accordingly, it follows that the legislature has power to authorize the acquisition of a fee or of any lesser estate or interest. \* \* \*"

The North Dakota Supreme Court has adhered to the above-quoted tenets. See, Wallentinson v. Williams County, 101 N.W.2d. 571 and Lalim v. Williams County, 105 N.W.2d. 339.

The interest acquired relative to the right of way not devoted to roadway use is in the nature of a negative easement in that the Legislature has expressly set forth the manner in which county highway ditches and backslopes are to be constructed and maintained after construction. Section 24-05-20 of the N.D.C.C. provides:

"24-05-20. County and township road grades and ditches to be back sloped - Planting of grass. - All county and township roads shall be constructed with back sloped grades and ditches. Such grades and ditches shall be sloped to a sufficient degree to permit farm implements used for cutting and gathering hay to operate thereon, and such grades and ditches shall be cleared of all stones or other obstructions that would hinder the operation of such implements. Upon completion of such newly constructed or reconstructed roads, the governing body having authority over such roads shall plant grass upon the back slopes of the grades and ditches. The grass or hay growing upon or within the right of way of such roads may be cut for hay by any owner or tenant of lands adjoining the right of

way."

While the above section of law does not expressly require the backslopes and ditches be maintained in grasses, it contains a strong inference that such was the Legislative intent in view of the authorization granted the adjacent landowner to cut the hay growing within the right of way. This conclusion is further enhanced by the limitations on the use of highway right of way imposed by the Legislature under the provisions of Sections 24-12-01 and 24-12-02 of the N.D.C.C. Those particular sections state:

"24-12-01. Injuries to highways. - No person shall willfully dig up, remove, displace, break, or otherwise injure or destroy any public highway, right of way, or bridge, or any rest area, picnic area, or tourist camp or improvements thereon, operated in connection with a public highway, or any private way laid out by authority of law, or any bridge upon such way without first securing permission from the person or governing body having jurisdiction and control thereof."

"24-12-02. Obstructing highways. - No person shall:

1. Obstruct any public highway in any manner with intent to prevent the free use thereof by the public;
2. Willfully and knowingly obstruct or plow up, or cause to be obstructed or plowed up, any public highway or right of way, except by order of the officials having jurisdiction over such highway for the purpose of working or improving the same; or
3. Build or place a barbed wire fence across any well-traveled trail which has been the usual and common route of travel for not less than one year without placing on the outside of the top tier of barbed wire on said fence a board, pole or other suitable protection, to be at least sixteen feet in length."

Therefore, it is my opinion that the county in acquiring the right of way easement to "construct, improve and maintain a highway", also acquired that property interest necessary to implement and effectuate the legislative mandate expressed in Section 24-05-20, supra. Since the cultivation of the right of way thus acquired is a use inconsistent with the provisions of Section 24-05-20, supra, the county would have the right to institute proceedings it deems necessary to protect that interest.

Sincerely,

ALLEN I. OLSON

Attorney General