

**OPINION**  
**77-44**

May 12, 1977 (OPINION)

Mr. Walter R. Hjelle  
Highway Commissioner  
State Highway Department  
Bismarck, ND 58505

Dear Mr. Hjelle:

This is in reply to your letter of May 11, 1977, in which you asked the following questions:

1. Does the Highway Department have authority to prohibit landowners who abut the highway from draining into the highway ditches?
2. Does the Highway Commissioner have authority to purchase wetlands and to replace those non federal easement wetlands which are or might be affected by the project?

In response to the first question concerning drainage, North Dakota Century Code, Section 24-03-06 provides:

24-03-06. METHOD OF CONSTRUCTION OF HIGHWAY DITCHES. Any and all highways of any kind hereafter constructed or reconstructed by the department, any board of county commissioners, any board of township supervisors, their contractors, subcontractors or agents, or by any individual firm or corporation, shall be so designated as to permit the waters running into such ditches to drain into coulees, rivers, and lakes according to the surface and terrain which such highway or highways are constructed in accordance with scientific highway construction and engineering so as to avoid the waters flowing into and accumulating in the ditches to overflow adjacent and adjoining lands. In the construction of highways, as herein provided, the natural flow and drainage of surface waters shall not be obstructed, but such water shall be permitted to follow the natural course according to the surface and terrain of the particular terrain.

This section was considered by the North Dakota Supreme Court the case of Viestenz v. Arthur Township, 55 N.W.2d. 572 (1952); Viestenz v. Arthur Township, 129 N.W.2d. 33 (1964). In Viestenz I, the court was dealing with Section 24-0633 from the 1949 Supplement to the North Dakota Revised Code of 1943. This section is virtually identical to Section 24-03-08 of the current code. The only difference is that in 1949, the law had the following statement of intent incorporated into the body of the statute:

" \* \* \* It is the intention of this act that in the construction of highways, as herein provided, the natural flow and drainage of surface water shall not be obstructed, but that such water shall be permitted to follow the natural courses according to the surface and terrain of the particular

terrain."

The court stated at 54 N.W.2d. 575:

"By this law those in charge of the construction of highways in addition to making the roads fit for travel must consider the drainage affected by the construction. It is made their mandatory duty to provide drainage towards a natural water course of any water which may accumulate in the ditches along the highway."

In Viestenz II, decided in 1964, the court reversed a district court denial of an injunction and ordered the district court to issue the injunction so that the defendants would be required to construct the township highways which bordered the petitioner-plaintiffs land on the south and the east so that the highways would not obstruct the natural flow of surface waters to the south and to the east.

It is clear that North Dakota Century Code 24-03-06 and the opinions of the Supreme Court require that the State Highway Department may not obstruct the natural surface water drainage of abutting landowners. Based on that, it is my opinion that the State Highway Commissioner has no authority to prohibit drainage into a ditch by an abutting landowner in the absence of a threat to the structural integrity of the highway.

In response to your second question concerning the authority of the Highway Department purchasing replacement lands for those wetlands which may be depleted as a result of the project, I refer you to Article 56 of the North Dakota Constitution. Article 56 provides in part:

"Revenue \* \* \* shall be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of a highway.

Further, Section 24-01-18 of the North Dakota Century Code provide the permissible purposes for which the Commissioner may exercise the power of eminent domain. All the purposes in that section are directly related to the construction or maintenance of the state's highway system. The Commissioner may only acquire lands which "he deems necessary for the present public use \* \* \* or which he may deem necessary for reasonable future public use \* \* \* ". Without a showing or necessity for highway purpose, the Commissioner is without authority to acquire lands by eminent domain.

It is my opinion that the acquisition of substitute wetlands is not one of the purposes permitted in Section 24-01-18.

Sincerely,

ALLEN I. OLSON

Attorney General