

**OPINION**  
**78-37**

October 10, 1978 (OPINION)

Mr. Walton S. Russell  
Special Assistant Attorney General  
North Dakota State Board of Registration  
for Professional Engineers and Land Surveyors  
P. O. Box 644  
Mandan, ND 58554

Dear Mr. Russell:

You recently requested, on behalf of the North Dakota State Board for Professional Engineers and Land Surveyors, an opinion from this office as to respective authorities of the board of county commissioners and the county highway engineer in designing and constructing bridges on the county highway system. In summary, your letter indicated that a county highway engineer, who is not a registered professional engineer, is a duly appointed and acting county highway engineer and in such capacity has undertaken the design and superintendent of the construction of various bridges within his jurisdiction. You also stated that the individual concerned occupied the position of county highway engineer prior to January 1, 1967. You noted the Board's concern for the public safety that may be jeopardized by poorly designed and constructed highway bridges.

Your letter also contains references to Sections 43-19.1-29, 43-19.1-28, 11-31-03 and also Chapter 24-08, all of the North Dakota Century Code.

In setting forth your position, you ask three specific questions, the first of which is:

Do board of county commissioners have the power to delegate to the county engineer the design of bridges?

The general powers of the board of commissioners are described in Section 11-11-14. Subsections 5 and 15 are pertinent:

POWERS OF BOARD OF COUNTY COMMISSIONERS. The board of county commissioners shall have the following powers:

\* \* \*

5. To construct and repair bridges and to open, lay out, vacate, and change highways in the cases provided by law. But the board may not contract for the construction of bridges costing more than one hundred dollars without first complying with the provisions of chapter 24-08.

\* \* \*

5. To do and perform such other duties as are or may be prescribed by law.

\* \* \*

Section 24-01-01 describes the legislative intent for the construction, maintenance and control of streets and highways of North Dakota.

24-01-01. DECLARATION OF LEGISLATIVE INTENT. \* \* \*

In designating the highway systems of this state, as hereinafter provided, the legislative assembly places a high degree of trust in the hands of those officials whose duty it shall be, within the limits of available funds, to plan, develop, operate, maintain, and protect the highway facilities of this state, for present as well as for future use. To this end, it is the intent of the legislative assembly to make the state highway commissioner, and the state highway department acting through him, custodian of the state highway system and to provide sufficiently broad authority to enable the commissioner to function adequately and efficiently in all areas of appropriate jurisdiction with specific details to be determined by reasonable rules and regulations which may be promulgated by him, subject to the limitations of the constitution and the legislative mandate hereinafter imposed.

It is recognized that the efficient management, operation, and control of our county roads, city streets, and other public thoroughfares are likewise a matter of vital public interest. Therefore, it is the further intent of the legislative assembly to bestow upon the board of county commissioners similar authority with respect to the county road system and to local officials with respect to the roads under their jurisdiction.

While it is necessary to fix responsibilities for the construction, maintenance, and operation of the several systems of highways, it is intended that the state of North Dakota shall have an integrated system of all roads and streets to provide safe and efficient highway transportation throughout the state. To this end, it is the intent of the legislative assembly to give broad authority and definite responsibility to the state highway commissioner and to the boards of county commissioners so that working together, free from political pressure and local interests, they may provide for the state an integrated system of state and county highways built upon a basis of sound engineering with full regard to the interest and well-being of the state as a whole. \* \* \* (Emphasis added)

Responsibility for the construction, maintenance and operation of the county road system by county commissioners is reiterated in Section 24-05-17:

RESPONSIBILITY FOR COUNTY ROAD SYSTEM. The boards of county commissioners in their respective counties shall have the sole authority and responsibility to acquire land for, construct, maintain and operate the county road system as designated and selected by them.

The legislature has placed the entire responsibility for the county highway system upon the county commissioners.

If a bridge constitutes an integral part of a county highway, we believe that the county commissioners have the necessary authority to delegate its design and construction responsibilities to the county highway engineer, since that office is specifically charged, as part of its duties, with the design of county highways. Section 11-31-03, subsections 1 and 11, provide:

POWERS AND DUTIES. Under the direction and supervision of the board of county commissioners, the county engineer shall:

1. Design and make plans for county and township highways.

\* \* \*

1. Perform such other duties as may be designated by the board of county commissioners.

\* \* \*

Section 24-01-01.1, N.D.C.C., provides various definitions for highways and matters related thereto but does not include a definition of the word "bridge." However, the words, highway, street, or road, are defined in subsection 20:

0 "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".

Likewise, the term roadway is defined in subsection 31:

1. "Roadway" shall mean in general, the portion of a highway, including shoulders, for vehicular use. In construction specifications, the portion of a highway within limits of construction.

Consistent with North Dakota's definition of a highway, 39 Am. Jur.2d, Highways, Streets, and Bridges, Section 11, page 409, observes whether a bridge constitutes a part of a highway as follows:

Section 11. Bridges.

\* \* \* A "bridge" connecting public highways, and erected for the general use and accommodation of the public, is itself a public highway, and is usually treated as constituting a part of the highways with which it is connected, except where the language of some particular statute is such as to show plainly that the term "highway" is not intended to include bridges. This is true whether the bridge is built and maintained at public expense or by a public or private corporation authorized to charge and collect tolls from persons using it. \* \* \*

In similar fashion, the North Dakota Supreme Court in *Brenna v.*

Hjelle, 161 N.W.2d. 356 resolved a question as to whether a bridge constituted a part of the state highway system, for the purpose of expending Article 56 moneys for the construction of the bridge. The Court said:

Any bridge, in whatever shape or form, has always been considered a part of the ordinary road. It is the road, as it is carried across the river, a low spot, or rough terrain. While bridges and culverts are not synonymous, a bridge being part of the highway to carry it over water or rough spots, and a culvert being a conduit for passage of water under the highway, both generally have been considered part of the road.  
\* \* \*

Courts have almost universally held that bridges and culverts are a part of highways. \* \* \* (Citations.)

Therefore, the answer to your first query is yes. Since the bridges constitute an integral and inseparable part of the county highway system, the county commissioners by virtue of the authority vested in them by the state legislature do have the power to delegate to the county highway engineer the responsibility to design bridges on the county highway system.

Your second question was:

Do county engineers have power to design bridges? Do nonregistered county engineers have the power to design bridges?

It is presumed that the first portion of your question is directed to the office or position of county highway engineer rather than the individual occupying the position. The presumption is based on the rationale that if the question dealt with the individual, such an inquiry would necessarily be answered by our response to the second portion of your inquiry.

Under the provisions of subsections 1 and 11 of Section 11-31-03, supra, the county highway engineer is charged, statutorily, with the responsibility for the design of county highways and such other duties as may be imposed upon him by the board of county commissioners. Further, the county commissioners have been given additional authority in establishing the employment obligations of the county highway engineer under Section 11-31-02 of the (Emphasis added), which states:

QUALIFICATION AND EMPLOYMENT BASIS. The person employed or appointed as county highway engineer must be a duly qualified highway engineer. The compensation and other terms of service of such engineer shall be determined by the board of county commissioners and may be on a monthly or a per diem basis. Several counties may employ or appoint the same engineer.

The above statutory provision, when coupled with the applicable portions of Section 11-31-03, supra, and our prior conclusion that a bridge is part of a highway compels the conclusion that the county highway engineer can legally design bridges.

The second portion of your question is answered in conjunction with our response to your third question, which states as follows:

Are the provisions of Section 43-19.1-28 mandatory upon the state and its subdivisions, and if so, does such constitute a limitation upon the exemptions provided in Section 43-19.1-29 of the N.D.C.C.?

Section 43-19.1-28 states:

PUBLIC WORKS. This state and its political subdivisions, including counties, cities, townships and legally constituted boards, districts, commissions, or authorities, shall not engage in the construction of public works involving the practice of professional engineering as herein defined when the contemplated expenditure for the project shall exceed the sum of five thousand dollars, unless the engineering drawings and specifications and estimates have been prepared by, and the construction is executed under the supervision of, a registered professional engineer. Any engineering contract executed in violation of this section shall be null and void.

The pertinent portion of Section 43-19.1-29 provides:

EXEMPTION CLAUSE. This chapter shall not be construed to prevent or affect:

\* \* \*

3. The practice of engineering or surveying for a county by a person not registered under this chapter whose appointment as county engineer or county highway superintendent was in effect on January 1, 1967.

\* \* \*

Section 43-19.1-28 appears to have a broad and all inclusive application. However, such a finding by this office is not vital to this opinion in view of the facts presented. Chapter 43-19.1 has yet to be considered by a court of record in this state and likewise, this office has not been made aware of any action taken by your board that would assist in making such a conclusion. Under these circumstances, we would be forced to hypothesize a broad factual basis upon which our opinion would rest. We prefer not to engage in such an exercise if it is not required in responding to the factual situation presented by the request.

In your letter you stated the county highway engineer in question occupied that position as of January 1, 1967. He would therefore come within the ambit of the protective provisions of subsection 3 of Section 43-19.1-29, supra. It should be noted that Section 43-19.1-29 has application to Chapter 43-19.1 in its entirety and by its language has not been limited or restricted in any manner.

In defining the word "exemption," Black's Law Dictionary, Deluxe, Fourth Edition, provides:

Exemption. Freedom from a general duty of service; immunity from a general burden, tax or charge. (Citations.)

The same works also addresses itself to the phrase, "words of exemption," and gives it the following definition:

Exemption, words of. It is a maxim of law that words of exemption are not to be construed to impart any liability \* \* \*.

If we were to construe Section 43-19.1-28, supra, as being a limitation upon the exemption provided in Section 43-19.1-29, subsection 3, supra, the effect of such construction would be to totally vitiate that exception granted by the legislature in clear and express language. We think the legislature intended that practicing engineers in the position of county highway engineer, as of January 1, 1967, would not be made subject to the act. In short, this class was "grandfathered in." Perhaps it was contemplated that the exemption would cease through the attrition.

The alternative would be to find that Section 43-19.1-28, supra, is a total limitation on Section 43-19.1-29 and that a nonregistered engineer could not fill the position of county highway engineer under exemption. This we cannot do.

Sincerely,

ALLEN I. OLSON

Attorney General