Date Issued: June 28, 1982 (AGO 82-50)

Requested by: A. S. Benson,
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- QUESTIONS PRESENTED -

I.

Whether roads dedicated to the public by a plat of a rural subdivision become the responsibility of a township for purposes of road maintenance.

II.

Whether the county or township has the authority to grant an easement for the construction of a sewer facility on the rights-of-way of the roads dedicated to the public by a plat of a rural subdivision.

III.

Whether the county and township are responsible for the maintenance of their respective roads during and after the construction of the sewer facility.

IV.

Whether either the county or township would be liable to a landowner who is denied access to his property because of the construction of a sewer facility on the highway right-of-way.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that roads dedicated to the public by a plat of a rural subdivision do not become the responsibility of a township for purposes of road maintenance unless the township accepts such responsibility.

II.

It is my further opinion that both the county and township lack the authority to grant an easement for the construction of a sewer facility on the rights-of-way of the roads dedicated to the public by a plat of a rural subdivision.

III.

It is my further opinion that the county and township are responsible for the maintenance of their respective roads during and after the construction of the sewer facility.

IV.

It is my further opinion that the county or township may be liable to a landowner who is denied access to his property because of the construction of a sewer facility on the highway right-of-way.

- ANALYSIS -

I.

The platting of a rural subdivision whereby certain roads are dedicated to the public does not operate as a matter of law, to vest the title to such dedicated roads in a governmental entity, such as a township. The legal effect of such platting and road dedication is that of a continuing offer which is subject to acceptance. The rule in North Dakota is stated as follows in Ramstad v. Carr, 154 N.W. 195 (N.D. 1915):

While there is a great deal of conflict in the authorities upon the question of whether an acceptance is necessary in the case of a statutory dedication, still we believe that the better and more prevalent rule is that an acceptance is necessary. The rule seems sound and logical, and has the support of excellent
authority. The Supreme Court of Michigan, in the case of County of Wayne v. Miller, 31 Mich. 447, in an opinion by Judge Cooley, said:

". . . As the execution and recording of the plat is wholly a private matter, subject to no public supervision whatever, this view would enable proprietors of lands to lay out so many streets and avenues as they might see fit, and wherever their private interests should determine; and, whether the streets were desired by the public or not, the private ownership would be displaced. Either one of two consequences must then follow:

The public must be under some obligations to treat the land as constituting a street, and be subject to such liability as that fact would impose, or the land must remain waste property, in the hands of an owner who cannot use it for the purposes of profit, and who at the same time refuses to put it to the purposes contemplated in making the plat. . . . But, if the plat is regarded as a grant, it is equally necessary that there should be acceptance. No one can thrust a grant upon another without his assent. (Citations omitted.) It is true, acceptance of a grant may be presumed when it is beneficial. (Citations omitted.) But there can be no conclusive presumption that a grant of land for a public way is so. We may almost take judicial notice that an offer of land for such a purpose is often - and very properly - declined, for the reason that no such way as the one proposed is needed, and by the acceptance the public would be burdened with obligations without corresponding benefits." 154 N.W. 195, 202.

The general rule as to the necessity of the acceptance of the offer to dedicate land to a public use is found in 23 Am. Jur.2d. Dedication section 42 (1965), where it is stated:

Section 42. Necessity.

Unless otherwise provided by statute, acceptance of an offer to dedicate land to public use is ordinarily essential to a complete dedication and to work an exemption of the dedicated property from taxation, especially where the public body is to be charged with the duty to maintain and repair the facility offered to the public, and subjected to liability for nonperformance of such duty. This general rule applies to a dedication for highway purposes. . .

The method of acceptance can vary, and that question is addressed in 23 Am. Jur.2d. Dedication Section 50 (1965).

Section 50. Generally.

Although formal acceptance is not inherently essential to fix the public right in the property dedicated, and generally official acceptance may consist in any positive conduct of the proper public officers evincing their consent on behalf of the public, formal action has been held necessary where the dedication will impair exclusive existing franchises or in order to render a governmental subdivision responsible for maintenance and repair and liable for injuries resulting from the neglect thereof, such as in the case of a highway. . .

II.

Under existing statutory and case law authority, the county or township would only acquire an easement in the roads dedicated to the public in the rural subdivision plat and the governmental entity would have no greater rights to the underlying fee than they would in a case of a Section line highway. In a case of a section line highway, the North Dakota Supreme Court most recently has stated in Minot Sand & Gravel Co. v. Hjelle, 231 N.W.2d. 716, (N.D. 1975):

In North Dakota the rights of the public to section line highways and to streets are easements only, limited to the right to travel and other rights incident thereto, and the owner of the adjoining land owns the fee title to the property
included in the 33 foot easement up to the section line. (Citations omitted.) 231 N.W.2d. 716, 721.

Therefore, a recreation service district would have to obtain the easement from the owner of the abutting property authorizing the installation of the sewerline, although it may be located within the highway right-of-way.

III.

Section 24-05-17 of the North Dakota Century Code imposes upon the board of county commissioners the responsibility of maintaining the county road system under their jurisdiction. Likewise, the township supervisors have the responsibility of appointing an overseer of township highways under the provisions of section 58-12-01, N.D.C.C. Among the duties of the township overseer of the highways are:

1. Have direct charge of the construction and maintenance of all township highways and bridges, whether the work done is by contract or day labor;

2. Be responsible for the maintenance of the township highways throughout the entire year;. . .

Both of the above statutes imposing maintenance responsibilities on the governmental entities are to be read in conjunction with the provisions of section 24-12-01, N.D.C.C., which provides for the protection of a highway. That section provides:

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.

Therefore, the county or township would have to maintain the highway during the construction period and thereafter so as to provide a highway that is reasonably fit for vehicular traffic.

IV.

In the case of Filler v. City of Minot, 281 N.W.2d. 237 (N.D. 1979), the North Dakota Supreme Court addressed the question of the compensable of the temporary loss of the access to one's property.

When a street is so obstructed during the construction of a public work that access to abutting property is wholly cut off, the fact that the injury is only temporary is generally held to be no reason for denying the owner compensation. However, when access, though rendered difficult and inconvenient, is not wholly cut off, the owner is denied compensation. This is so even if there is such an injury to the use of the property for business purposes during the construction of the work as to materially affect the value of the leasehold interests, and this injury is due to the presence of structures in the street that would undoubtedly constitute a ground for compensation if they were maintained there permanently. . ." 281 N.W.2d. 237, 244.

In accordance with the above supreme court decision, it is my opinion that a landowner who is unable to gain access to his property, because the roads are impassable because

of the construction of the sewer facility, may have a cause of action for the temporary denial of access to his property.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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