

Overruled by N.D.A.G. 90-31

Office of the Attorney General  
State of North Dakota

Opinion No. 83-36

Date Issued: September 26, 1983

Requested by: Senator Joseph A. Satrom  
Representative Serenus Hoffner  
Representative Robert W. Martinson

--QUESTION PRESENTED--

Whether the elimination of an intersection of two streets constitutes a vacation of parts thereof pursuant to Chapter 40-39 of the North Dakota Century Code.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that the elimination of an intersection of two streets constitutes a vacation of parts thereof pursuant to Chapter 40-39, N.D.C.C.

--ANALYSIS--

Section 40-39-05, N.D.C.C., states:

40-39-05. PETITION FOR VACATION OF STREETS, ALLEYS, OR PUBLIC GROUNDS--CONTENTS--VERIFICATION.--No public grounds, streets, alleys, or parts thereof within a municipality shall be vacated or discontinued by the governing body except on a petition signed by all of the owners of the property adjoining the plat to be vacated. Such petition shall set forth the facts and reasons for such vacation, shall be accompanied by a plat of such public grounds, streets, or alleys proposed to be vacated, and shall be verified by the oath of at least one petitioner. (Emphasis supplied)

It cannot be disputed that if parts of two streets are to be vacated or discontinued, that cannot be accomplished except in accordance with Chapter 40-39, N.D.C.C. The fundamental issue then is, does the elimination of the intersection of two streets constitute a 'vacation' of a public ground, street, alley, or 'parts thereof'?

An 'intersection' is defined in Section 39-01-01(25), N.D.C.C., as follows:

39-01-01. DEFINITIONS. In this title, unless the context or subject matter otherwise requires:

\*\*\*

25. 'Intersection' means the area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict. . . .

\*\*\*

The portion of the roadway which is common to both highways constitutes the intersection. The intersection does not exist except in relation to the two highways which define its boundaries. Once such an intersection is established, it is my opinion that as a matter of law such an established intersection becomes an integral part of both intersecting roadways.

The Iowa Supreme Court has said that the terms 'vacate' and 'discontinue' as used in the context of a statute similar to Section 40-39-05, N.D.C.C., are synonymous. The definition of 'vacate' adopted by that court is 'to put an end to'. See *McCarl v. Clarke County*, 148 N.W. 1015 (Iowa 1914). Black's Law Dictionary defines the term likewise: 'To put an end to, as, to vacate a street'. Black's Law Dictionary, (5th Ed. 1979).

A Texas appellate court did have occasion to decide an eminent domain case involving a somewhat similar project. *City of Beaumont v. A. B. Marks*, 427 S.W.2d 111, (Tex. 1968). In that case, an at-grade railroad crossing was eliminated and an underpass constructed one-half block from the old crossing. The tracks were located in the middle of the street which intersected with another street at an old crossing. Substantial portions of the street on which the tracks were located were closed, and a second track was constructed parallel to the existing one. Most of the first street at the intersection was vacated. A portion of the intersecting street at the intersection was also vacated, and that street was relocated. The court described the project this way: 'There was a change of the street grade in both Orleans and Gilbert Streets . . . the intersection of Orleans and Gilbert Streets was abandoned, vacated and closed . . .' 427 S.W.2d 111, 116.

The city's governing body has the power to establish by ordinance the grade of all streets, alleys, and sidewalks in the municipality as the convenience of its inhabitants may require pursuant to Section 40-39-03, N.D.C.C. It is my opinion that as a matter of law changing the grade of streets after they have been established in a way which would result in the elimination of an intersection would constitute a vacation of parts of both streets. To vacate an intersection, a city must follow the procedures set forth in Chapter 40-39, N.D.C.C.

--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 question presented is decided by the courts.

Robert O. Welfald  
Attorney General

Prepared by: DeNae H. M. Kautzmann  
Assistant Attorney General