

Date Issued: April 30, 1986 (AGO 86-17)

Requested by: Ward D. Briggs, Riverside City Attorney

- QUESTIONS PRESENTED -

I.

Whether N.D.C.C. section 24-17-05 provides an absolute mandate upon the highway commissioner to acquire an outdoor advertising structure determined to be a nonconforming structure.

II.

Whether a political subdivision, acting in a proprietary capacity, may cause the removal of a nonconforming compensable advertising structure without compliance with N.D.C.C. section 24-17-05.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that N.D.C.C. section 24-17-05 does not provide an absolute mandate upon the highway commissioner to acquire an outdoor advertising structure determined to be a nonconforming structure.

II.

It is my further opinion that a political subdivision, acting in a proprietary capacity, may cause the removal of a nonconforming compensable advertising structure without compliance with N.D.C.C. section 24-17-05.

- ANALYSES -

I.

N.D.C.C. section 24-17-05 provides as follows:

24-17-05. COMPENSATION FOR REMOVAL OF SIGNS. The commissioner is directed to acquire by purchase, gift, condemnation, or exchange, signs lawfully erected which do not conform to this chapter or the regulations established by the commissioner. Owners of advertising structures, signs, displays, or devices acquired by the commissioner pursuant to this section, and the owners of the land upon which such displays are located shall be paid just compensation for the reasonable damages, if any, suffered by the reason of such removal.

Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected and maintained under state law, provided that federal matching funds are appropriated, allotted, and made available to this state under title 23, United States Code, for the purpose of providing just compensation for the removal of such signs, displays, or devices. No municipalities, county or local zoning authorities, or political subdivision shall remove or

cause to be removed any advertising structures, except such structures that encroach upon the right of way, without paying compensation in accordance with this section.

Numerous elements must be considered in making a determination that an outdoor advertising structure is nonconforming and compensable. The date of the erection of the outdoor advertising structure must be determined. N.D.C.C. section 24-17-03. The actual zoning, if any, of the land on which the outdoor advertising structure is erected must be determined. 23 USC Section 131(d). If the land is unzoned, the determination must be made as to the actual use being made of the land. N.D.C.C. section 24-17-03. If the determination is made that the actual land use is for an unzoned commercial or industrial activity, then a decision must be made whether the outdoor advertising structure is located within the parameters of the agreements between the highway department and the United States Department of Transportation. 23 USC Section 131(d).

The classification of the outdoor advertising structure ultimately deals with the payment of just compensation for the removal of the structure. The essence of N.D.C.C. section 24-17-05 is the requirement to pay just compensation upon removal of the nonconforming outdoor advertising structure. This aspect of the statute is executory in nature since it prescribes no time of removal for the nonconforming outdoor advertising structures.

Therefore, the classification is transitory and is dependent upon the factual situation in existence at the time of the actual removal. Events intervening from the time of the initial classification of the sign as nonconforming compensable could have a dramatic effect on the ultimate classification of an outdoor advertising structure. For example, a change in zoning to industrial or commercial or the actual use of the land for such purposes would confer the status of conformity on an outdoor advertising structure located on such property. In such a case, the sign would not be subject to removal.

The executory nature of N.D.C.C. section 24-17-05 is further substantiated by the requirement that federal funds be made available to the state for the purpose of paying just compensation at the time of the removal of a compensable sign. By virtue of this contingency, the conclusion that the classification of a sign as being nonconforming compensable would render meaningless the acquisition thereof by the highway commissioner. This is so as the federal government will not participate in the cost of removal of any sign that is considered to be conforming irrespective of where or when they were erected. 23 CFR Section 750.700(a).

Further contingencies still exist within the spectrum of N.D.C.C. section 24-17-05. The questions of the necessity of the taking and of the compensability of the property taken are judicial in nature and have been reserved to the courts. See *Kessler v. Thompson* 35 N.W.2d. 172 (N.D. 1956); *Guerard v. State* 220 N.W.2d. 525 (N.D. 1975).

It is a well-established rule of statutory construction that the strict words of a statute should not be adhered to where the result is injustice or absurdity. In *Interest of B.L.* 301 N.W.2d. 387

(N.D. 1981); State v. Mees 272 N.W.2d. 61 (N.D. 1978). To apply N.D.C.C. section 24-17-05 as to obligate the highway commissioner to acquire all nonconforming outdoor advertising structures regardless of intervening events or the lack of appropriate funds to pay for such acquisition would be unjust and absurd.

Therefore, it is my opinion that N.D.C.C. section 24-17-05 does not provide an absolute mandate upon the highway commissioner to acquire an outdoor advertising structure which does not conform to appropriate regulations.

## II.

N.D.C.C. section 24-17-05 contemplates that the sign owner is entitled to just compensation when the advertising structure is acquired or caused to be removed by virtue of a legislative enactment or administrative regulation which renders a legally erected sign nonconforming. The statute further provides that a nonconforming outdoor advertising structure cannot be removed until federal matching funds are made available to the state for the payment of just compensation.

The foregoing requirements prohibit the statute's application to a factual situation involving the political subdivision acting as a landowner. In this instance, the removal of the outdoor advertising structure would not be by virtue of an ordinance or governmental regulatory plan. Further, the political subdivision would not be a recipient of federal matching funds with which to pay just compensation. See 23 U.S.C. 131(g). Also, there is no provision whereby the state allocates the federal matching funds to political subdivisions. Therefore, in such a factual situation the political subdivision is seeking to act not buy its legislative powers in a governmental capacity, but in a proprietary capacity as a landowner.

The distinction between a political subdivision's proprietary and governmental function has been long recognized in North Dakota. The North Dakota Supreme Court, in Chrysler Light and Power Co. v. City of Belfield 224 N.W. 871, 877 (N.D. 1929), stated as follows:

But, as has been indicated, a city is vested with two classes of power: The one governmental, legislative, or public; the other, in a sense, proprietary or private. (Citation omitted.) "In its governmental or public character the corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. \* \* \* But, in its proprietary or private character the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual and as to such powers, and to property acquired thereunder, and contracts made thereunder," the corporation is regarded as having the rights and obligations of a private, rather than those of a public corporation. 1 Dillon, Mun. Corp. (Fifth Ed.) Section 109; Winona v. Botzet (C.C.A.) 169

F.321, 23 L.R.A. (N.S.) 204; Illinois Trust and Sav. Bank v. Arkansas City (C.C.A.) 76 F.271, 34 L.R.A. 518; 43 C.J. pp. 183, 184. (Emphasis in original text.)

While the real property may have originally been acquired by virtue of a governmental process, the subsequent management and use of that property is a proprietary function of the political subdivision. N.D.C.C. section 24-17-05 contemplates the payment of just compensation when an outdoor advertising structure is acquired pursuant to a regulatory scheme created by exercise of a governmental power by the political subdivision. N.D.C.C. section 24-17-01. It is the exercise of the governmental power that is the catalyst for invoking the just compensation provisions of N.D.C.C. section 24-17-05.

In an analogous situation, the California Supreme Court observed, in *Metromedia v. San Diego* 592 P.2d. 728, 744 (Calif. 1979), as follows:

The state has no interest in construing its statutes to require payment of compensation in any case in which the federal agency charged with administration of the federal program would not institute action to impose a penalty. . . .

\* \* \*

The legislative history of that act >Highway Beautification Act! indicates that the Congress intended to require payment of compensation only for billboards removed pursuant to the Highway Beautification Act or state statutes enacted to conform to that act. . . .

Neither 23 USC 131 nor N.D.C.C. chapter 24-17 make any pretense of regulating the relationship between a landowner and the owner of an outdoor advertising structure. That relationship is outside the scope of both statutes and is not subject to the just compensation requirement under N.D.C.C. section 24-17-05. The same rationale would have application to a political subdivision acting in its proprietary capacity as to a landowner when dealing with the owner of an outdoor advertising structure.

Therefore, it is my opinion that a political subdivision, when it acts in its proprietary capacity, may cause the removal of a nonconforming compensable advertising structure without compliance with N.D.C.C. section 24-17-05.

- EFFECT -

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

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