

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-3

Date issued: February 8, 1988

Requested by: James W. Wold, Griggs County State's Attorney

- QUESTION PRESENTED -

Whether a county has a duty to furnish, install, or maintain a culvert in a township road at the intersection of a natural watercourse?

- ATTORNEY GENERAL'S OPINION -

It is my opinion that, absent an agreement to the contrary, a county has no duty to furnish, install, or maintain a culvert in a township road at the intersection of a natural watercourse unless the natural watercourse has been or is "proposed to be opened and improved for the purpose of drainage."

- ANALYSIS -

This inquiry arises in light of an attempt to determine the application of N. D. C. C. ' 24-08-02.1 to natural watercourses. That section requires a county to furnish and install culverts on township roads which are intersected by an "established drain." N. D. C. C. ' 24-08-02.1. This office earlier opined that an "established drain" was defined by N. D. C. C. ' 61-21-01(4).¹ 1983 N. D. Op. Att'y Gen. 12. Under that definition a natural watercourse which has been, or will be, improved for drainage is an "established drain." In that instance, N. D. C. C. ' 24-08-02.1 would require the county to furnish and install any necessary culverts.

However, in 1981 the Legislative Assembly enacted N. D. C. C. " 61-16.1-42, 61-16.1-43. These sections apply when it is necessary to run a drain through a road. The cost, after state and federal funds are considered, is to be split

¹In the earlier opinion the citation was to N.D.C.C. ' 61-21-01(1). However, the subsections have been rearranged alphabetically and subsection 1 has now become subsection 4. Subsection 2 of N.D.C.C. ' 61-16.1-02 also uses the same language to define "assessment drain." N.D.C.C. ' 61-16.1-02(2) (1985). This was not noted in the earlier opinion. It is evident, however, that an "established drain" includes an "assessment drain."

60-40 between the water resource district and the county, respectively.

The object of N. D. C. C. " 24-08-02.1, 61-16.1-42, and 61-16.1-43 is to allocate the financial responsibility for installation of culverts upon various entities. While each relates to the same subject matter, N. D. C. C. ' 24-08-02.1 conflicts with N. D. C. C. " 61-16.1-42 and 61-16.1-43. N. D. C. C. ' 24-08-02.1 requires the county to absorb all the costs of furnishing and installing the culverts. N. D. C. C. " 61-16.1-42 and 61-16.1-43, on the other hand, require the water resource district to absorb 60% of the costs not absorbed by the state or federal governments.

Each provision of the North Dakota Century Code is to be construed "liberally, with a view to effecting its objects and to promoting justice." N. D. C. C. ' 1-02-01. If possible, apparently conflicting statutes relating to the same subject matter should be read in a manner which gives effect to both. Kosmatka v. Safety Responsibility Div., 196 N. W. 2d 402 (N. D. 1972); Strandinger v. Hatzenbuhler, 137 N. W. 2d 212 (N. D. 1965).

These statutes may all be given effect and their object achieved if interpreted as follows: N. D. C. C. ' 24-08-02.1 must be read to apply only to drains existing, factually or legally, prior to the time the road is constructed. Thus, the term "established drain" means a structure defined in N. D. C. C. ' 61-21-01(4) which is actually built or which has been "established" by completing the legal procedures necessary for a drain (i. e., having a final assessment area or a final drainage permit). N. D. C. C. " 61-16.1-42, 61-16.1-43, on the other hand, must be read to apply to those drains which are "established" after a road has been built. Read in this light, these statutes would further a legislative policy of requiring the party changing the status quo and benefiting from the change to pay the costs.

For example, if a drainage project is established, the plans are finalized and the costs are fixed. Costs of construction of a new road across the drain are absorbed by the county as a cost of the road because the new road changes the status quo and benefits all the public. However, when there is an existing road those wishing to construct a drain or modify an existing channel through that road are required to pay a portion of that cost because their activities change the status quo and the greater benefit accrues to them. Because the Legislature has recognized the public benefits of drainage, a portion of the costs is also shared by the road entity.

Thus, in those cases where a road has yet to be constructed and there is a natural watercourse which is or will be improved as a legally established drain, the county must bear the costs. In other cases where the road has

In this instance a "legally established drain" is one which may not legally be challenged because an assessment area has been set up, a permit has been granted, or it is an existing drain for which no permit was required when it was built.

already been built and a natural watercourse is to be improved by the water resource district to be used as a part of a drain, the cost is to be shared pursuant to N. D. C. C. ' 61-16.1-42, 61-16.1-43. In either case, unless the drain is a private drain, once the culvert is finished and installed, maintenance costs should be allocated according to N. D. C. C. " 61-16.1-42, 61-16.1-43.

As to natural watercourses which are not improved or will not be improved for drainage, the entity responsible for the road (i.e., the township is responsible for township roads, the county for county roads, etc.) must construct and maintain the road so as to allow for "the natural flow and drainage of surface waters." N. D. C. C. ' 24-03-06. Failure to do so may result in an obstruction of a watercourse which is prohibited. N. D. C. C. ' 61-01-07. Where such a natural watercourse exists, proper culverts must be installed to assure there is no obstruction and the water will flow as it would were no road present.

Finally, it is conceivable a county and township may have entered an agreement whereby the county agreed to furnish and install culverts on certain township roads. Likewise, a water resource district may have a similar agreement. To the extent such agreements are lawfully entered, they may be enforced against the party agreeing to furnish and install the culvert. Nonetheless, ultimate responsibility will fall on the governmental entity to which the statutes assign the duty of furnishing and installing the culverts.

- EFFECT -

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

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