

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-17

Date issued: November 12, 1991

Requested by: Charlie Whitman, Bismarck City Attorney

- QUESTION PRESENTED -

I.

Whether the provisions of North Dakota Century Code '24-07-03 that address platted areas are self-executing and result in the closure of section line roads within the area that has been platted and recorded as a townsite, addition, or subdivision pursuant to N. D. C. C. ch. 40-50. 1.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the provisions of N. D. C. C. '24-07-03 addressing platted areas are not self-executing and do not result in the closure of section line roads within an area that has been platted and recorded pursuant to N. D. C. C. ch. 40-50. 1.

- ANALYSIS -

I.

Section line roads were created in North Dakota by acceptance of the federal grant of such right-of-way by the territorial legislature.

The offer from the federal government was simple in its provisions, providing: "That the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Section 2477, Revised Statutes 1866. 43 USCA '932 (West 1986) [Repealed 1976.]

North Dakota accepted the federal grant by enacting Chapter 13, Laws of Dakota Territory, 1870-1871. The acceptance was later codified in the Revised Code, Dakota Territory, Chapter 29, Section 1 of the Political Code. The acceptance provided, in part:

" 1 Section Line Highways.] All section lines shall be, and are hereby declared, public highways, as far as practicable, provided, That nothing in this act shall be construed as to interfere with existing highways in settled portions of the territory.

" 2 Vacation and Charges.] The board of county commissioner of each county shall have power to vacate and change the highways within their respective counties, located by the legislative assembly, as hereinafter provided. "

The foregoing provisions were codified in N. D. C. C. ' 24-07-03. Prior to 1977 that section provided:

24-07-03. Section lines considered public roads--Closing same under certain conditions.--In all townships in this state outside the limits of incorporated cities, the congressional section lines shall be considered public roads, to be opened to the width of two rods on each side of such section lines, where the same have not been opened already upon the order of the board having jurisdiction, without any survey being had, except where it may be necessary on account of variations caused by natural obstacles, subject, however, to all the provisions of this chapter in relation to assessments of damages.

The county commissioners, if petitioned by the adjoining landowners, are authorized to close section line roads or portions thereof which are intersected by interstate highways causing such section line road to be a dead end, providing the closing of such dead end section line road does not deprive adjacent landowner access to his property. After such section line roads are closed, they may be leveled and farmed by the adjacent landowners or tenants; provided, however, that if drainage is interfered with due to the farming operations, alternate means of drainage must be provided for by the landowners or tenants farming such lands.

N. D. C. C. ' 24-07-03 (1975).

In 1977, N. D. C. C. ' 24-07-03 was amended to read, in part:

24-07-03. SECTION LINES CONSIDERED PUBLIC ROADS - CLOSING SAME UNDER CERTAIN CONDITIONS.) In all townships in this state, outside the limits of incorporated cities, and outside platted townsites, additions, or subdivisions recorded pursuant to chapter 40-50, the congressional section lines shall be considered public roads, to be opened to the width of two rods on each side of such section lines, where the same have not been opened already upon the order of the board having jurisdiction, without any survey being had, except where it may be necessary on account of variations caused by natural obstacles, subject, however, to all the provisions of this chapter in relation to assessments of damages.... "

1977 N. D. Sess. Laws ch. 235.

The 1977 amendment declared that section line roads outside a townsite, addition, or subdivision platted and recorded pursuant to N. D. C. C. ch. 40-50 are considered open. The amendment did not declare that the section line roads within the platted area are closed. That interpretation is consistent with the unambiguous language of the statute.

N. D. C. C. ' 24-07-03 was again amended in 1987. N. D. C. C. ' 24-07-03 presently provides:

24-07-03. Section lines considered public roads - Closing same under certain conditions.--In all townships in this state, outside the limits of incorporated cities, and outside platted townsites, additions, or subdivisions recorded pursuant to sections 40-50.1-01 through 40-50.1-17 or recorded prior to July 1, 1987, under former chapter 40-50, the congressional section lines are public roads, open to the width of thirty-three feet [10.06 meters] on each side of such section lines.

1987 N. D. Sess. Laws ch. 501, ' 18.

The 1987 amendment recognizes the statutory changes in the platting law and plats recorded under the old law, N. D. C. C. ch. 40-50. Again, the amendatory language did not indicate a legislative intent to provide for a self-executing or automatic closure of section line roads located within a newly platted and recorded area.

N. D. C. C. ' 40-50.1-01(7) requires that a plat of townsite, an addition to a townsite, or a subdivision of land must contain, inter alia, all public highways, streets, and alleys of record. The law existing at the time of the 1977 amendment to N. D. C. C. ' 24-07-03, required the plat of a townsite, addition, or subdivision to show all rivers, streams, creeks, lakes, ponds, swamps, all public highways, streets, and alleys that are laid out, opened or traveled. N. D. C. C. ' 40-50-01(7) (repealed 1987) (emphasis supplied).

In North Dakota, section line roads are regarded as public highways. State v. Silseth, 399 N.W.2d 868 (N.D. 1987). The terms, "highway" and "road" have been legislatively defined as being synonymous. N. D. C. C. ' 24-01-01.1(22). Therefore, any plat of land created and filed pursuant to N. D. C. C. ch. 40-50.1 must show the section line roads contained within such plat as public highways. This requirement constitutes an affirmation of the existence of the section line road. The fact that N. D. C. C. ' 24-07-03 contains a specific procedure for closing a section line road supports this affirmation. This affirmation is also supported by the fact that congressional section lines outside the limits of incorporated cities, unless closed by proceedings permitted by statute, are open for public travel. Small v. Burleigh County, 225 N.W.2d 295, 300 (N.D. 1974). See also City of Grand Forks v. Flom, 56 N.W.2d 324 (N.D. 1952).

It is therefore my opinion that the provisions of the first paragraph of N. D. C. C. ' 24-07-03 do not constitute a self-executing process whereby section line roads contained in a plat created and recorded pursuant to N. D. C. C. ch. 40-50.1 would automatically be closed.

- EFFECT -

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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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