

**LETTER OPINION
93-L-156**

May 5, 1993

Mr. Jerry Renner
Kidder County State's Attorney
Steele, ND 58482

Dear Mr. Renner:

Thank you for your March 18, 1993, letter requesting an opinion regarding a particular road in the county. Your questions involve the following factual situation:

In 1962, an approximate 35 acre tract of land in rural Kidder County on the North side of Lake Isabel was surveyed and platted into lots for resale by its owners. This acreage is not within any city limits. This survey plat contained a 60 foot wide road or street known as Lakeview Drive. The plat was filed with the Kidder County Register of Deeds. The plat contained the following statement:

"Board of County Commissions of Kidder County, North Dakota, has approved the subdivision land as shown on the annexed plat, has accepted the dedication of all streets shown thereon."

Dated July 30, 1962
Signed - Commission Chairman
Signed - County Auditor

You ask four questions regarding Lakeview Drive. A summary of the questions follows with my response to each. For purposes of my responses, I am assuming that Lakeview Drive is not a section line.

Question 1. Is the 60-foot-wide street known as Lakeview Drive considered a public right of way?

Mr. Jerry Renner
May 5, 1993
Page 2

The 1962 dedication of the streets by the owner was for public use as shown on the subdivision plat.

Counties are creatures of the constitution and may act only in the manner and on matters prescribed by the Legislature in statutes enacted in conformity with the constitution. County of Stutsman v. State Historical Soc'y of North Dakota, 371 N.W.2d 321 (N.D. 1985). Thus, initially, it must be determined whether the board of county commissioners in 1962 had statutory authority to approve the plat and accept the dedicated street thereon.

An examination of the law existing in 1962 does not reveal any statutory authority empowering the boards of county commissioners of this state to accept property dedicated for use as a street. It was not until 1981 that such authority was conferred upon the various boards of county commissioners. See N.D.C.C. ch. 11-33.2. Before 1981, counties apparently approved subdivision plats pursuant to N.D.C.C. ch. 11-33 on county zoning (see Berger v. County of Morton, 275 N.W.2d 315 (N.D. 1979)), but chapter 11-33 specifically excluded "any power relating to the establishment, repair, and maintenance of highways or roads." N.D.C.C. ? 11-33-02.

If Lakeview Drive had ever been designated by the county commissioners as part of the county road system pursuant to N.D.C.C. ? 24-05-16, Lakeview Drive would be considered a public right of way. However, it appears that Lakeview Drive has never been designated as part of Kidder County's road system. The North Dakota Department of Transportation's (hereafter Department's) records do not support such designation. (N.D.C.C. ? 24-05-16 requires counties to inform the Department of the roads designated as part of the county road system.)

Consequently, because Lakeview Drive has never been formally designated as part of Kidder County's road system, and because the board of county commissioners lacked statutory authority to approve Lakeview Drive

Mr. Jerry Renner
May 5, 1993
Page 3

as a public right of way in 1962, it would initially appear that Lakeview Drive is not a public right of way.

However, it is possible for Lakeview Drive to be deemed a public right of way pursuant to the common law doctrine of implied dedication or the statutory provision enabling public roads to be created by prescription. See Cole v. Minnesota Loan and Trust Co., 117 N.W. 354, (N.D. 1908); N.D.C.C. ? 24-07-01.

Under the doctrine of implied dedication, lands or easements may be dedicated to the public without a conveyance and may be accomplished by a "writing, by parol, by acts in pais, or . . . by acquiescing in the use of the easement by the public." Id. at 358. The intention to dedicate must be properly and clearly manifested and there must be an acceptance by or on behalf of the public. Id. In this case, the 1962 dedication by the landowners of the streets for public use constitutes a clear manifestation of their intention to dedicate Lakeview Drive to the public. It is not clear that acceptance by the county commissioners of the dedication was sufficient for purposes of the common law doctrine since the county commissioners in 1962 had no statutory authority to accept such a dedication. However, "[n]o express acceptance by the public . . . [is] necessary." Id. at 361. If actions of the public after the dedication confirm that the public accepted the dedication of Lakeview Drive for public use, then Lakeview Drive is a public right of way based on the common law doctrine of implied dedication. How the public acted in regard to Lakeview Drive after the dedication for public use in 1962 is a question of fact about which I am unable to provide an opinion.

Under N.D.C.C. ? 24-07-01, roads which have been open and used by the public during twenty successive years are deemed to be public roads or public rights of way by prescription. Whether Lakeview Drive has been open and used by the public during twenty successive years is a question of fact about which I am unable to provide an opinion.

In conclusion, an investigation of the facts is necessary to determine whether the common law doctrine of implied dedication or the statutory provision

Mr. Jerry Renner
May 5, 1993
Page 4

enabling public roads to be created by prescription requires Lakeview Drive to be considered a public right of way.

Question 2. If Lakeview Drive is a public right of way, then:

- a. Is Lakeview Drive considered a county road or a township road or neither?
- b. Does the county or township have an obligation as far as improving or maintaining Lakeview Drive?

a. Again, for Lakeview Drive to be part of the Kidder County road system, it would have to be selected and designated as a part of that system by the board of county commissioners. Also, the director of the Department is to be notified of the designated county road system for each of the counties. N.D.C.C. ? 24-05-16. The designated county road system for Kidder County on file with the Department does not include Lakeview Drive.

For a road to be part of a township road system, it would have to be designated by the board of township supervisors as such. N.D.C.C. ? 24-06-01; 1983 N.D. Op. Att'y Gen. 91 (copy enclosed). I am unaware of whether the township supervisors have designated Lakeview Drive as part of its township road system.

Thus, it appears that Lakeview Drive is not part of the county road system since the Department's records do not indicate such. However, an investigation of the facts is necessary to conclusively determine whether Lakeview Drive was designated by either the county or the township as part of the county or township road systems.

b. "[A] county has no duty to construct roads on land not located on section lines or not part of the county road system" Umpleby v. North Dakota State Game and Fish Dep't, 347 N.W.2d 156, 160 (N.D. 1984).

It would appear to follow that a township has no duty to construct roads on land not located on section lines or not part of the township road system.

There is no duty upon a county or township to maintain

Mr. Jerry Renner
May 5, 1993
Page 5

an improved road which is not part of its designated road system. DeLair v. County of LaMoure, 326 N.W.2d 55 (N.D. 1982). In DeLair, the court held there was no duty to maintain an improved road on a section line even though section lines had previously been held to be public roads without any action by the county or township. See Small v. Burleigh County, 225 N.W.2d 295 (N.D. 1975).

Based on the foregoing North Dakota Supreme Court cases, it is my opinion that a county has no duty to improve or maintain a road on a public right of way unless it has been designated by the county as part of the county road system. Similarly, it is my further opinion that a township has no duty to improve or maintain a road on a public right of way unless it has been designated by the township as part of the township road system.

Question 3. Can Lakeview Drive be blocked off by private parties at a point just west of its intersection with a section line?

If Lakeview Drive is a public right of way, no person may obstruct it or cause it to be obstructed in a manner which prevents the use thereof by the public. N.D.C.C. ? 24-12-02. If Lakeview Drive is not a public right of way, it may be blocked off. However, the obstruction may not be situated within the section line right of way. See N.D.C.C. ?? 24-07-03, 24-06-28, and 24-12-02.

Question 4. Do the cabin owners whose property adjoins Lakeview Drive need county or township permission to make improvements to Lakeview Drive?

In Zueger v. Boehm, 164 N.W.2d 901 (N.D. 1969), the court addressed a similar question regarding the construction and improvement of a section line road in an unorganized township and held that authorization from the county was required. Although the road in Zueger was on a section line, the language of the case appears to be broad enough to apply to any public road. Therefore, in my opinion, if Lakeview Drive is a public right of way, regardless of whether it is part of any county or township road system, the individuals seeking to improve Lakeview Drive would

Mr. Jerry Renner
May 5, 1993
Page 6

need permission from the county or township or both. All improvements to a public right of way must be made in compliance with the relevant North Dakota law regarding road improvements and under the direction of the county or township. Id.

In my opinion, if Lakeview Drive is not a public right of way, the cabin owners do not need county or township permission to make improvements.

I am sorry I am unable to respond to the factual issues raised. However, I hope my discussion and opinions on the legal issues will be helpful in resolving the factual issues.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

las/krb
Enclosure

Mr. Jerry Renner
May 5, 1993
Page 7

Mr. Jerry Renner
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Steele, ND 58482