

OPINION
49-191

October 31, 1949 (OPINION)

TOWNSHIPS

RE: Easements

Your letter of October 27, 1949, has been referred to the undersigned for answer.

In your letter you state that a township in your county has given to a telephone company a right-of-way to place telephone poles and wires along a township highway; that the highway is located on a section line; and that the poles will be placed within the 33 feet on each side of the section line which is allowed, by statute, for highway purposes.

You then ask, "May the township give such an easement and may such an easement for right of way give the telephone company the privilege of proceeding forthwith and without payment or compensation to the abutting land owners?"

There seems to be no doubt that it is competent for the township to give an easement for a right-of-way to place poles alongside a highway over which the township has jurisdiction. But such an easement cannot deprive the abutting owner of rights which have accrued to him as an abutting owner.

It was settled in *Donovan v. AZlert*, 11 N.D., 289, that the owner of the land abutting on a village street is the owner of the fee to the center thereof subject only to the easement of the public to use the street for public travel. The court then went on to hold that the placing of telephone poles along the side of the street constituted an additional burden or servitude upon the street inconsistent with its dedication for purposes of travel, and that the owner was entitled to an injunction against the telephone company to prevent the erection of its poles until adequate compensation was paid to the abutting owner.

This principle was affirmed and extended to include rural highways (under facts almost identical to facts existing in your county) in *Cosguff et al v. Tri-State Telephone Co.*, 15 N.D. 210. See also *Otter Tail Power Co. v. Von Bank*, 72 N.D. 497.

We are, therefore, of the opinion that the telephone company may not proceed with the erection of its poles merely because it has procured an easement from the township, but that it must secure an easement from the abutting owner or else condemn the land in the same manner as it acquires other land for its telephone poles.

WALLACE E. WARNER

Attorney General