

OPINION
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November 30, 1956 (OPINION)

CITIES

RE: Culverts - Expenditure

This is in reply to your letter of November 26, 1956 in regard to the authority of your city commission to replace culverts within the boundaries of your city.

You inform us that the crossing where the new culvert was installed is part of the platted part of the city, and serves as a natural drain for the pertinent section of the city and outlying parts thereof. Apparently the culvert installed as a replacement was larger than the old culvert due to heavy industrial traffic, and for the purpose of protecting area which was formerly highway No. 2.

You further inform us that the cost of the culvert is \$2,635.00 and that the city commission has approved the purchase and its location, but that the bill for same has not been approved. The commission's question is as to whether it is out of the boundaries of the law in approving the cost of the culvert under the described circumstances.

Subsection 23 of section 40-0501 of the N.D.R.C. of 1943 provides:

"40-0501. POWERS OF ALL MUNICIPALITIES. The governing body of a municipality shall have the power: * * * *

23. CULVERTS, DRAINS, CESSPOOLS. To construct and keep in repair culverts, drains, sewers, catch basins, manholes, cesspools, vaults, cisterns, areas, and pumps within the corporate limits; * * * *."

We do not find further statutory specifications on limiting the authority of your city commission in determining the necessity of replacing culverts, or its discretion in determining the size of culvert necessary for replacement.

We find the following general statement in regard to the exercise of discretion of the governing board of a municipality in McQuillin, Municipal Corporations, Second Edition, Revised - Section 1980, Vol. 5, page 184 et seq:

"It is fundamental that discretionary powers vested in public officers are not subject to judicial control. The general rule, therefore, is well settled that the exercise of discretionary powers by the proper municipal authorities within the prescribed legal limits, relating to public improvements of the several kinds, concerning which reasonable differences of opinion may exist, in good faith, without fraud, oppression or arbitrary action, will not be reviewed by the courts. Thus, speaking generally, under the prevailing practice the necessity, character and extent of the improvement are

committed in the discretion of the proper municipal authorities, and their judgment is conclusive, unless the court is clearly satisfied that their action has been oppressive and without reasonable grounds. Steps to provide for and the manner of obtaining necessary or desirable public improvements give frequent occasion for the application of this rule involving official discretion as explained in an earlier chapter.

"Unless legal limitations exist, power to open, improve, pave and maintain streets, establish sewers and drains, and secure public improvements of all kinds, is discretionary with the proper municipal authorities, and if the governing law has been observed substantially, their action therein is not subject to judicial review, except in cases expressly provided by law. In other words, where a power touching local improvements is expressly granted to municipal authorities, as a rule, they are, in the reasonable exercise of it, beyond the control of the courts.

"As the necessity or utility of an improvement is a matter within municipal discretion, and this discretion is generally vested in the legislative body whose decision is usually final, ordinarily, courts will not interfere on the ground that a given improvement is unnecessary, and that the ordinance providing for it is therefore oppressive and unreasonable. It is well settled, and it has been affirmed repeatedly by numerous judicial decisions of the several jurisdictions, that in the absence of constitutional or charter restrictions, municipal discretion includes the nature and extent of the improvement, the location of the improvement, the plans and manner of construction the nature and kind of material to be used, the cost thereof, and the opening and vacation of streets, alleys and public ways. The expediency of vacating streets and alleys, as already stated, rests primarily in the discretion of the municipality, and its determination relative thereto is, in the absence of fraud or collusion, conclusive, and not subject to review by the courts.

"Final municipal discretion, evidenced by formal order or resolution or a legislative act by ordinance, exercised in good faith, in the public interest, with due recognition of private property and rights therein, is usually regarded as conclusive relating to the necessity for the particular improvement, but, as pointed out in various parts of this work, courts will protect rights of property guaranteed by organic mandate when the conditions justify such step, and investigate the reasonableness of municipal action in the premises."

We further find the following general statement in regard to municipal liability for damages due to insufficient culverts, in McQuillin, Municipal Corporations, Second Edition, Revised - Section 2877, Vol. 6, page 1249 et seq:

"Where a municipal corporation constructs a culvert for the passage of the waters of a watercourse or natural drain, it will be liable for damage due to a negligent construction of the culvert where such

negligent construction is the proximate cause of flooding adjacent lands, or its inadequacy (according to the rule in many states) to carry away water ordinarily coming into it, or for failure of the municipality to remove obstructions therein; and a culvert obstructing a watercourse, to the injury of riparian owners, is a nuisance, and damages are recoverable.

"The culvert must be sufficient to accommodate, not only the natural and normal flow of the stream, for example where the culvert is constructed over a natural watercourse, but such abnormal and excessive flow as may reasonably be anticipated in time of high water and floods. However, 'there is no duty to provide for floods so unusual and extraordinary as to bring them within the category of an "act of God."' The duty of a municipality with respect to culverts to take care of surface water coming through a natural drain does not end with the original installation, but is a continuing one, to be exercised with due regard to changed conditions affecting the flow of water to be accommodated by the culverts. * * * *"

In conclusion we might state your letter indicates no facts that might justify a court in determining that the city board put in too large, or too expensive a culvert, under the circumstances.

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