

LETTER OPINION
97-L-132

August 8, 1997

Mr. Kent Reiersen
Williston City Attorney
PO Box 1366
Williston, ND 58802-1366

Dear Mr. Reiersen:

Thank you for your letter asking whether N.D.C.C. § 40-39-05 concerning the vacation of streets, alleys, or public grounds applies when an area is being replatted under N.D.C.C. § 40-50.1-16 and the replatting will result in the vacation of a street or alley.

N.D.C.C. ch. 40-50.1 governs the platting of town sites. Before lots have been sold, the proprietor of a platted site may vacate the plat by recorded instrument, which destroys the force and effect of the recording of the plat and divests all public rights in the streets, alleys, easements, and public grounds laid out in the plat. N.D.C.C. § 40-50.1-16(1). However, after lots have been sold there are additional public rights:

If lots have been sold, a plat or any part of a plat may be vacated by all owners of the lots in the plat joining in the signing of the instrument declaring the vacation. Vacation of streets and public rights is not effective without endorsement by the governing body that has the power to approve the plat. The endorsement must indicate the public rights to be vacated.

N.D.C.C. § 40-50.1-16(2). Subsection 2 applies to the two situations described in your letter because lots have been sold in both existing plats.

N.D.C.C. ch. 40-39 governs the opening and vacating of streets, alleys, and public places. Before a street, alley, public ground or part thereof within a city may be vacated or discontinued, there must be a petition signed by all owners of adjoining property. N.D.C.C. § 40-39-05. If the governing body wishes to consider the petition,

Mr. Kent Reiersen
August 8, 1997
Page 2

the governing body must first find that the petition is legally sufficient. If the governing body so finds, the petition must then be filed with the city auditor who is required to provide public notice that there will be a hearing on the petition. N.D.C.C. § 40-39-06. There must be a public hearing on the petition, and the petition may be granted if the governing body passes a resolution to that effect by two-thirds vote of its members. N.D.C.C. § 40-39-07.

Your question involves the relationship, if any, between N.D.C.C. chs. 40-39 and 40-50.1. One of the requirements in N.D.C.C. ch. 40-39 for vacation of a street, alley, or public ground is for a petition setting forth the facts and reasons for the vacation, accompanied "by a plat of such public grounds, streets, or alleys proposed to be vacated." N.D.C.C. § 40-39-05. The use of the word plat may imply a platted subdivision covered by N.D.C.C. ch. 40-50.1. However, the Supreme Court has determined that the "plat . . . proposed to be vacated" refers only to that part of the street, alley, or public ground which is proposed to be vacated and not to the entire street, alley, or public ground. State Bank of Burleigh County Trust Company v. City of Bismarck, 316 N.W.2d 85, 91 (N.D. 1982). The definition of plat for purposes of N.D.C.C. § 40-39-05 likewise implies that this section is not referring to an entire platted townsite or addition as that term is used in N.D.C.C. ch. 40-50.1.

Also, the current law should be applied to the situation you have described despite the possibility that the original platting and laying out of the street may have occurred under different statutes long ago. The proceedings you have described are new proceedings to vacate a plat including part of a public way. Landowners and affected members of the public generally do not have a vested right in the continuation of statutes such as platting statutes, but instead have a mere expectancy in continuation of existing laws. See City of Fargo, Cass Cty v. Harwood Tp., 256 N.W.2d 694, 700 (N.D. 1977), Fairmount Tp. Bd. of Sup'r v. Beardmore, 431 N.W.2d 292, 295 (N.D. 1988). For example, the validity of an attempted vacation of an alley under the predecessor to N.D.C.C. ch. 40-39 was interpreted under the law in effect at the time of the attempted vacation, and not under the prior law dating from the time that the city acquired title to the alley. Smith v. Anderson, 144 N.W.2d 530, 531-533 (N.D. 1966).

Former law governing platting provided that the vacation of a plat did not authorize the closing or obstructing of any public highways laid out according to law, but that if part of the plat is vacated, the proprietors of the lots vacated were allowed to enclose the

Mr. Kent Reiersen
August 8, 1997
Page 3

streets, alleys, and public grounds adjoining their lots. N.D.C.C. §§ 40-50-24 and 40-50-25 (Allen Smith Co. 1960). A similar provision is not found in present N.D.C.C. ch. 40-50.1. North Dakota case law has not resolved the question of whether the endorsement by the governing body required for the vacation of streets and public rights when a plat or part of a plat is vacated under N.D.C.C. § 40-50.1-16(2) requires the governing body to utilize the procedure outlined in N.D.C.C. ch. 40-39 for the vacation of streets, alleys, or public grounds. However, cases decided under the former statutes indicate that these chapters may be applied separately. See generally, Hille v. Mill, 226 N.W. 635 (N.D. 1929); Welsh v. Monson, 79 N.W.2d 155 (N.D. 1956); State Bank v. City of Bismarck, 316 N.W.2d 85 (N.D. 1982).

The protection of the public's right to travel has been a significant focus of the courts. See Smith v. Anderson, 144 N.W.2d 530 (N.D. 1966) (city attorney criticized for failing to "protect" city title where the city intended to vacate an alley but the lot number was incorrect and the vacation was overturned). In City of Grand Forks v. Flom, 56 N.W.2d 324 (N.D. 1952), it was held that the rights of the public in a highway can only be divested by full and substantial compliance with some method authorized by law. The appropriate governing officials must have knowledge or give consent before a street or roadway be vacated. City of La Moure v. Lasell, 145 N.W. 577, 582 (N.D. 1914).

The procedure for vacation of streets and public rights set out in N.D.C.C. § 40-50.1-16(2) protect interested landowners' rights and require specific approval from the appropriate governing body. All of the owners of lots in the plat must join the petition and the specific public rights to be vacated must be stated and endorsed by the governing body. The approval required from the governing body protects the general public who do not own lots in the plat but who may have an interest in use of streets or other public rights such as parks. The procedures for vacating streets, alleys, and public grounds in N.D.C.C. ch. 40-39 provide different safeguards, such as requiring notice, a public hearing and a super-majority vote of the governing body before vacation. However, that chapter only requires the signatures of lot owners adjacent to the part to be vacated, not of the owners of all lots in the platted subdivision or addition, each of whom may have an interest in protecting the entire plat. N.D.C.C. ch. 40-39 and 40-50.1 are intended to accomplish different tasks, and each provide their own method to protect public rights in streets, alleys, and public grounds.

Mr. Kent Reiersen
August 8, 1997
Page 4

Therefore, it is my opinion that a governing body may vacate streets and public rights through the required procedures for vacating a plat under N.D.C.C. ch. 40-50.1 without additionally following the procedures for vacating streets, alleys, or public grounds under N.D.C.C. ch. 40-39.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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