

LETTER OPINION
97-L-66

June 18, 1997

Ms. Jeanne McLean Behrens
Bottineau County State's Attorney
314 East 5th Street
Bottineau, ND 58318

Dear Ms. Behrens:

Thank you for your letter asking several questions regarding fencing along a section line.

In North Dakota, the congressional section lines are public roads and are open for travel outside the limits of incorporated cities and outside properly recorded platted townsites, additions, or subdivisions. N.D.C.C. § 24-07-03. A section line easement outside of city limits or platted areas may be closed to travel only under limited circumstances as set out in N.D.C.C. § 24-07-03. The board of county commissioners may be petitioned by a person having an interest in land adjoining a section line to close the section line. The commission must hold a public hearing and make a finding of public benefit and also a finding that either the portion of the section line road desired to be closed has not been used for ten years, is not traveled due to natural obstacles or difficulty of terrain, is not required due to readily accessible alternate routes of travel, or is intersected by interstate highways causing the section line to become a dead end, provided that the closing of such a dead end does not deprive adjacent land owners access to their property. N.D.C.C. § 24-07-03.

Your first question concerns N.D.C.C. § 24-06-28. This section provides that "[n]o person may place or cause to be placed any permanent obstruction, stones, trees, or rubbish within thirty-three feet [10.06 meters] of any section line, unless written permission is first secured" You ask whether a fence is considered a permanent obstruction as used in this section. The North Dakota Supreme Court has held that fencing within a section line easement is an obstruction if done in violation of certain provisions which allow a board of county commissioners or a board of township supervisors to grant written permission for such fencing within limited parameters. Small v. Burleigh County, 225 N.W.2d 295 (N.D. 1974) (Small I); Small v. Burleigh County, 239 N.W.2d 823 (N.D. 1976) (Small II); Saetz v. Heiser, 240 N.W.2d 67 (N.D. 1976). Therefore it is my opinion that

fencing within the section line easement is a permanent obstruction of that easement which is not permitted unless written permission is first secured from the appropriate board pursuant to law.

Your second and third questions concern the operation of N.D.C.C. §§ 24-06-29 and 24-06-30. N.D.C.C. § 24-06-29 concerns the removal of stones, trees, or rubbish from within a section line easement when the easement is opened and N.D.C.C. § 24-06-30 concerns the removal of fences when a section line easement is opened. Both sections permit the cost of removal to be taxed against the land if the landowner does not remove the obstructions after being notified to do so. These statutes each address the same general topic of removing obstructions from section line easements when a public highway is opened along the section line. N.D.C.C. § 24-06-29 is not applicable to fencing because it does not refer to fencing, while N.D.C.C. § 24-06-30 specifically states that it concerns fencing. See N.D.C.C. § 1-02-07.

N.D.C.C. § 24-06-30 provides:

When a public highway is opened along any section line, the board of county commissioners or the board of township supervisors, as the case may be, shall notify the owner of adjacent property to remove any fences not constructed pursuant to subsection 2 of section 24-06-28 within thirty-three feet [10.06 meters] of the section line in the manner provided for notice to remove stones, trees, or rubbish. If the owner of adjacent property fails to remove the fences within thirty days after the notice is given, the board of county commissioners or the board of township supervisors, as the case may be, shall remove the fences. The cost of removal must be entered the same as taxes against the adjacent property and paid in the same manner as taxes.

N.D.C.C. § 24-06-30 provides for the removal of fencing from within section line easements when the fencing was erected according to law or proper authorization. Fences along or across section lines which have been closed pursuant to N.D.C.C. § 24-07-03 or which have not been opened because construction of a road is impractical due to the topography of the land along the section line are not prohibited by N.D.C.C. § 24-06-28; however, the fence is subject to removal under N.D.C.C. § 24-06-30. N.D.C.C. § 24-06-28(2)(a). Further, if a section line has not been closed pursuant to section 24-07-03, a fence may be placed across the section line pursuant to N.D.C.C. ch.

24-10. N.D.C.C. § 24-06-28(2)(b). Any fencing across section line easements under N.D.C.C. ch. 24-10 may be ordered removed if the required cattle guards are not kept in repair or if the appropriate board determines that it is necessary to remove the cattle guard and gateway for the purpose of improving the highway or section line. N.D.C.C. § 24-10-04. Fencing may also be placed in the section line easement by a grant of permission from the board of county commissioners or the board of township supervisors, but if it obstructs the public's right to travel, it must be removed. See Burleigh County Water Resource District v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994). See also Letter from Attorney General Heidi Heitkamp to Cynthia Feland (December 19, 1996) (county or township board may grant permission for fencing along section line within easement if fencing does not effectively deprive public of ability to travel within easement, but fencing may have to be removed at landowner's expense).

The provisions of N.D.C.C. § 24-06-30 apply only if a condition precedent is satisfied: "[w]hen a public highway is opened along any section line" N.D.C.C. § 24-06-30 (emphasis supplied). See 1981 N.D. Op. Att'y Gen. 207, 210; Letter from Assistant Attorney General Gerald W. VandeWalle to Charles Crane (May 16, 1968) (N.D.C.C. §§ 24-06-28, 24-06-29, and 24-02-30 apply when public body acts to build a public road).

Under N.D.C.C. § 24-07-03, section lines outside of incorporated cities or outside of properly recorded platted townsites, additions, or subdivisions are public roads open for travel. See State v. Silseth, 399 N.W.2d 868, 869 (N.D. 1987) (term "public road" in N.D.C.C. § 24-07-03 is the same as "public highway" under N.D.C.C. § 24-12-02(2)). Under normal circumstances, the only time that a public highway will be opened along a section line is when the section line is reopened after having been closed by law. See 1994 N.D. Op. Att'y Gen. L-134 (April 29 letter to Mahoney) (county may reopen section line road previously closed under N.D.C.C. § 24-07-03). N.D.C.C. § 24-07-03 also implies that if a section line easement in an incorporated or platted area subsequently is no longer within an incorporated city or platted area by vacation of the plat, deannexation, or otherwise, then the formerly closed section line easement would be opened. See 1996 N.D. Op. Att'y Gen. 89; Letter from Attorney General Heidi Heitkamp to Ronald Reichert (January 16, 1997) (section line easement remains when incorporated into city limits and may subsequently be reopened under law). Therefore, the references in N.D.C.C. §§ 24-06-29 and 24-06-30 to opening a section

Ms. Jeanne McLean Behrens
June 18, 1997
Page 4

line apply if a section line has been closed under or by operation of N.D.C.C. § 24-07-03 and is subsequently reopened.

Several opinions of the North Dakota Supreme Court and of this office have implied that N.D.C.C. §§ 24-06-29 and 24-06-30 apply in any instance when an obstruction is sought to be removed from a section line easement and have not limited the application of these sections to instances when a public highway is being opened. See, e.g., Burleigh County Water Resource Dist., Ames v. Rose Twp. Board of Twp. Supervisors, 502 N.W.2d 845 (N.D. 1993), Small I, 1995 N.D. Op. Att'y Gen. L-101 (April 24 letter to O'Connell). Those opinions addressed the question whether an obstruction was in violation of the law. However, they did not discuss what governmental authority required the landowner to remove the fence or obstruction if it was found to be in violation of law, nor did the opinions address the specific statutory language of N.D.C.C. §§ 24-06-29 and 24-06-30 stating that those statutes apply when a public highway is opened along a section line.

These prior opinions are not strong authority for the proposition that N.D.C.C. §§ 24-06-29 and 24-06-30 apply when a public highway has always been open, as opposed to being opened, along a section line. Opinions must be read in light of the facts presented and the problem that the court was then considering. Dickinson Educ. Ass'n v. School Dist., 499 N.W.2d 120, 125 (N.D. 1993). Comments in opinions which are not essential to the determination and not involved in the action are dictum and are not controlling in subsequent cases. Bakke v. St. Thomas Public Sch. Dist. No. 43, 359 N.W.2d 117, 120 (N.D. 1984).

"When interpreting a statute, however, we are bound to give meaning and effect to every word, phrase, and sentence." First State Bank v. Moen Enterprises, 529 N.W.2d 887, 891 (N.D., 1995). "All sections of a statute must be construed to have meaning because the law neither does nor requires idle acts." County of Stutsman v. State Historical Soc., 371 N.W.2d 321, 325 (N.D. 1985). "Statutes must be read to give effect to all of their provisions, so that no part of the statute is inoperative or superfluous." Trinity Medical Center, Inc. v. Holum, 544 N.W.2d 148, 157 (N.D. 1996). Therefore, in order to provide meaning to each word of these statutes, it is my opinion that N.D.C.C. §§ 25-06-29 and 24-06-30 only apply when a public highway is being opened along that portion of the section line easement.

There is a different legal remedy for removing fencing from a section line easement which was not fenced according to law. N.D.C.C.

Ms. Jeanne McLean Behrens
June 18, 1997
Page 5

§ 24-12-02 prohibits the obstruction of public highways or rights-of-way. N.D.C.C. § 24-12-02 has been held to apply to section line easements even where the section line has not been specifically opened or improved. Silseth, 399 N.W.2d at 869-870. A violation of N.D.C.C. § 24-12-02 is a class B misdemeanor. N.D.C.C. § 24-12-05. Fencing placed within the section line easement without specific permission from the appropriate board or placed in violation of statutory authorization may be found to violate N.D.C.C. § 24-12-02. See Silseth. A person found guilty of an offense may be ordered to pay restitution for damages resulting from the offense or to restore damaged property. N.D.C.C. § 12.1-32-02(1)(e) and (f). Damages, in such a case, would include the cost of removing the fence and restoring the section line to the condition it would have been in if it had not been fenced. Letter from Attorney General Heidi Heitkamp to Jeffrey J. Peterson (November 22, 1996).

Another option to abate an illegal fence obstructing an open section line easement is to bring an action for an injunction requiring the fence to be removed. 1960-1962 N.D. Op. Att'y Gen. 130. An injunction may be obtained to abate a nuisance. N.D.C.C. § 32-05-02. A nuisance is an unlawful act or omission which unlawfully interferes with, obstructs, or tends to obstruct a street or highway. N.D.C.C. § 42-01-01(3). A public nuisance may be abated by any public body or officer authorized by law. N.D.C.C. § 42-01-09. State statutes also authorize certain governmental authorities to remove obstructions in a public highway. See, e.g., N.D.C.C. §§ 24-05-17 (counties), 24-06-01 (townships).

The United States offered the section line easements to the Dakota Territory and the North Dakota Legislature, and this offer was accepted. Ames, 502 N.W.2d at 847. The North Dakota Supreme Court has held "that the Legislature's belated tolerance of fencing on section lines is not effective to deprive the public of rights dating back to 1871 and 1866, and that the State does not own section line right-of-way but merely holds it as trustee for the public." Saetz, 240 N.W.2d at 72. Therefore, it is my further opinion that fencing within a section line easement is only temporary, albeit for an indeterminate length of time, and may be removed under appropriate statutory procedures depending upon the nature of the authorization, or the fact that there was no authorization, to build the fence. Prior opinions of this office which conflict with this opinion are overruled to the extent of the conflict.

Sincerely,

Ms. Jeanne McLean Behrens
June 18, 1997
Page 6

Heidi Heitkamp
ATTORNEY GENERAL

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