

**N.D.A.G. Letter to Manbeck (Nov. 13, 1990)**

November 13, 1990

Mr. Douglas G. Manbeck  
Nelson County State's Attorney  
P.O. Box 428  
Lakota, ND 58344

Dear Mr. Manbeck:

Thank you for your October 19, 1990, letter, in which you inquired: 1) whether N.D.C.C. § 61-21-43.1 applies to assessment drains only or to all drains; 2) whether allowing a drain to silt in to the point of totally obstructing the drain over a period of years constitutes a negligent act or omission of a landowner or the landowner's tenant; and 3) whether any person or entity, other than the landowner, has standing to question the validity of a water resource district board's order to the landowner to clean out a privately constructed silted in drain to its originally constructed depth.

N.D.C.C. § 61-21-43.1 provides:

61-21-43.1 Removal of obstructions to drain - Notice and hearing - Appeal - Injunction. If the board determines that an obstruction to a drain has been caused by the negligent act or omission of a landowner or his tenant, the board shall notify the landowner by registered or certified mail at his post office of record. . . . In the event of an emergency the board may, immediately upon learning of the existence of the obstruction, apply to a court of proper jurisdiction for an injunction prohibiting such a landowner or his tenant to maintain such an obstruction. . . . Any landowner aggrieved by action of the board under the provisions of this section may appeal the decision of the board to the district court of the county in which the land is located in accordance with the procedure provided for in section 28-34-01. A hearing as provided for in this section is not a prerequisite to such an appeal.

N.D.C.C. § 61-21-01(4) defines "drain" for purposes of N.D.C.C. ch. 61-21 as "any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains of any nature or description constructed for such purpose, including dikes and appurtenant works. . . ."

Based on this definition, the use of the word "drain" in N.D.C.C. § 61-21-43.1 includes all drains, including privately constructed drains and assessment drains.

N.D.C.C. § 54-12-01(4) requires the Attorney General to consult with and advise state's attorneys in matters relating to the duties of their office. This provision has uniformly been

interpreted by this office to restrict the questions which may be answered by an opinion to questions of law. Generally, questions of negligence and proximate cause are fact questions, unless the evidence is such that reasonable minds can draw only one conclusion from the evidence. Carlson Homes, Inc. v Messmer, 307 N.W.2d 564, 566 (N.D. 1981). In North Dakota, actionable negligence is the existence of a duty or obligation on the part of one to protect another from injury, the failure to discharge that duty, and the resulting injury to the other proximately caused by the breach of duty. Id. Negligence is relative in its application and depends on the situation of the party and the degree of care that the circumstances reasonably impose. Moum v. Maercklein, 201 N.W.2d 399, 402 (N.D. 1972). Therefore, whether a landowner has been negligent by allowing a drain to silt in over a period of years is a question of fact to be determined by the board of managers of the water resource district.

N.D.C.C. § 61-21-42 places all drains constructed in the state, except township drains, under the charge of the board of managers of the water resource district and requires the board to keep the drains open and in good repair. If the board determines that the landowner was negligent by allowing the drain to silt in, the board is required to notify the landowner specifying the nature and extent of the obstruction and state that if the obstruction is not removed within thirty days, the board can remove the obstruction and assess the cost of removing the obstruction or a portion of the cost against the property of the landowner. N.D.C.C. § 61-21-43.1.

With regard to standing, N.D.C.C. § 61-21-43.1 provides that any landowner aggrieved by an action of the board under N.D.C.C. § 61-21-43.1 may appeal the decision of the board to the district court of the county in which the land is located, in accordance with the procedure provided for in N.D.C.C. § 28-34-01. Although N.D.C.C. ch. 61-21 does not define "aggrieved landowner," the North Dakota Supreme Court, in Washburn Pub. School Dist. v. State Bd. of Pub. School Educ., 338 N.W.2d 664 (N.D. 1983), stated that an aggrieved party is one who is factually aggrieved. A person is factually aggrieved if a decision has enlarged or diminished that party's interest. Id. Mere dissatisfaction or displeasure of an individual with a decision of a board is not enough to give an individual or entity a right to appeal from a decision. Id. at 667.

In addition to this statute, a person may also be able to acquire standing and attack the drainage collaterally as a violation of another law such as the Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1251 et seq.

I hope this discussion has been helpful to you.

Sincerely,

Nicholas J. Spaeth

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