

**OPINION
69-528**

September 9, 1969 (OPINION)

Mr. Paul G. Woutat

Attorney, Grand Forks County

Board of Drainage Commissioners

RE: Waters - Drainage Districts - Acquisition of Easements

by Eminent Domain

This is in reply to your letter of September 2, 1969, in which you ask whether or not a county board of drainage commissioners may lawfully proceed to acquire right-of-way necessary for the construction of a legal drain incident to section 14 of the constitution of the state of North Dakota. Section 14 of the North Dakota Constitution provides:

Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner. No right-of-way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, provided however, that when the state or any of its dependents, agencies or political subdivisions seeks to acquire right-of-way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right-of-way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages."

Section 32-15-02(3) of the North Dakota Century Code provides:

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

* * *

3. Public buildings and grounds for the use of any county, city, park district, village, or school districts; canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, city, or village, or for draining any county, city, or village; raising the banks of streams, removing obstructions therefrom and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other uses for the benefit of any county, city, park district, or village, or the inhabitants thereof, which may be

authorized by the legislative assembly, but the mode of apportioning and collecting the costs of such improvement shall be such as may be provided in the statutes by which the same may be authorized;

* * *."

Section 61-21-19 of the North Dakota Century Code, as amended, provides:

RIGHT-OF-WAY - HOW ACQUIRED - ASSESSMENT OF DAMAGES - ISSUANCE OF WARRANTS. The right-of-way for the construction, operation and maintenance of any proposed drain, if not conveyed to the county by the owner, may be acquired by eminent domain in such manner as may be prescribed by law. Where lands assessed for drainage benefits are not contiguous to such drain, assess right-of-way thereto over the land of others may be acquired in the same manner. Such right-of-way, when acquired, shall be the property of the county. The board may issue warrants in a sum sufficient to pay the damages assessed for such right-of-way. Such warrants shall be drawn upon the proper county treasurer, and shall be payable out of any drain funds in the hands of the treasurer which have been collected for the construction of the drain for which such right-of-way is sought to be obtained. The board shall negotiate the warrants at not less than the par value thereof and shall pay into court for the benefit of the owners of the right-of-way the amount to which each is entitled according to the assessment of damages, paying the surplus, if any, to the county treasurer, who shall place the same to the credit of the proper drain fund."

It is clear from these constitutional and statutory provisions that lands may be acquired by eminent domain for the construction of a legal drain by a county board of drainage commissioners. Your question is concerned with whether or not the county drain board may take immediate possession of the property as provided in section 14 of the North Dakota Constitution, or whether they must first proceed with court action and an assessment of damages, as provided in chapter 32-15 of the North Dakota Century Code, before taking possession. In this regard we would note the provision permitting the state or any of its departments, agencies or political subdivisions to take possession of the right-of-way upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right-of-way is located was inserted in section 14 of the Constitution of North Dakota in 1956 by constitutional amendment. See chapter 397, 1957 Session Laws of North Dakota. If there is any conflict between a statute and a constitutional provision the constitutional provision prevails. It appears the county drainage board is, in fact, acting in behalf of the county. The decision as to whether such a board is to be created rests with the county commissioners. See section 61-21-03 of the North Dakota Century Code. The property acquired by the county drainage board is the property of the county. See section 61-21-19 of the North Dakota Century Code. In fact, when the board of drainage commissioners acquire property by eminent domain it is acting for and in behalf of the county. There would appear to be no question but that a county is a political subdivision of the state of

North Dakota as contemplated in section 14 of the North Dakota Constitution. Counties are created by the legislature and their boundaries are defined thereby. See chapter 11-01 of the North Dakota Century Code. See also sections 166 and 167 of the North Dakota Constitution.

It is therefore our opinion that a county board of drainage commissioners may lawfully proceed to acquire right-of-way necessary for the construction of a legal drain incident to section 14 of the North Dakota Constitution and may take possession of such property by depositing the money as provided therein.

HELGI JOHANNESON

Attorney General