

LETTER OPINION
2000-L-36

March 10, 2000

Mr. Charlie Whitman
Bismarck City Attorney
PO Box 5503
Bismarck, ND 58506-5503

Dear Mr. Whitman:

Thank you for your letter concerning street improvements in an area of Bismarck included in the National Register of Historic Places and in the State Historic Sites Registry.

You advise that the city is again contemplating, as it has for many years, improvements to the intersection of Avenue C and Washington Street. You advise that the city has identified several alternate projects to rebuild the intersection of Washington Street and Avenue C, the result of which "would vary from a relatively small loss of the city's boulevard trees to a more widespread removal." You also advise that Washington Street is on a section line and the city holds a varying right-of-way between 65 and 80 feet. You specifically ask whether the fact that the city has the right-of-way on Washington Street necessary for road improvements would change the application of N.D.C.C. § 55-10-08 which protects sites on the State Historic Sites Registry.

The fact that the city already has a right-of-way necessary for roadway improvements in my opinion would not change the application of N.D.C.C. § 55-10-08 to the proposed alternate projects. A right-of-way easement is an interest in real property. Huber v. Oliver County, 529 N.W.2d 179, 181-182 (N.D. 1995). See also N.D.C.C. § 47-01-03(1), (3) (real property is land and that which is incidental or appurtenant to land); N.D.C.C. § 47-05-01(4) (easements for a right-of-way are attached to land as incidents or appurtenances); Johnson v. Armour & Co., 291 N.W. 113, 116 (N.D. 1940) (easements are attached to other lands as incidents or appurtenances); N.D.C.C. § 24-01-01.1(15) (an easement under N.D.C.C. title 24 is "a right acquired by a public authority to use or control property for a designated highway purpose.").

As you recognize, N.D.C.C. § 55-10-08(2) specifies that the city "may not demolish or cause to alter the physical features or historic character of any site listed in the state historic sites registry . . . without first obtaining a prior approval thereof from the superintendent of the state historical board upon authorization of the <PAGE NAME="p.L-37">state historical board." The city is required to cooperate with the State Historical Board in identifying and

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implementing a reasonable alternative to alteration before obtaining approval. Id.

You also acknowledge that Stutsman Co. v. State Historical Soc. of North Dakota, 371 N.W.2d 321 (N.D. 1985), is the seminal case regarding the application of statutes designed to preserve and protect state historic sites. You question "whether improving the street would 'demolish or cause to alter the physical features or historic character of [the] site.'" As the supreme court in the Stutsman Co. case explained, administrative rules and criteria implementing N.D.C.C. § 55-10-08 provide guidance regarding whether a site should be listed on the registry. Id. at 327-328. Among the factors that may be considered in determining whether property should be registered are movements, lifeways, folkways, and other patterns or phenomena that reflect the historic development of a community such as landscape architecture, urban design or planning, and aesthetic expressions that characterize or possess special aesthetic values or had an important influence on the historic community for which they were created. See N.D. Admin. Code § 40-02-01-03(1), (2).

N.D. Admin. Code § 40-02-01-10 requires a city to notify the superintendent of, and receive the superintendent's written approval for, any "proposed actions which would result in the alteration or demolition of registry properties." A part of the assessment to be made by the superintendent is whether the city has investigated and proposed alternatives which would not jeopardize the property's registry status. N.D. Admin. Code § 40-02-01-10(1), (2). Because a property's registry status is determined by those factors which earned that status, proposed alterations which adversely affect those factors "jeopardize the property's registry status" and may not be approved. N.D. Admin. Code § 40-02-01-10(2).

Among the criteria considered by the Historical Society Board in deciding to list the Bismarck Cathedral Area Historic District on the State Historic Sites Registry was that related to urban design or planning. "Under Criterion 2f [N.D. Admin. Code § 40-02-01-03(2)(f)], the Bismarck Cathedral Area Historic District is distinctive for its landscape architecture in the form of the boulevard trees that line the streets and avenues in 'The Hill' area." North Dakota Historic Sites Registry Nomination Form pertaining to the Bismarck Cathedral Area Historic District 3. See National Register of Historic Places - Inventory - Nomination Form dated 8 May 1980, sec. 7 ("The success of curbside plantings, primarily Siberian elm . . . resulted in heavily canopied streets which embrace the neighborhood and contribute significantly to the ambiance of the district as it exists today."); National Register of Historic Places Nomination Form prepared in 1996 and dated 11 August 1997 (to expand the boundaries of the Bismarck Cathedral Area Historic District to coincide with the area covered by

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the State Historic Sites Registry) sec. 7, p. 39 ("Approximately 350 American elms and green ash trees in the boulevards along all avenues and streets within the original and expanded district boundaries . . . create a visual canopy along the streets and avenues with an average spacing between trees of 20 feet. . . . The integrity of this resource is high."); sec. 8, p. 45 ("The Cathedral Area benefits from the many trees planted in the boulevards, most of which predate the homes they shade. Tree planting was a method of bringing residential development and expansion to the neighborhood. They were a feature planned in the teens and 1920s to beautify the growing community of Bismarck[.] Today, the mature trees visually, physically, and economically enhance and help to define the Bismarck Cathedral Area Historic District. In those early years a uniform planting of the boulevards along Washington Street, Raymond Street, Mandan Street, and Avenues A, B, C, and D was organized. . . . The ambiance of the neighborhood is immensely enhanced by the beauty and uniformity of these trees. . . . Conscious community planning of such civic leaders as C. B. Little and T. R. Atkinson in the teens and twenties, with a vision of the future beautification of their town is certainly demonstrated in this wise, foresightful use of boulevard space."). Certain parts of the federal nomination forms were attached to and incorporated in the State Historic Sites Registry nomination form.

Whether the city's alternate projects would result in the alteration or demolition of registry properties and jeopardize the properties' registry status is a fact question which our office may not determine in a legal opinion. See Letter from Attorney General Nicholas Spaeth to James E. Sperry 1, 2 (Nov. 7, 1986). However, I have summarized one of the criterion which was considered in the determination to place the Bismarck Cathedral Area Historic District on the state registry for guidance in evaluating how to proceed. In my opinion, N.D.C.C. § 55-10-08 and implementing rules apply to road improvements that require removal of boulevard trees in the Bismarck Cathedral Area Historic District which is on the State Historic Sites Registry.

Sincerely,

Heidi Heitkamp
Attorney General

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