

LETTER OPINION
2001-L-47

November 9, 2001

The Honorable Dennis Renner
State Representative District 31
4530 Hwy 6
Mandan, ND 58554

Dear Representative Renner:

Thank you for your letter requesting an opinion regarding the authority or responsibility of the Morton County Commission with respect to a trail across one farmer's land which provides access to another farmer's land.¹

In early 1976, the Fischers approached the Morton County Commission requesting that the Commission open a section line running across the Berger property to enable Fischer to move cattle and hay more easily from his home property to another parcel he owns. The Morton County Commission then met with the Fischers and the Bergers. The Morton County Commission's June 9, 1976, minutes state, "[a]n agreement was reached to open the section line and furnish Mr. Berger with a cattle pass. Mr. Berger will put up the fence, and Mr. Fischer will fix his own road."

In its minutes of July 6, 1976, the county commission indicated an intent to rescind the action of the opening of the section line:

Mr. Morrelle will contact Mr. Berger to rescind the action [of] the opening of the section line between Section 19, Township 136, Range 82, and Section 24, Township 136, Range 83. After this information is obtained, action will be taken by the County Commissioners. On the line between Section 30, Township 136, Range 82, and Section 25, Township 136,

¹ This trail, with cattle guards and gates, has become controversial because the family desiring access, the Fischers, defeated the cattle guards with plywood and the family owning the land, the Bergers, responded by wiring a fence over the cattle guards. See Memo from Morton County Assistant State's Attorney Brian D. Grossinger to the Fischers and the Bergers, August 1, 2001. Morton County determined that the Bergers' actions were legitimate "self-help" when confronted with the Fischers' illegal acts defeating the cattle guards. Id.

Range 84, the fence on the West side will be 700 feet and on the East side 660 feet to allow for easy access to that end of N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 30, Township 136, Range 82, and N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 25, Township 136, Range 83.

At its July 8, 1976, meeting the county commission took the following action:

Moved by Kautzman, seconded by Dahl that in view of the cost of making the section line traversable, to construct a cattle guard and gate at the North end of the Section line between Section 25, Township 139, Range 83, and Section 30, Township 139, Range 82, and construct a cattle guard and gate on the South end of the trail crossing the N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 30, Township 139, Range 82, and that an easement be given to Morton County of 33 feet by Mr. Adam Berger, owner of N $\frac{1}{2}$ N $\frac{1}{2}$ Section 30, Township 139, Range 82, with the condition that if a road is ever constructed on said section line, this easement be terminated.

A survey was done and the county installed the cattle guards and gates. However, it appears the easement providing a right of way to the county was never signed by the county or Berger.

An excerpt of the minutes of July 1976 signed by the Morton County Auditor and each of the County Commissioners states as follows:

Moved by Kautzman, seconded by Dahl, since upon further investigation, study, and consideration, the board has resolved to permit the construction of a cattle guard and gates between section 24, township 136, range 83, and section 19 township 136, range 82, where said section line meets the section line between section 25, township 136, range 83, and section 30, township 136, range 82, all in Morton County North Dakota.

Further, that a cattle guard and gate be constructed on the south property line of N $\frac{1}{2}$ N $\frac{1}{2}$ section 30, township 136, range 82, where a trail presently exists and is being used for access purposes.

Further, that Adam Berger, the owner of the N $\frac{1}{2}$ N $\frac{1}{2}$ section 30, township 136, range 82, shall agree to give Morton County a 33 foot easement across said property with the same to be surveyed by the County Engineer.

Further, that in the event a road shall be constructed on the section line between section 24, township 135, range 83, and section 19, township

136, range 82, then and in that event such easement shall automatically be cancelled without any further legal proceedings what so ever.

Further, that pursuant to sections 24-05-07, 24-07-03, and 24-06-28, North Dakota Century Code, and Chapter 24-10 North Dakota Century Code. The board has determined that the construction of cattle guards and gates would be within the best interests of the county since the same would permit passage, and access of Elmer Fisher [sic] to the SE $\frac{1}{4}$ of section 24, township 136, range 83, in Morton County.

Further, that the portion of the section line between sections 25, township 136, range 83, and section 30, township 136, range 82, requested to be opened by Elmer Fisher [sic], has a topography which makes any road construction impractical, and Morton County does not deem it advisable to build any road in that area because of such impracticality.

This excerpt indicates that the county commission was acting pursuant to N.D.C.C. §§ 24-05-07, 24-07-03, 24-06-28, and ch. 24-10 of the North Dakota Century Code. Section 24-05-07 authorizes the county to deviate from a section line if the cost of constructing and maintaining a highway on a section line would be decreased materially. Section 24-06-28 prohibits obstructions of section lines unless permission has been obtained from the county commission. Section 24-07-03 indicates that section lines are public roads and indicates the manner in which portions of a section line may be closed. Chapter 24-10 authorizes the county commission to permit the construction of cattle guards and gates.

These actions indicate that the county commission intended to create an access trail for Fischer that deviated from the section line because the section line was more costly to improve. The county commission apparently took all actions consistent with this intent except it failed to get a written easement between Berger and the county.

Perhaps Berger agreed to allow Fischer to cross Berger's property so that Berger would not have to incur the cost of removing obstacles from the section line. The law at the time would have required obstructions on the section line to be removed unless permission for those obstructions had been secured from the county commission in cases where the demography of the land made the construction of a road on the section line impracticable. See N.D.C.C. §§ 24-07-03, 24-06-28, Small v. Burleigh County, 225 N.W.2d 295 (N.D. 1975), Small v. Burleigh County, 239 N.W.2d 823 (N.D. 1976), Saetz v. Heiser, 240 N.W.2d 67 (N.D. 1976).

If the actual section line had been opened by the county commission, the Bergers may have incurred costs of moving or adding fences on their property, and the county commission may have incurred costs related to improving the section line road. Instead

of opening the section line as the county commission had originally intended, it apparently was decided to deviate from the section line and provide a different route for Fischer. See N.D.C.C. § 24-05-07. This would require obtaining a right of way from Berger through the portion of Section 30 owned by Berger and installing cattle guards and gates pursuant to N.D.C.C. ch. 24-10. The right of way was surveyed and an easement was drawn up consistent with the survey and pursuant to the county commissioner's July 1976 motion. However, the easement was neither signed nor recorded.

It appears to me, given all of the actions taken by the county commission regarding this matter, that the county commission does have a duty relating to the right of way across Berger's property because the county intended that such right of way replace the section line running along Berger's property and installed cattle guards and gates consistent with this intent. The right of way was, in effect, intended as a deviation from the section line and was approved by the county commission. Further, this agreement allowing Fischers to travel over Berger's land, made under statutory authority, has apparently been relied upon by both families for over 20 years.

In my opinion, the county commission has a duty to revisit this matter to determine whether it will pursue the easement or whether it will provide some other means of access to Fischer's property.

It is possible the sale of the easement may be binding against the Bergers if certain facts are proven. The constitutional guarantee protecting the Bergers against having their property taken without just compensation "is not dependent upon the employment of any particular remedy." Donaldson v. City of Bismarck, 3 N.W.2d 808, 816-817 (N.D. 1942). Good consideration for a contract includes granting something one is not otherwise entitled to or refraining from an act that one otherwise could undertake. N.D.C.C. § 9-05-01. See Farmers Union Oil Co. v. Maixner, 376 N.W.2d 43, 46 (N.D. 1985). Allowing Fischer to travel across Berger's property may have been preferable to Berger because if the county would have "opened" the section line road running across Berger's property, Berger would have had to move or add fences and perhaps incur other costs, such as removing other obstructions, to make the section line open. This may explain why Berger apparently agreed to the easement without monetary compensation, but with construction of cattle guards and gates to serve Berger's land for ranching. Also, the alleged contract memorialized by the minutes of the board may be enforceable even though not in writing because of the county's performance of its duties under the contract by construction of the cattle guards and gates. Williston Co-op Credit Union v. Fossum, 459 N.W.2d 548, 551 (N.D. 1990); N.D.C.C. § 47-10-01. Therefore, the possibility is open for Morton County to develop proof relating to facts showing that a sale of this easement did occur. Whether such facts can be demonstrated convincingly is not a matter on which I may issue an opinion. Letter from Attorney General Wayne Stenehjem to Representative Todd Porter, March 23, 2001.

If the county commission determines to pursue the easement, it may 1) bring a quiet title action under N.D.C.C. ch. 32-17, 2) take steps to purchase the right of way from the Bergers, or 3) if the Bergers are unwilling to agree to the county's acquiring the right of way for a certain sum, the county may condemn and take the right of way through its eminent domain powers. N.D.C.C. § 24-05-07. If the county is determined to own or acquires the right of way, the county commission has the duty to prohibit the obstruction of the right of way. See N.D.C.C. §§ 24-05-24, 24-06-28, 24-12-02. Thus, the county commission would have the duty to require the Bergers to remove the locks from the gates and obstructions across the cattle guards.²

If the county determines not to pursue the easement, then it needs to consider whether to provide some other means of access to the Fischer's land.³ See N.D.C.C. § 24-07-06; Hector v. Board of Township Supervisors of Stanley Township, 177 N.W.2d 547 (N.D. 1970). The county should also consider what it will do regarding the cattle guards and gates it installed on the Berger's property.

In addition to the foregoing analysis, it is possible that the Fischers have acquired a right of way across the Berger property via adverse possession. See N.D.C.C. §§ 28-01-07, 28-01-08, 28-01-09, 28-01-10, 28-01-11, and 47-06-03. This would be solely a private matter between the Fischers and the Bergers, not involving Morton County or its employees or former employees except for evidentiary purposes. It is also possible that the right of way is a public road by prescription. See N.D.C.C. § 24-07-01. Further facts would need to be elicited in order to determine whether it is a public road by prescription. See Berger v. Berger, 88 N.W.2d 98 (N.D. 1968), Hartlieb v. Sawyer Township Bd., 366 N.W.2d 486 (N.D. 1985).

I hope this discussion has been helpful.

Sincerely,

Wayne Stenehjem
Attorney General

las/vkk

² When exercising discretion concerning removal of obstructions, the county commission may need to take into consideration the Fischers alleged actions of defeating the cattle guards with plywood.

³ It is unclear to this office whether the Fischers can access this land via any other route.