

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 99-F-05

Date issued: April 7, 1999

Requested by: Allen Kopyy, Morton County State's Attorney

- QUESTION PRESENTED -

Whether a public road easement obtained by prescription is extinguished by the governing body's acquisition of an express road easement.

- ATTORNEY GENERAL'S OPINION -

As a general rule, a public road easement obtained by prescription is not extinguished by the governing body's acquisition of an express road easement.

- ANALYSIS -

N.D.C.C. ch. 24-07, "Opening and Vacating Highways," begins by stating that 20 years of use establishes a road and that such roads are declared to be public roads or highways. N.D.C.C. § 24-07-01. By such means a public road might be established by prescription. Kritzberger v. Traill County, 242 N.W. 913, 915 (N.D. 1932) ("A public highway need not be opened by officials. The people may open the road themselves by use"). A public road easement might be extinguished under N.D.C.C. ch. 24-07 or N.D.C.C. § 47-05-12.

N.D.C.C. §§ 24-07-05 et seq. set out a formal procedure to be followed by either a county or township, depending upon which government has jurisdiction, if a public road is to be vacated. 1995 N.D. Op. Att'y Gen. L-121, L-122. See also Casey v. Corwin, 71 N.W.2d 553 (N.D. 1955). Whether these procedures have been satisfied is a fact question. Nothing in N.D.C.C. ch. 24-07, however, provides for the termination of a prescriptive road easement by the acquisition of an express easement.

N.D.C.C. § 47-05-12 describes four ways by which easements may be extinguished.

1. By vesting of the right to the servitude and the right to the servient tenement in the same person;
2. By the destruction of the servient tenement;
3. By the performance of any act upon either tenement by the owner of the servitude or with his assent if it is incompatible with its nature or exercise; or
4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by prescription.

N.D.C.C. § 47-05-12.

Acquisition of an express easement over the same land to which a prescriptive easement applies may implicate subsection 3 and might be considered incompatible with the continued existence of the prescriptive easement. But the rule is otherwise.

As a general rule, an easement, once established, survives even though the owner of the easement seeks and obtains permission or license from the owner of the servient estate to make the same use of the latter's premises as could be made under the existing servitude.

25 Am.Jur.2d Easements and Licenses in Real Property § 118 (1996). Another treatise states:

It seems to be the general rule that an easement once established will not be divested (sic) by obtaining permission or license from the owner of the servient estate to use it, even though the permission or license is coextensive with the easement.

50 A.L.R. Annot. 1295, 1296 (1927). Case law supports these expressions of the rule. E.g., Rinderer v. Keeven, 412 N.E.2d 1015, 1028 (Ill. App. Ct. 1980); Speer v. Carr, 429 S.W.2d 266, 269 (Miss. 1968); Allen v. Neff, 135 S.E. 2, 3 (W. Va. 1926); Smith v. Fairfax, 201 S.W. 454, 455 (Ky. 1918); Dee v. King, 50 A. 1109, 1110 (Vt. 1901).

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Ultimately, whether any subsection of N.D.C.C. § 47-05-12 or provision of N.D.C.C. ch. 24-07 apply to extinguish a prescriptive road easement is a question of fact.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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