

LETTER OPINION
99-L-36

April 7, 1999

Mr. Stephen M. McLean
Dickey County State's Attorney
PO Box 215
Ellendale, ND 58436-0215

Dear Mr. McLean:

Thank you for your request for my opinion regarding whether Dickey County has a legal obligation to provide access to a rural Dickey County cemetery. Quite a few years ago, the original owner of the property on which the cemetery is located sold the property surrounding the cemetery without reserving a means of access. There is presently no means of access and several family members of persons interred at the cemetery are now demanding access to the cemetery.

In your letter, you indicate that whether the cemetery is "abandoned," as that term is used in N.D.C.C. § 23-06-30, is unknown. Generally, counties are responsible for maintaining abandoned cemeteries. N.D.C.C. § 23-06-30. There is no specific definition of what constitutes an abandoned cemetery. Whether a cemetery is abandoned is a fact question to be determined by the board of county commissioners. Letter from Special Assistant Attorney General Lynn E. Crooks to Reynold Schmidt (Oct. 1, 1965). The county may wish to examine property records to determine who owns the cemetery land and whether that person has a duty to maintain the cemetery. Letter from Assistant Attorney General Lynn E. Erickson to Marcus Langemo, June 28, 1971.

There is no statutory requirement that a county provide access to a cemetery that has been abandoned and is being maintained by the county. The county itself may need to acquire either the permission of the surrounding landowner or a more formal easement to cross the property in order to fulfill its maintenance duties. However, N.D.C.C. § 23-06-30 does not impose a duty to maintain buildings or other structures which are not related to the cemetery. Letter from Assistant Attorney General Leslie R. Burgum to George Whitney, March 13, 1968. This implies that there is no requirement that the county construct a roadway or obtain public access to the cemetery. Thus, it is my opinion that a county maintaining an abandoned cemetery is not obligated to provide access to that cemetery by virtue of the duty of maintenance under N.D.C.C. § 23-06-30 when no access presently exists.

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If the owner of the cemetery is found, that person may petition the county to open access to the cemetery pursuant to N.D.C.C. § 24-07-06. This statute provides:

Whenever any tract of land is surveyed or sold in tracts less than the original subdivision as established by the government survey thereof, so that any part thereof does not touch upon a public road so as to allow the owner of such tract access to a public highway, the board of county commissioners . . . , upon petition of such owner, may open a cartway or highway along the lines of any such tract or tracts when in the judgment of such board such cartway or highway is necessary

N.D.C.C. § 24-07-06. See also N.D.C.C. § 24-07-05 concerning a petition of neighboring landowners. N.D.C.C. § 24-07-07 et seq. provides for surveying and laying out roadways following a petition received under N.D.C.C. §§ 24-07-05 or 24-07-06. However, these procedures are not mandatory, and it is within the lawful discretion of the county commission to determine whether a roadway is necessary under N.D.C.C. § 24-07-06 following a petition by the owner to open a highway or cartway for access. Accordingly, it is my opinion that Dickey County has no legal obligation to provide and maintain access to the cemetery described in your letter. If the owner petitions for a road under N.D.C.C. § 24-07-06, or an appropriate petition from area landowners is received under N.D.C.C. § 24-07-05, the county may open a cartway or highway pursuant to N.D.C.C. § 24-07-06.

The lack of a duty to provide for access, however, does not imply that it would be an abuse of the county's discretion to provide access to an abandoned cemetery as part of maintaining that cemetery. It is reasonable to imply authority to provide access to an abandoned cemetery as required to maintain the cemetery and to "maintain the dignity . . . of the grounds." N.D.C.C. § 23-06-30. See Brink v. Curless, 209 N.W.2d 758, 769 (N.D. 1973) (county officials have such powers as expressly or impliedly conferred by statute and which are reasonably necessary to carry into effect the powers and duties so delegated).

Sincerely,

Heidi Heitkamp
Attorney General

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