

**LETTER OPINION
2001-L-01**

February 6, 2001

The Honorable Merle Boucher
Minority Leader
House of Representatives
State Capitol
Bismarck, ND 58505

Dear Representative Boucher:

Thank you for your letter asking me to respond to questions from the Richland County auditor. First, the auditor asks whether N.D.C.C. § 61-21-32 requires counties to be responsible for 40 percent of the cost of bridges or culverts and repaired in connection with a drainage project.

Drain projects can be constructed by water resource districts under authority provided in either N.D.C.C. ch. 61-21 or 61-16.1. N.D.C.C. § 61-21-31 provides that whenever it is necessary to run a drain across a highway, the Department of Transportation, board of county commissioners, or the board of township supervisors, when notified by the water resource board to do so, shall make necessary openings through the road or highway, and shall build and keep in repair all suitable culverts or bridges at its own expense, as provided under the provisions of N.D.C.C. § 61-21-32. N.D.C.C. § 61-21-32 contains the provisions apportioning the costs of the construction and repair. If a bridge or culvert is constructed on a county or township highway system and the cost of the bridge or culvert exceeds \$100, the county is responsible for 40 percent of the cost not paid by the state or federal government. When the cost of the bridge or culvert is \$100 or less, the township is responsible for 40 percent of the cost, rather than the county.

Similar provisions apply to drains constructed under the authority of N.D.C.C. ch. 61-16.1. N.D.C.C. §§ 61-16.1-42 and 61-16.1-43 require the county to pay for 40 percent of the cost of any bridge or culvert constructed or repaired on a county or township highway system in connection with a drain. Townships are not required to share in the cost.

I am enclosing copies of 1988 N.D. Op. Att'y Gen. 8 (Feb. 8 to James Wold) and Letter from Attorney General Heidi Heitkamp to Jonal Uglem (April 14, 1998), which discuss cost sharing responsibilities under the statutes in more detail.

Second, the Richland County auditor asks whether it is right for the taxpayers of the entire county to contribute when only the drain district benefits. Because the Legislative Assembly originally established the division of responsibility, it apparently decided as a matter of policy that because of the public benefits of drainage, a portion of the cost should be shared by the road entity. See 1988 N.D. Op. Att'y Gen. 8 ("because the legislature has recognized the public benefits of public drainage, a portion of the cost is also shared by the road entity"). The North Dakota Supreme Court has recognized that a statute requiring railroads to pay for the costs of accommodating the public's need for drainage improvements advances a legitimate state interest in drainage. Southeast Cass Water Resource Dist. v. Burlington Northern R. R. Co., 527 N.W.2d 884, 890-91 (N.D. 1995).

The Legislature and the courts have consistently required entities that construct roads to accommodate both artificial and natural drainage. In a previous opinion addressing artificial drainage, this office stated:

Generally, an upper landowner may artificially drain the land into a natural watercourse, but will be liable to a lower landowner if the drainage causes injury by discharge of water in greater volume or concentration than would have happened if natural conditions had been left undisturbed. Rynestad [v. Clemetson], 133 N.W.2d [559] at 563-564 [(N.D.1965)]. In Viestenz v. Arthur Township, 54 N.W.2d 572 (N.D. 1952), the North Dakota Supreme Court reviewed the natural drainage pattern of the land to determine the township's obligation to install appropriately sized culverts. The court, in interpreting what is now § 24-03-06, said:

By this law those in charge of the construction of highways in addition to making the roads fit for travel must consider the drainage affected by the construction. It is made their mandatory duty to provide drainage towards a natural water course of any water which may accumulate in ditches along the highway.

Id. at 575. (emphasis added).

The Attorney General, based on the above statement from Viestenz, issued an opinion that the highway department could not obstruct the

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natural surface water drainage of abutting landowners and could not prohibit drainage into a ditch by an abutting landowner in the absence of a threat to the structural integrity of the highway. Letter from Attorney General Allen I. Olson to Mr. Walter R. Hjelle (May 12, 1977). See also Lemer v. Koble, 86 N.W.2d 44, 48 (N.D. 1957)(the entity responsible for the road has a duty to inspect and make plans for culverts to be constructed where necessary to preserve a natural drainway for surface water, including naturally and artificially drained water) and Olson v. Cass County, 253 N.W.2d 179, 181 n.1 (N.D. 1977) (N.D.C.C. § 24-03-06 provides that drainage of surface water shall not be obstructed, but shall be allowed to follow the natural water flow course). In N.D.C.C. § 24-03-06, the word "natural" does not mean water which would flow naturally without artificial alteration, but instead describes the direction water naturally flows within a drainage basin.

1996 N.D. Op. Att'y Gen. L-171, L-172–L-173 (October 1 to Rep. Bruce Laughlin). It may be inferred that the prevention of flooding has been given a higher priority by lawmakers than the inconvenience or expense which may be imposed on road building authorities. Whether it continues to be "right" to place the responsibility for a portion of the costs of culverts and bridges on counties or other road entities in connection with a drain project is a matter left to the discretion of the Legislative Assembly.

Sincerely,

Wayne Stenehjem
Attorney General

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Enclosure