LETTER OPINION
2004-L-71

November 24, 2004

Mr. David Sprynczynatyk
Department of Transportation
608 East Boulevard Avenue
Bismarck, ND 58505-0700

Dear Mr. Sprynczynatyk:

Thank you for your letter asking whether a pedestrian or bicycle path may be constructed within the easement area of a general right of way easement conveyed to the county or state for a public highway. It is my opinion that, as a general rule, constructing a trail for pedestrians or bicyclists within an existing general right of way easement granted for a public highway without any restrictions or limitations does not constitute an additional burden on the land for which the abutting landowner must be compensated.

ANALYSIS

An easement is a burden on the land and the extent of the burden is determined by the terms of the grant by which it was acquired. N.D.C.C. §§ 47-05-01 and 47-05-07; Minnkota Power Coop., Inc. v. Lake Shure Properties, 295 N.W.2d 122, 127 (N.D. 1980). A proposed use of an easement must be within the purpose of the original dedication. Cosgriff v. Tri-State Telephone & Telegraph Co., 107 N.W. 525, 526 (N.D. 1906); Yegen v. City of Bismarck, 291 N.W.2d 422, 426 (N.D. 1980) (prohibition on parking on street was consistent with the primary use of the street as originally dedicated and abutting landowner was therefore not entitled to additional compensation). If it is not, it constitutes an additional servitude for which the fee owner is entitled to compensation. Id.; City of Fargo v. Fahrlander, 199 N.W.2d 30, 34 (N.D. 1972). If the proposed use is within the original purpose of the easement, the abutting landowner is not entitled to relief or to compensation. Donovan v. Allert, 91 N.W. 441, 443 (N.D. 1902).

Generally, an easement grant is strictly construed against the grantor in ascertaining the extent of the easement. F. T. Chen, Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms, 3 A.L.R.3d 1256, § 2[a], 3[a] at pp. 1260, 1262, Supp. 130 (1965); Corbett v. La Bere, 68 N.W.2d 211, 215 (N.D. 1955) (the language of a grant is to be construed most strongly against the grantor); 28A C.J.S. Easements § 57 (1996). Unless used by the parties in a technical sense, words in a contract are construed in their ordinary and popular sense, rather than according to their

strict legal meaning. N.D.C.C. § 9-07-09; Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432, 433-434 (N.D. 1995).

A sample easement provided to our office conveyed an easement and right of way for construction and maintenance of a "county highway" as long as it is used for a public highway. The first step in determining whether the easement holder is entitled to make a particular use of an easement is to determine whether the use falls within the purposes for which the servitude was created. Restatement (First) of Property § 4.10, p. 595 (2000); Donovan v. Allert, 91 N.W. 441, 443 (N.D. 1902) (the ultimate issue to be determined is whether the use of the street for telephone posts and wires was within the purposes of the original dedication to the public; more specifically, "to what public purposes were the streets originally dedicated?"); Cosgriff v. Tri-State Telephone & Telegraph Co., 107 N.W. 525, 526 (N.D. 1906). To determine whether constructing a pedestrian or bike path in an existing highway right of way constitutes an additional burden, it is necessary to determine whether doing so is consistent with the purposes for which the highway right of way was granted.

In Donovan v. Allert, 91 N.W. 441, 443-444 (N.D. 1902), the North Dakota Supreme Court discussed the purposes that could be made of a street dedicated to a city. The court stated:

> The primary use of a street or highway is confined to travel or transportation. Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, or in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in a car drawn by horses or moved by electricity, the object to be gained is moving from place to place. The same idea is expressed by courts and text writers, that 'motion is the primary idea of the use of the street.' . . . The primary intention and idea of the use of the street was for travel, - moving from place to place in any way that does not interfere with the use of the street for travel in any other way. The manner or mode of travel is not restricted to those known or in use at the time of the dedication, but may be those modes of travel that are the result of modern inventions.

Id. See also Cosgriff v. Tri-State Telephone & Telegraph Co., 107 N.W. 525, 526-527 (N.D. 1906) (discussing the purposes that could be made of an easement granted for a rural highway); Yegen v. City of Bismarck, 291 N.W.2d 422, 426 (N.D. 1980); 39 Am. Jur. 2d Highways, Streets, and Bridges § 217 (1999) (streets and highways are established and maintained primarily for purposes of travel and transportation by the public, and uses incidental thereto; such travel may be for either

business or pleasure); 39 Am. Jur. 2d Highways, Streets, and Bridges § 221 (1999) (the public easement in a highway embraces all public travel, not prohibited by law or by dedicatory restriction, on foot and in motor vehicles, as the needs of the public demand); City of Fargo v. Fahrlander, 199 N.W.2d 30, 34 (N.D. 1972) (pedestrian traffic is consistent with use of a street for travel).

In Donovan, the court stated that constructing and operating telephone lines in a street right of way was not within the original purpose of a street dedication. Donovan, 91 N.W. at 445. Instead, it was for the distinct and separate use of communication. The court implied that had the use been a difference in the kind of vehicles, in their number or capacity, in the manner, method, or means of locomotion, or if the use aided the public in exercising its right of passage or facilitated the use of the street as a public way, the use would have been consistent with the purpose of the easement and permissible. Id. at 444-445. Consequently, if a use is a change in the mode or manner of transportation or aids in or facilitates the "right of free passage," the court would likely find the use consistent with the purpose of an easement granted for highway purposes and not an additional servitude.

Thus, under an easement granted for a public highway, the public obtains the right to travel, the right to pass from place to place on foot, bicycle, or motor vehicle. The manner and mode of travel is not restricted to those known or in use at the time of the grant or dedication. The abutting landowner retains fee ownership and may exercise acts of ownership and possession that do not interfere with the public use as a highway. Otter Tail Power Co. v. Von Bank, 8 N.W.2d 599, 600 (N.D. 1942) (where an easement is granted the grantor may, without expressly reserving the right to do so, exercise all rights of ownership over the property subjected to the easement consistent with a fair enjoyment of the use of the easement). See also Burleigh County Water Resource District v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994). Consequently, where an easement is granted for a highway the grantor has the right to use for agricultural purposes that portion of the property covered by the easement and not actually occupied by the highway, provided he does not interfere with the grantee's use of the easement for highway purposes. Otter Tail Power Co. v. Von Bank, 8 N.W.2d 599, 600 (N.D. 1942).

Because the abutting owner retains fee ownership and has the right to use that portion of the property not occupied by the highway, one could argue that only that portion actually occupied by the highway when it was first constructed can now be used by the public. One could also argue that because the road was to be used by motor vehicles at the time the grant was made, the highway right of way can be used only by motor vehicles. Those arguments, however, are not supported by the law.

Even though only a segment of the right of way may have been occupied by a road when the highway was first constructed, the easement holder is not subsequently prohibited from using the entire easement area. See Nowling v. BNSF Railway, 646 N.W.2d 719, 723 (N.D. 2002) (the easement holder has the right to make use of the entire easement area for purposes for which the easement has been granted); Keidel v. Rask, 290 N.W.2d 255, 258 (N.D. 1980) ("public highways in North Dakota are not limited in width to the actual traveled surface of the roadway"); Dakotah Hotel Company v. City of Grand Forks, 111 N.W.2d 513 (N.D. 1961) (the city had the right to use the entire area of the street and could therefore remove trees and an island located on the street); N.D.C.C. § 24-07-03 (section lines are considered public roads open for public travel to the width of thirty-three feet on each side of the section line); Knox v. Pioneer Natural Gas Co., 321 S.W.2d 596, 600 (Tex. Civ. App. 1959) (if the language of the grant clearly gives the grantee a right in excess of the one actually used, such right would still exist notwithstanding the exercise of a lesser privilege); Yegen v. City of Bismarck, 291 N.W.2d 422, 425-26 (N.D. 1980) (prohibiting curb side parking was consistent with the primary use of the street as originally dedicated, i.e., for travel; the party's argument that the prohibition was not contemplated by the parties when the street was dedicated in 1874 was without merit).

The abutting owner's right to use the easement area, therefore, is subordinate to the right of the public to use the entire easement area for highway purposes. Otter Tail Power Co. v. Von Bank, 8 N.W.2d 599, 604 (N.D. 1942) (the abutting landowner would not interfere with the easement if hay or grain were planted on the nontraveled portion of the highway easement area but, should there be any interference, the highway use would prevail). Consequently, even if the abutting landowner has the right to use the untraveled portion of the highway, the right is limited and must bow to the right of the public to use that portion for travel.

The second argument is that because the parties to the easement contemplated primarily use by motor vehicles, the right of way cannot be used by bikers and hikers. In determining whether a particular use of a general easement granted for highway purposes is allowed, "the interpreter is warranted in assuming that the parties to the conveyance contemplated a normal development of the use of the dominant tenement." 5 Restatement of Property § 484, p. 3020 (1944). See also Minnkota Power Coop., Inc. v. Lake Shure Properties, 295 N.W.2d 122, 128 (N.D. 1980) (a "[general] easement may be used by the dominant owner in availing himself of all modern inventions and all improvements"); 28A C.J.S. Easements § 160 (1996); Knox v. Pioneer Natural Gas Co., 321 S.W.2d 596, 601 (Tex. Civ. App. 1959); Restatement (First) of Property, §§ 482 and 484 (1944); Chevy Chase Land Co. v. United States, 733 A.2d 1055, 1075 (Md. 1999) (changes in the mode of use are presumed to be within the contemplation of the parties; highway easements include within their scope all changing means or modes of

transportation which might arise in the ordinary course of improvement); Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC, 740 N.E.2d 328, 335 (Ohio Ct. App. 2000). This is so even if it were unlikely that the parties anticipated the specific developmental changes. Crane Hollow, 740 N.E.2d at 335; Chevy Chase Land Company v. United States, 733 A.2d 1055, 1077 (Md. 1999). In Chevy Chase, the court said although the parties did not actually contemplate a hiker/biker trail, it was legally contemplated because the use involves the passage over land consistent with the needs of the public. Id. The use of the right of way as a hiker/biker trail constituted a change in instrumentality consistent with the essential purpose anticipated at the time of the grant, i.e., transportation or passage from one place to another. Id. See also State of Minnesota, by Washington Wildlife Preservation, Inc. v. State of Minnesota, 329 N.W.2d 543, 547 (Minn. 1983), in which the court, finding that a recreational trail was consistent with a right of way conveyed to a railroad for public travel, said:

> It has long been held that the holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in aid of the *general purpose* for which the easement was acquired are permissible. . . .
>
> > 'If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising [the public] easement is expansive, developing and growing as civilization advances.
> >
> > In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals . . . . And thus the methods of using public highways expanded with the growth of civilization, until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired.
> >
> > Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use

> were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use.'

Id. at 546-547 (quoting from Cater v. Northwestern Telephone Exchange Co., 63 N.W. 111 (Minn. 1895)).

The rationale expressed by these courts is consistent with the principle expressed by the North Dakota Supreme Court in Donovan that an easement for highway purposes is not restricted to the manner or mode of travel known or in use at the time the grant is made. Donovan v. Allert, 91 N.W. 441, 443.

While the North Dakota Supreme Court has not addressed this precise issue, it has determined that a public highway may be used for travel by any means, including use by pedestrians and bicyclists. Donovan v. Allert, 91 N.W. 441, 443 (N.D. 1902). Unless prohibited by statute, it appears to be well settled that bicyclists and pedestrians have a right to use highways equally with other vehicles. See, e.g., Ignatowitch v. McLaughlin, 262 N.W. 352, 359 (N.D. 1935) (the rights of pedestrians and motor vehicles to use highways are reciprocal); 40 C.J.S. Highways § 244 (1991) (the public easement is not restricted to transportation in movable vehicles; pedestrians have the same rights as drivers of vehicles; bicycles are vehicles and bicyclists have a right to make reasonable use of the highway equally with other vehicles). The right to use the highways, however, is subject to reasonable regulation. 40 C.J.S. Highways § 244 (1991). Indeed, our Legislature, in apparent recognition of pedestrians' and bicyclists' rights to use the highways, has adopted laws regulating their use. See N.D.C.C. §§ 39-10-33 and 39-10.1-05 (specifying where on the highway pedestrians and bicyclists may travel).

In addition, as the following paragraphs indicate, courts in other jurisdictions have determined that a hiking or biking trail falls within the definition of a highway purpose or that such a trail falls within the scope of an easement conveying a right of way for a highway or for transportation purposes and does not constitute an additional burden on the land. Some courts have concluded easements conveyed for railroad purposes, which appear to be narrower in scope than easements conveyed for a public highway, included within their scope the right to construct hiking, biking, or recreational trails. The rationale for so finding is that a railroad, like a paved road, is a highway dedicated to the public to use for travel.

In Opinion of the Justices to the Senate, 352 N.E.2d 197 (Mass. 1976), the court determined that establishing bike paths physically separated from the paved roadways was a highway purpose. The court said:

> We conclude that a bikeway . . . is so intimately related to a highway, to traditional highway uses, and to the interests of motorists that the establishment of bikeways is within the scope of the provision in art. 78 permitting the use of the specified funds for the 'construction, reconstruction, maintenance and repair of public highways.'
>
> Bicycles traditionally have a recognized place on our highways. Bicycles are expressly authorized by statute to use most public ways.

Id. at 200.

In Ryan v. Preston, 69 N.Y.S. 100 (N.Y. App. Div. 1901), the court held that constructing a bike path along public roads and streets did not impose an additional burden on the highway and was not a use of the highway for which the abutting landowner was entitled to compensation. The court said notwithstanding that the fee remains in the abutting owner, the grant to public use impliedly contemplates such legitimate street uses as the public may require in the future, including uses that tend to promote the comfort and safety of the traveling public. Id. at 101.

In People v Sweetser, 140 Cal. Rptr. 82, 85 (Cal. Ct. App. 1977), the court, finding that carrying a kayak within the perimeters of a county easement conveyed for public highway purposes was within the scope of the easement, stated that an easement for public highway purposes includes every kind of travel for the movement or transportation of persons or property which is reasonable and proper in the use of a public way and "embraces all public travel on foot or in vehicles that is not prohibited by law or by a restriction in the easement itself." In City of Scottsdale v. Thomas, 753 P.2d 1207, 1208 (Az. 1988), the court found that an equestrian trail came within an easement dedicated to a pubic roadway.

Courts have construed easements conveyed for transportation purposes to also include the right to construct hiking or biking trails. In State of Minnesota, by Washington Wildlife Preservation, Inc. v. State of Minnesota, 329 N.W.2d 543, 547 (Minn. 1983), the Minnesota Supreme Court stated that a railroad right of way used by hikers, bikers, cross country skiers, and horseback riders is still being used as a right of way for transportation. Id. The court found recreational use of the right of way to be consistent with the purposes for which the right of way was acquired, i.e., for transportation. Id. As such, the recreational form of transportation imposed no greater burden on the servient estate. Id.

In Chevy Chase Land Company v. United States, 733 A.2d 1055, 1077 (Md. 1999), the Maryland Supreme Court held that use of a railroad right of way as a recreational trail for hikers and bikers was consistent with its essential nature relating to the passing over the land of another. In Barney v. Burlington Northern Railroad Company, Inc., 490 N.W.2d 726, 733 (S.D. 1992), the South Dakota Supreme Court held that converting a railway right of way to a recreational trail for hikers, bikers, skiers, and snowmobilers will allow the right of way to continue to be used as a public highway compatible and consistent with the prior use as a public railway; no greater burden is placed upon the servient estate. Its conclusion was based on the rationale, similar to that expressed by the North Dakota Supreme Court in Donovan v. Allert, 91 N.W. 441 (N.D. 1902), the Minnesota Supreme Court in State of Minnesota by Washington Wildlife Preservation, Inc. v. State of Minnesota, 329 N.W.2d 543, 547 (Minn. 1983), and numerous other courts, that "the holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in aid of the general purpose of which the easement was acquired are permissible." Barney, 490 N.W.2d at 733. Because the use was consistent and compatible, there was no taking and the landowners were not entitled to compensation. Id. See also Restatement (First) of Property § 4.10, p. 595 (2000) (the purpose of an easement for "railroad right of way" may be narrowly defined as transportation by railroad, or more generally defined as transportation or movement of people and goods; if the former is adopted, the right of way could only be used for rail transport; if the latter is adopted, it could be used for a hiking and bicycle trail).

As noted above, several courts have found that it is permissible to construct hiking and biking trails within the perimeters of an easement granted for transportation purposes. The North Dakota Supreme Court has stated that an easement for a public highway conveys to the public the right to travel, the right to pass from place to place. Donovan v. Allert, 91 N.W. 441 (N.D. 1902). In other words, it conveys the right to use the highway for transportation purposes. Placing hiking or biking trails within the easement area would very likely make driving safer on the highways and make biking and walking safer for members of the public who choose to travel by that means. Such a use would be consistent with the purpose for which a general easement given for a public highway was granted, i.e., for travel, to pass from place to place. There may be instances where resort to extrinsic evidence is necessary to determine whether constructing a hiking or biking trail in an existing right of way constitutes an additional burden.[1] But as a general

[1] For example, if an easement is ambiguous, extrinsic evidence may be considered to show the parties' intent. Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432, 434 (N.D. 1995). Even when an ambiguity does not exist, courts may look at custom and usage to determine what was meant by the general terms used in an easement at the time it was executed. Minnkota Power Coop., Inc. v. Lake Shure Properties, 295 N.W.2d 122, 127 (N.D. 1980). Evidence can be introduced to show that

rule, it is my opinion that constructing a hiking or biking trail within an existing right of way of a general easement granted for a public highway without any restrictions or limitations does not constitute an additional burden on the land for which the abutting landowner must be compensated.

Sincerely,

Wayne Stenehjem
Attorney General

jak/pg

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. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

---

a term has, because of the meaning given to it by a certain trade, custom, or usage, acquired a different meaning from its ordinary meaning. 12 R. Lord, Williston on Contracts § 34:5, at pp. 31-32 (4th ed. 1999). In one case, the North Dakota Supreme Court upheld the admission of extrinsic evidence to determine the extent of an easement given to a county for a highway to determine the value of damages the grantor suffered when a telephone company placed telephone lines and poles in the highway right of way. Otter Tail Power Co. v. Von Bank, 8 N.W.2d 599, 605 (N.D. 1942).