

**LETTER OPINION<sup>1</sup>**  
**2005-L-18**

August 16, 2005

Mr. James O. Johnson  
Mercer County State's Attorney  
PO Box 39  
Stanton, ND 58571-0039

Dear Mr. Johnson:

Thank you for your letter asking whether Mercer County lost an easement by abandonment. The easement contained a condition subsequent. It granted a right of way for so long as the right of way was used for highway purposes. Ultimately, it is a question of fact whether the easement has been abandoned or has terminated pursuant to its own terms due to nonuse.

ANALYSIS

You indicated the following facts regarding the easement: On November 8, 1921, Mercer County acquired a written easement for a road that served a residence at the south end of the easement and ended at a section line at the northwest end. The easement stated the land was for "use as a public highway so long as it shall be used [f]or that purpose." The road ends at the Knife River on the south end. A portion of the easement has been washed away by the Knife River. It is unclear how much the road has been used since the early 1970s. On June 19, 1996, pursuant to a petition of the adjacent landowners, the section line at the northwest end of the easement was closed by the Mercer County Commission. There is no access to the easement from the south end because of the location of the Knife River.

Easements created by express grant may be extinguished in a number of ways. Dennison, Whether an Easement in Real Property has been Terminated or Extinguished by Abandonment, 53 Am. Jur. Proof of Facts 3d 519, § 5. The written terms of an easement ordinarily will determine the manner of its termination. 25 Am. Jur. 2d Easements and Licenses § 96. But, in addition to termination of an easement by its own terms, an easement can be extinguished by abandonment. Id. See also N.D.C.C. § 47-05-12 (listing ways an easement may be extinguished).

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<sup>1</sup> This opinion vacates and replaces N.D.A.G. 2005-L-18 issued on July 21, 2005.

### **Extinguishment by Abandonment**

You inquire whether the easement has been abandoned. More specifically, you ask if abandonment is established by the public's non-use, or because the section line was closed in 1996, the section line having "provided the only access to the easement."

Easements issued by express grant cannot "be lost through mere nonuser." McHugh, Inc. v. Haley, 237 N.W. 835, 838 (N.D. 1931). See also id. at 837. The Court has reiterated this rule. Giese v. Morton County, 464 N.W.2d 202, 203 (N.D. 1990) ("an easement created by express grant is not extinguished by non-use or partial use"); Royce v. Easter Seal Soc'y, 256 N.W.2d 542, 546 (N.D. 1977). Further, "clear proof of abandonment" is required. McHugh, 237 N.W. at 838. There must be "clear evidence of unequivocal acts consistent only with abandonment." Id. There must be facts showing intent to make no further use of the easement. Id. Whether there has been abandonment is a question of fact which must be established by "evidence clear and unequivocal of acts decisive and conclusive". See also Giese, 464 N.W.2d at 203; Royce, 256 N.W.2d at 546. The burden is on those challenging the continued existence of a public way, Giese, 464 N.W.2d at 203, and the burden is heavy. "[F]ull and substantial compliance" with the law is required. City of Grand Forks v. Flom, 56 N.W.2d 324, 328 (N.D. 1952).

"The pivotal element required to prove that a governmental entity has abandoned public property is a showing of clear intent to abandon." State v. Fisher, 75 P.3d 338, 340 (Mont. 2003) (citing Baertsch v. County of Lewis and Clark, 845 P.2d 106 (Mont. 1992)). "The conduct which is claimed to demonstrate the intent to abandon must be some affirmative official act so decisive and conclusive as to indicate a clear intent to abandon." Id. Abandonment cannot be established by mere implication. Id.<sup>2</sup> See also McHugh, Inc. v. Haley, 237 N.W. 835, 837 (N.D. 1931) (abandonment of an easement requires clear and unequivocal acts decisive and conclusive evidencing an intent to terminate the easement).

In light of this law, the fact that Mercer County closed the section line between sections 29 and 30, thereby cutting off public access to the road easement at its western end does not prove the easement's abandonment. Finding abandonment would require a conclusion that closing the section line implicitly terminated the easement. But public roads cannot be abandoned by implication. There must be "clear evidence of unequivocal acts consistent only with abandonment." McHugh, 237 N.W. at 838.

You also ask whether the easement has been abandoned based on non-use by the public. As discussed, non-use alone does not constitute abandonment of an easement

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<sup>2</sup> Closing a section line under N.D.C.C. § 24-07-03 does not apply to or close a road spur connected to the section line. N.D.A.G. 95-L-121.

created by an express grant. E.g., Giese v. Morton County, 464 N.W.2d at 203. Non-use is one fact from which an abandonment may be inferred and non-use “together with other circumstances” may show the intent necessary to constitute abandonment. McHugh, 237 N.W. at 837 (quoting 2 Tiffany on Real Property 1379 (2nd ed.)). Mere non-use alone, however, is not sufficient to extinguish an easement by abandonment.

### **Termination of an Easement on the Occurrence of a Stated Event or Violation of a Condition**

As noted above, an easement may be extinguished in a number of ways. The written terms of an easement may specify when it terminates. An easement may specify that it terminates on the occurrence, breach, or nonperformance of a condition. 25 Am. Jur. 2d, Easements and Licenses, § 97. Where an easement has been created until the happening of a specific event or contingency, the easement will terminate ipso facto on the happening of the specified event or contingency. Id.

The easement you provided to us grants a right of way to the county for highway purposes so long as the easement is used for a public highway. The “so long as” provision in the easement likely creates a condition subsequent. See N.D.A.G. 2000-F-17. A condition subsequent “defeats an interest that has already vested.” Matter of Estate of Zimbleman, 539 N.W.2d 67, 71 (N.D. 1995); Griswold v. Minneapolis, St. P. & S. S. M. Ry. Co., 97 N.W. 538 (N.D. 1903) (finding a condition subsequent in a right of way easement granted to a railroad company valid and enforceable).

An easement similar to the easement granted to Mercer County was at issue in Giese v. Morton County, 464 N.W.2d 202 (N.D. 1990). The easement granted a right of way for highway purposes “so long as . . . [it is] used for a public highway.” Id. at 203. In Giese, the landowner brought an action to enjoin the county from claiming an easement for a public road. On appeal, Giese asserted that the district court erred in enforcing the easement because the county had failed to maintain the road as a public highway as required by the easement. Id. Giese challenged the district court’s findings that the county had not abandoned the road. Id. The court reiterated the general rule that an easement created by express grant is not extinguished by non-use or partial use. Id. The court said that to support his contention, Giese must present “clear and unequivocal evidence of acts demonstrating and indicating abandonment.” Id. The Giese court found that the road in question had been used by the public and was therefore not abandoned.

The court never really addressed Giese’s argument that the easement language itself terminated the easement. It is not clear in the Giese decision why it did not address this issue. The court did consider the fact that the road had had some use. Since use is a factor properly considered in determining whether an easement has been extinguished by abandonment, it is possible, and maybe even likely given the abandonment analysis the court used, that it considered the easement’s use to determine whether the easement had

been extinguished by abandonment. And perhaps the court did not specifically address whether the easement terminated by its own terms, which required nonuse, because the court found the easement had been used. While the Giese decision is not particularly instructive on the proper application of a condition subsequent in a highway easement, it is clear that conditions subsequent in the grant of an easement are one method by which an easement can be terminated. The easement granted to Mercer County contains a condition subsequent. It grants a right of way for so long as it is used as a public highway. Like abandonment, nonuse is a question of fact.

### **Conclusion**

An easement can be extinguished in a number of ways. To be extinguished by abandonment, the party challenging the existence of the easement must prove facts showing an intent to make no further use of the easement. Mere nonuse is not sufficient. Whether there has been abandonment is a question of fact which must be established by "clear and unequivocal of acts decisive and conclusive."<sup>3</sup> The written terms of an easement may also specify when it terminates. It may do so upon the occurrence of a specific event, or upon the occurrence of a condition. In this case, the easement was conditioned on its continued use as a public highway. As noted above, non-use is also a question of fact. This office does not resolve questions of fact in an opinion. See, e.g., N.D.A.G. 2001-L-19, N.D.A.G. 97-L-177, N.D.A.G. 95-L-121.

Sincerely,

Wayne Stenehjem  
Attorney General

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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).

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<sup>3</sup> It is also possible that if the easement has been abandoned, the public may have acquired a prescriptive easement to use the road. See N.D.C.C. § 24-07-01; N.D.A.G. 95-L-121 (if a road has been used for 20 successive years, it may become a public road). This letter also does not address the possibility of an easement by necessity or an easement implied from a pre-existing use. See generally Griffeth v. Eid, 573 N.W.2d 829 (N.D. 1998); Mougey Farms v. Kaspari, 579 N.W.2d 583 (N.D. 1998).