

**LETTER OPINION
2008-L-16**

Mr. James D. Gion
Hettinger County State's Attorney
PO Box 101
Regent, ND 58650-0101

Dear Mr. Gion:

Thank you for your letter asking who may act as fence viewers in unorganized townships. For the reasons stated below, it is my opinion that the law does not provide for fence viewers in unorganized townships. Consequently, parties to a partition fence dispute in an unorganized township must either work out the dispute themselves or apply to the district court for resolution of the dispute.

ANALYSIS

Your letter concerns fence viewers in unorganized¹ townships. As you note, N.D.C.C. § 47-26-02 provides that in organized townships, "the members of the board of township supervisors shall act as fence viewers." As you also note, N.D.C.C. ch. 47-26 does not explicitly make provision for fence viewers in unorganized townships.

Fence viewers generally exist to determine questions involving partition fences² and are often said to constitute a tribunal of limited jurisdiction with their duties and functions being judicial in nature.³ Further:

The powers of the fence viewers are determined by the statutes under which they act, and, dependent on the particular statute involved, fence viewers have power to pass on the necessity of a partition fence, to inspect an existing fence, to pass on the sufficiency of a fence, to determine the need

¹ See N.D.A.G. 98-F-15 (unorganized or congressional township is a geographical area that is not a legal subdivision of the county for governmental purposes); N.D.A.G. 2000-L-46 (organized (civil) township only exists if the procedures of N.D.C.C. ch. 58-02 are followed; otherwise, territory constitutes a congressional or unorganized township and no township offices exist in an unorganized township).

² See N.D.C.C. § 47-26-05.

³ 36A C.J.S. Fences § 32 (2003).

for repairs or rebuilding, to fix the amount which shall be paid to the owner erecting or repairing the fence by the other owner, and to determine all controversies arising under the statutes relating to partition fences.⁴

North Dakota law provides for similar powers for fence viewers.⁵

Because the law is silent as to who may act as fence viewers in unorganized townships, you question whether county commissioners may take on that responsibility. This inquiry is certainly appropriate since there are a number of instances in North Dakota law where county commissioners act or have some particular duty with regard to unorganized townships.⁶

However, a county “may only exercise those powers specifically provided by law, or which are necessary to the exercise of the powers specifically provided by law.”⁷ For example, “a county commission may levy a tax in a dissolved civil township only if there is statutory

⁴ 36A C.J.S. Fences § 33 (2003) (footnotes omitted).

⁵ See, e.g., N.D.C.C. § 47-26-07 (fence viewers may order partition fence maintained); N.D.C.C. § 47-26-09 (fence viewers may settle controversy as to rights in fence and duty to maintain); N.D.C.C. § 47-26-11 (fence viewers may settle controversy when land bounded by river or pond); N.D.C.C. § 47-26-12 (fence viewers may determine sufficiency of waterway as a fence); N.D.C.C. § 47-26-15 (fence viewers may determine whether a partition fence may be removed). See also N.D.A.G. 50-67 (when a landowner encloses his land, so that an adjoining landowner’s partition fence becomes one side of his enclosure, he may then be compelled to share the original cost and pay his share of the upkeep of the partition fence).

⁶ See, e.g., N.D.C.C. § 4-16-10 (board of county commissioners shall appoint person to destroy and exterminate gophers in unorganized townships upon petition of ten resident landowners); N.D.C.C. § 24-07-03.1 (surface owner may petition board of county commissioners in unorganized township to authorize improvement of section line for travel for agricultural purposes); N.D.C.C. § 24-07-04(1), (5) (proceedings to open or vacate highway must be brought to board of county commissioners if the road is situated, in whole or in part, in unorganized township); N.D.C.C. § 57-15-21 (board of county commissioners has same jurisdiction in unorganized township as board of township supervisors has in organized township for levying taxes for road and bridge purposes); N.D.C.C. § 57-15-22 (tax levied by board of county commissioners in unorganized township for construction and improvement of roads and bridges); N.D.C.C. § 63-05-01 (board of county commissioners in unorganized townships may designate land adjoining township highway to be mowed by adjacent landowners).

⁷ N.D.A.G. 98-F-15 (citing Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924)).

authority to levy that tax.”⁸ Thus, unless members of a board of county commissioners have specific authority to act as fence viewers in unorganized townships, they may not do so.⁹

As noted in an earlier opinion from this office:

It must be presumed the Legislature says what it means. Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993). The law is what the Legislature says, not what is unsaid. Id. It is improper to construe a statute “so as to legislate that which the words of the statute do not themselves provide.” Peterson v. Heitkamp, 442 N.W.2d 219, 221 (N.D. 1989). Therefore . . . the board of county commissioners cannot appoint its members as district overseers of highways in unorganized townships.¹⁰

I found no statute which directly or indirectly authorizes members of a board of county commissioners to act as fence viewers in unorganized townships. In N.D.C.C. ch. 47-26, dealing with partition fences and fence viewers, the only officials mentioned who may act as fence viewers are members of the board of township supervisors.¹¹ Had the Legislature intended to give county commissioners the authority to act as fence viewers in unorganized townships, it certainly could have provided for that as it had done in other contexts.¹² Thus, a statutory change would be necessary for county commissioners to act as fence viewers in unorganized townships.

Based on the foregoing, it is my opinion that the law does not provide for fence viewers in unorganized townships. Consequently, parties to a partition fence dispute in an

⁸ N.D.A.G. 98-F-15 (dissolution of a civil township results in transformation of an organized township into an unorganized township).

⁹ See N.D.A.G. 98-L-107 (“State law does not authorize the board of county commissioners to appoint its members as district overseers of highways in unorganized townships.”). State law was later amended in 1999 to specifically allow the board of county commissioners to appoint its members as district overseers of highways in unorganized townships. See 1999 N.D. Sess. Laws ch. 102, § 2 and N.D.C.C. § 24-06-14.

¹⁰ See N.D.A.G. 98-L-107.

¹¹ See N.D.C.C. § 47-26-02 (members of board of township supervisors act as fence viewers in organized townships); N.D.C.C. § 47-26-03 (disputes involving partition fences in more than one civil township must utilize township supervisors from each affected township as fence viewers); N.D.C.C. § 47-26-04 (township supervisor paid fee as fence viewer); N.D.C.C. § 47-26-19 (township supervisor acting as fence viewer subject to penalty for failure to perform duty).

¹² See note 5.

LETTER OPINION 2008-L-16
November 26, 2008
Page 4

unorganized township must either work out the dispute themselves or apply to the district court for resolution of the dispute.

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.¹³

¹³ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).