

**LETTER OPINION
2009-L-12**

July 7, 2009

The Honorable Merle Boucher
House of Representatives
PO Box 7
Rolette, ND 58366-0007

Dear Representative Boucher:

Thank you for your letter requesting my opinion about modifications to an unimproved section line. For the reasons stated below, it is my opinion that a government body having the appropriate authority may modify a section line by improving or altering the section line to accommodate contemporary modes of travel.

ANALYSIS

You ask whether an unimproved section line may be modified or altered to reduce damage to the section line caused by contemporary modes of travel such as bicycles and all-terrain vehicles.¹ You also ask, based upon N.D.A.G. 2000-F-02, what modifications would be considered “reasonably necessary to travel the section line” as well as what constitutes “damage” to the property within the section line.² That opinion concluded that “the public’s right to travel on an unimproved section line does not include the right to

¹ Your request generally asks whether section lines may be modified, but does not ask how or whether specific government entities or private individuals may modify a section line. Regardless, the relevant public authority may grant a private individual the right to improve a section line, but the individual who performs the work becomes an agent of the public authority and the authority remains subject to all statutory provisions applicable to the improvement as if it were constructed by the public authority under its own power. Zueger v. Boehm, 164 N.W.2d 901, 906-907 (N.D. 1969); see also N.D.C.C. § 24-07-03.1 (a person may improve a portion of a section line connecting two parcels of land in which that person has a surface interest, or connecting a parcel of land to a highway, upon approval from the relevant government entity).

² N.D.A.G. 2000-F-02.

damage the property belonging to the landowners except as reasonably necessary to travel the section line.”³

Congressional section lines are public roads in all townships of this state outside the limits of incorporated cities and outside platted and duly recorded townsites, additions, or subdivisions. All such section lines are open for travel to the width of 33 feet on each side of the section line.⁴ Those section lines, unless closed by statutory proceedings, are open for public travel without the necessity of any prior action by a governmental agency, even if the easement has not been improved or surfaced.⁵ However, the adjacent landowner still owns the underlying land subject to a highway easement, and may plow or cultivate an unimproved section line so long as these actions do not obstruct travel.⁶

It generally has been stated that the public easement of passage over a highway includes every kind of travel and communication for the transportation of persons or property that is reasonable and proper.⁷ Section lines are often used for both recreational and non-recreational purposes, including providing farmers with access to their farmland.⁸

Further, the public is not limited in the means by which it may exercise its right to travel on open section line easements. “The easement of the public in a highway is not limited to the particular methods of use in vogue when the easement was acquired, but includes all methods that are later developed, which are assumed to have been contemplated.”⁹ For example, “[a] horse-drawn carriage, a horseback rider, a cyclist, or a pedestrian are equally entitled to the use of the highways with motor vehicles.”¹⁰ Comparatively, when discussing the purposes that could be made of a street in a city, the North Dakota Supreme Court stated:

³ One legal treatise has explained that a traveler is permitted to cause reasonable, minimal damage to the land that results from the act of traveling, such as moving a fallen tree branch that blocks the way or trampling vegetation when passing through. See 39 Am. Jr. 2d Highways, Streets, and Bridges § 223 et. seq. (2008). What particular acts constitute reasonably necessary damage would require me to make findings of facts, which this office is not authorized to do.

⁴ N.D.C.C. § 24-07-03.

⁵ See Small v. Burleigh County, 225 N.W.2d 295, 300 (N.D. 1974).

⁶ See State v. Brossart, 565 N.W.2d 752 (N.D. 1997).

⁷ 39 Am. Jur. 2d Highways, Streets, and Bridges § 231 (2008), see also N.D.A.G. 2004-L-71 (concluding that construction of a hiking or biking trail within an existing right-of-way of a general easement granted for a public highway would be consistent with a general easement for travel).

⁸ Kappenman v. Klipfel, 765 N.W.2d 716, 729 (N.D. 2009).

⁹ 39 Am. Jur. 2d Highways, Streets, and Bridges § 231 (2008).

¹⁰ Matson v. Dawson, 178 N.W.2d 588, 591 (Neb. 1970).

The primary use of 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.¹¹

It follows that use of an unimproved section line within the limits contained in N.D.C.C. § 24-07-03 that has not been closed by public proceedings or limited to certain classes of vehicles by the proper jurisdiction¹² is permitted for any mode of travel including bicycles, motorcycles and all-terrain vehicles that are commonly used for recreation.

Problems may arise, however, because contemporary modes of travel may result in erosion or other cumulative damages. "The use of the public highways is not an absolute right which everyone has, and of which a person cannot be deprived; it is instead a privilege which a person enjoys subject to the control of the State in its valid exercise of its police power."¹³ Further, other limitations on the public's use of a section line easement for travel exist because the landowner abutting an open section line retains ownership of the property within the easement, subject to the public's right to travel.¹⁴ "[T]he rights of the public to section line highways and to streets are easements only, limited to the right to travel and other rights incident thereto, and the owner of the adjoining land owns the fee title to the property."¹⁵

Since the government has "an exclusive right of control over and responsibility for the maintenance of highways,"¹⁶ and this authority may be delegated to political subdivisions

¹¹ Donovan v. Allert, 91 N.W. 441, 443-44 (N.D. 1902) (emphasis supplied).

¹² The class or kind of traffic may be specifically limited by the appropriate governmental entity having jurisdiction under law. See N.D.C.C. § 39-10-21. I have been unable to locate a law limiting travel on an unimproved section line to any particular means of travel.

¹³ State v. Kouba, 319 N.W.2d 161, 163 (N.D. 1982).

¹⁴ Burleigh County Water Res. Dist. v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994).

¹⁵ Small v. Burleigh County, 225 N.W.2d 295, 297 (N.D. 1974).

¹⁶ 39 Am. Jur. 2d Highways, Streets, and Bridges § 74 (2008).

or governmental agencies,¹⁷ it follows that a government may modify, improve, and alter section lines pursuant to its statutory authority. The government may modify section lines to accommodate contemporary modes of travel, but the reasonableness of the modifications is generally a question left to the discretion of the appropriate government authority.

Therefore, it is my opinion that the government agency or entity having jurisdiction over a section line easement may make improvements to the section line easement consistent with its statutory authority and consistent with the public's general right to travel a section line.¹⁸

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.¹⁹

¹⁷ 39 Am. Jur. 2d Highways, Streets, and Bridges § 83 (2008).

¹⁸ Any decision to improve a section line easement should take into consideration other contemporaneous uses of the easement, particularly if the improvement would have a negative impact on current uses such as transporting agricultural equipment. See Burleigh Co. Water Res. Dist. v. Burleigh Co., 510 N.W.2d 624, 628-629 (N.D. 1994) (while the public cannot be deprived of the use of an open section line easement, a county commission has reasonable discretion to approve partial obstructions of the easement).

¹⁹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).