

N.D.A.G. Letter to Tokach (Jan. 24, 1990)

January 24, 1990

Honorable Dick Tokach
House of Representatives
District 53
HCR2, Box 48
St. Anthony, ND 58566

Dear Representative Tokach:

Thank you for your January 15, 1990, letter in which you have raised several questions concerning the trespass laws of this state after having received an inquiry from a constituent. Your constituent claims that a double standard exists in application of the trespass laws between rural and urban properties.

I have enclosed with this letter a copy of the trespass laws as found in N.D.C.C. §§ 12.1-22-03 and 20.1-01-18. N.D.C.C. § 20.1-01-18 prohibits a person from hunting, pursuing, or entering for those purposes, legally posted land belong to another without first obtaining permission for such activities. If a person desires to trap protected fur bearing animals, that person must first obtain written permission of the owner or the operator of the land regardless of whether the land is posted.

N.D.C.C. § 12.1-22-03 sets forth additional trespass penalties. To be guilty of trespass under this section, it first must be proven that the trespasser knew that he was not licensed or privileged to be in or on the property in question. The severity of the offense will then be determined based upon the circumstances surrounding the entry.

Your constituent states in his letter to you that persons entering unposted private property within city limits can be prosecuted for trespass. This statement is not entirely correct. Merely because someone enters unposted property within city limits does not make that person guilty of a criminal offense. No offense is committed when a person walks to my front door without permission. However, if I tell that person to leave my property and that person does not leave, then a criminal offense has been committed.

The state trespass statutes found in N.D.C.C. § 12.1-22-03 require more than just the presence of a person on someone else's property to commit the offense. It must be proven that the alleged trespasser knew that he or she was not authorized to be on that property. In situations in which the alleged trespasser is not within a dwelling, other building, or other "place so enclosed as manifestly to exclude intruders", that person must either be told verbally or by the posting of a sign that entry or continued presence on the property is not permitted. These are the same general requirements that underlie the provisions of N.D.C.C. § 20.1-01-18.

It is certainly possible for a prosecutor to initiate a criminal case against a trespasser on agricultural land under the provisions of N.D.C.C. § 12.1-22-03. If a trespasser has been told by verbal or posted warning that such trespasser is not to be on the property, remaining on that property may subject that person to criminal liability. Prosecutions have occurred in this state under these sections for trespass upon agricultural lands. This is especially true if a person is on agricultural land when not engaged in hunting or trapping activities.

Prosecutors do tend to favor the trespass provisions of N.D.C.C. § 20.1-01-18 in cases where hunting or trapping activities are involved. Although there are more stringent signing requirements under this law, the Game and Fish law provisions contain certain features which may make proof of a violation easier and act as a deterrent for further violations.

N.D.C.C. § 20.1-01-20 provides that if a person has a firearm or other weapon in his possession when entering upon legally posted premises of another without permission, this fact is prima facie evidence that the person entered to hunt or pursue game. In other words, the fact that a person is armed with a firearm while on posted land without permission of the owner will be sufficient, by itself, to establish one of the elements necessary to prove a violation of N.D.C.C. § 20.1-01-18. This provision of law greatly assists a prosecutor in proving a case against an alleged violator.

In addition, N.D.C.C. § 20.1-01-26 imposes an additional penalty of the suspension of hunting or trapping privileges of a violator for up to two years. The violation of N.D.C.C. § 20.1-01-18 requires the court to suspend the defendant's hunting and trapping privileges for a period of at least six months. This additional penalty is an additional deterrent for the entry of a person upon posted land without permission of the owner.

The "prima facie case" provision of N.D.C.C. § 20.1-01-20 and the suspension of hunting and trapping privileges in N.D.C.C. § 20.1-01-26 are not available if a violation of N.D.C.C. § 12.1-22-03 is proven. In fact, a violator of N.D.C.C. § 12.1-22-03 could very well receive, assuming a first offense has occurred, only a small fine or a probation sentence which may serve as small deterrent for further activity by that defendant. Because of these additional penalties and the assistance to a prosecutor in proof of a case, it would appear that N.D.C.C. § 20.1-01-18 may very well be a harsher trespass statute than is found in N.D.C.C. § 12.1-22-03 when agricultural lands have been entered.

You have inquired as to whether N.D.C.C. § 12.1-22-03(2)(b) might be utilized in the prosecution of persons who enter rural fenced land. That section prohibits a person, knowing that he is not licensed or privileged to do so, from entering or remaining any place so enclosed as manifestly to exclude intruders. This section of law has been generally construed to involve an enclosure more substantial than a typical barbed wire fence. Barbed wire fences may be construed as utilized to keep livestock in a property rather than keeping people out of that property. Fences of the type which have generally been found to come within this section include chain link or other fences of similar height or mass which clearly evidence the owner's intent that access to that owner's property is

not permitted. However, a prosecutor may determine that this section may apply depending upon the specific facts and circumstances of the individual case.

I cannot agree with your constituent that the trespass laws of this state are inequitable when applied to rural and urban property. The state laws on the subject apply to both properties equally. However, each of these separate trespass statutes are present to meet differing factual situations and to serve different goals. There is nothing that would prohibit a person hunting on posted land from being prosecuted under N.D.C.C. § 12.1-22-03. However, in that case, a conviction of that offense would not involve suspension of hunting privileges and the resulted deterrent effect of that additional penalty. A county prosecutor will evaluate the facts of each individual case to determine what laws will be applied.

Your constituent has also suggested that all private property be considered legally posted against trespass without a sign being displayed. During the 1989 Legislative Session, a bill was introduced which would have provided for this. That bill was not approved, and in its place, I believe that N.D.C.C. § 12.1-22-03(4) was adopted. The original bill was determined by the relevant legislative committee to be both burdensome for enforcement purposes and potentially unfair. If such a law were passed, anyone entering someone else's property would be considered to be a trespasser. These persons would include friends, neighbors, relatives, stranded motorists, a paperboy, a fuel dealer, or any other person who would happen to enter upon the property of another. A law such as this would be inequitable and its validity when applied to criminal prosecutions could be questioned.

I hope that I have adequately responded to your inquiries. If you have further questions concerning this matter, please feel free to contact me at your convenience.

Sincerely,

Nicholas J. Spaeth

vkk
Enclosure