

LETTER OPINION  
95-L-101

April 24, 1995

Senator David O'Connell  
Route 1, Box 78  
Lansford, ND 58750

Dear Senator O'Connell:

Thank you for your letter asking four questions regarding a fence and corral built on a section line in your district.

In response to your letter, a member of my staff contacted an official in the township where the fence and corral are located. According to that official, the fence lies along an open east-west section line and intersects the corral, which completely obstructs the right-of-way reserved to the public by extending more than thirty-three feet on each side of the section line. See N.D.C.C. ? 24-07-03. The person who built the fence and corral apparently owns the land on both sides of the section line.

First, you ask whether township officials may enter the property and remove these obstructions. Unless closed by the board of county commissioners, congressional section lines outside platted subdivisions or incorporated cities are public roads open to a width of thirty-three feet on each side. N.D.C.C. ? 24-07-03; Burleigh County Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994). Obstruction of a public highway, including an open section line, is a criminal act. N.D.C.C. ? 24-12-02; State v. Silseth, 399 N.W.2d 868 (N.D. 1987). In addition, a board of township supervisors

shall notify the owner of adjacent property to remove any fences not constructed pursuant to subsection 2 of section 24-06-28 within thirty-three feet . . . of the [open] section line . . . . If the owner of the adjacent property fails to remove the fences within thirty days after the notice is given, the . . . board of township supervisors . . . shall remove the fences. The cost of removal must be entered the same as taxes against the

adjacent property and paid in the same manner as taxes.

N.D.C.C. ? 24-06-30 (emphasis added). Under subsection 2 of N.D.C.C. ? 24-06-28, fences may be built "[a]long or across section lines" which have been closed under N.D.C.C. ? 24-07-03 or never opened due to the topography of the land, but they may only be built "across" open section lines if cattle guards and gateways are provided where the fences "cross" the section line. See N.D.C.C. ch. 24-10; Ames v. Rose Township Board of Township Supervisors, 502 N.W.2d 845 (N.D. 1993). Also, "[u]nless the board of county commissioners has acted under Section 24-07-03, N.D.C.C., to establish a road by survey around natural obstacles, the actual . . . section line right of way will not be altered." 1981 Op. Att'y Gen. 207, 211 (emphasis added).

In this case, installing cattle guards and gateways would not make the fence comply with subsection 2 of N.D.C.C. ? 24-06-28 because the fence is built "along" the open section line rather than simply "across" it. Even with these changes, the fence would still divide in half the 66 foot easement reserved to the public under N.D.C.C. ? 24-07-03. In addition, the corral is a non-natural obstruction of the entire easement that cannot be approved by the township. Burleigh County Water Resource Dist., 510 N.W.2d at 628. Thus, unless this section line is properly closed by the county, N.D.C.C. ? 24-06-30 not only authorizes but imposes a duty on the board to enter the property and remove the fence and corral if the property owner does not remove them within 30 days after given notice to do so. A recent North Dakota Supreme Court decision suggests that this duty may be enforced by any affected person because the right of way is completely obstructed. See Burleigh County Water Resource Dist., 510 N.W.2d at 627. Also, a "public servant who knowingly refuses to perform any duty imposed upon him by law is guilty of a class A misdemeanor." N.D.C.C. ? 12.1-11-06.

You also ask whether the township may be sued if someone is injured as a result of the board of township supervisors' failure to remove these obstructions. Townships are no longer immune from liability. Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974). A township can be liable for injuries proximately caused by the negligence, wrongful acts, or omissions of its employees acting in the scope of their employment under circumstances where the employees would be

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personally liable. N.D.C.C. ? 32-12.1-03(1). "Employee" as used in this chapter includes township officers. N.D.C.C. ? 32-12.1-02(3). This liability exists even if an employee acted "within the scope of his employment in a reckless or grossly negligent manner or a willful or wanton manner." Binstock v. Fort Yates Pub. Sch. Dist., 463 N.W.2d 837, 842 (N.D. 1990). A township's potential liability is limited to \$250,000 per person and \$500,000 per occurrence. N.D.C.C. ? 32-12.1-03(2).

You next ask whether township officials who are aware of the obstruction can be held personally responsible for failing to remove the obstruction. Generally, a township must indemnify its employees for injuries proximately caused by acts or omissions occurring within the scope of their employment. N.D.C.C. ? 32-12.1-04(4). However, township employees may be personally liable for injuries they caused when acting either outside the scope of their employment or within the scope of their employment in a reckless, grossly negligent, willful, or wanton manner. See Binstock, 463 N.W.2d at 841. Whether either of these circumstances exist is a question of fact that must be determined on a case by case basis. Because township officials are aware of the location of the fence and corral on the section line, an argument might be made that their failure to remove these obstructions was a grossly negligent, reckless, wanton or willful omission. Regardless, the supervisors' potential criminal liability under N.D.C.C. ? 12.1-11-06 would still exist.

Finally, you ask what potential liability a township faces if it does not remove a fence built along an open section line. Before a township or its employees may be sued as described above, the township or its employees must owe a duty to the injured person. The township has no duty to build or maintain an improved road on a section line. DeLair v. County of LaMoure, 326 N.W.2d 55, 61 (N.D. 1982). However, as described above, N.D.C.C. ? 24-06-30 imposes a duty on township officials to remove the fence and corral as obstructions of an open section line. Thus, if the township's failure to remove the fence and corral, rather than its decision not to improve the section line, proximately causes injuries to people travelling on the section line, the township and its employees may be liable for damages.

Sincerely,

Senator David O'Connell  
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Heidi Heitkamp  
ATTORNEY GENERAL

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