

November 23, 1956 (OPINION)

CITIES

RE: Vacation of Streets

This is in reply to your letter of November 14, 1956, requesting an opinion of this office in regard to the closing of streets in the city of Tioga.

You enclose a sketch of the territory and streets concerned, informing us that the Tioga Park Board has purchased all of the property shown on said sketch excepting portions identified on said sketch as lots 10, 11 and 12, in block 5, and lots 1, 2 and 3 in block 6 as shown on said sketch.

You refer us to section 40-3904 of the 1953 Supplement to the N.D.R.C. of 1943 which provides:

"40-3904. VACATION OF STREETS AND ALLEYS WHERE SEWERS, WATER MAINS, PIPES AND LINES LOCATED; CONDITIONS. No public grounds, streets, alleys or parts thereof over, under, or through which shall have been constructed, lengthwise, any sewers, water mains, gas, or other pipes, or telephone or telegraph lines of the municipality or the municipality's grantees of the right-of-way therefor, shall be vacated unless such sewers, mains, pipes, or lines have been abandoned and are not in use or unless such grantee shall consent thereto, or unless perpetual easements for the maintenance of such sewers, water mains, gas or other pipes, or telephone or telegraph lines have been given."

You state that you assume that by municipality's grantees in this particular case is meant the City of Tioga and not the owner of the property before the property was platted, and ask whether we agree. We would assume that the sewer in this instance was constructed by and is owned by the City of Tioga, as is the usual case with city sewers, however, if a right-of-way to construct the sewer was granted to another entity by the city, and such other entity constructed the sewer, it will under terms of the statute be necessary to obtain the consent of such other entity prior to vacation of such street. If the sewer was constructed by the city or its employees and right-of-way of same has not been granted to another, it will only be necessary to obtain the consent of the city. The only conceivable circumstances under which the former owner of the street right-of-way would be within the protection of this statute would be where the rights of the city or its grantees to the sewer right-of-way had been granted to such former owner.

You inform us that the Tioga Park Board owns the property on both sides of Hanson street from lot 10, block 5 and north and from lot 3, block 6 and north, and that there is no water and sewer dug into said street North of said lot 10, block 5 and said lot 3, block 6. You ask whether said section 40-3904 prevents vacation of that part of Hanson Street which does not have water and sewer dug into it when

the Southern part of Hanson Street does have sewer and water.

It would appear to us that the obvious purpose of said section 40-3904 is to protect the owners of water, sewer, etc. right-of-way from vacation of streets that might affect same, only to the extent to which such vacation could affect such right-of-way. Looking to the terms of the statute, we find that it prohibits vacation of streets or parts of streets, over, under or through which shall have been constructed lengthwise any sewers. The part of the street here considered for vacation does not have any sewers constructed over, under or through it. It is, therefore, our conclusion that said section 40-3904 does not require the consent of the municipality or its grantee as a condition precedent to the vacation of the northern part of Hanson street.

You call our attention to section 40-3905 of the Code requiring a petition signed by all of the owners of the property adjoining the plat to be vacated. You ask whether the owner of the aforementioned lots 10, 11 and 12 in block 5 and lots 1, 2 and 3 of block 6 can be classified as "owners of the property adjoining the Plat to be vacated", which is the north half of Hanson Street. The sketch you enclose shows the lots 10, 11 and 12 of block 5 and lots 1, 2 and 3 of block 6 to be adjoining only the south half of Hanson Street.

It is the opinion of this office that if all that is to be vacated is the north half of Hanson Street, that the owners of the lots 10, 11 and 12 in block 5 and the lots 1, 2, and 3 of block 6 are not owners of property adjoining the plat to be vacated and that it will not be necessary that they sign the petition for vacation.

Note: We are assuming in the above, that no perpetual sewer right-of-way easements have been granted.

LESLIE R. BURGUM

Attorney General