

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1278

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

DeCosta Rickford
Operator's Signature

10/3/03
Date

2003 HOUSE POLITICAL SUBDIVISIONS

HB 1278

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

Ja Costa Rickford
Operator's Signature

10/3/03
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1278

House Political Subdivisions Committee

Conference Committee

Hearing Date: January 24, 2003

Tape Number	Side A	Side B	Meter #
1	X		27.9-52.8
1		X	0.0-15.6
Committee Clerk Signature <i>Mickie Schmidt</i>			2-4-03

Minutes:

TAPE 1: SIDE A:

(27.9) REP. GLEN FROSETH: We will open the hearing on **HB 1278**.

(29.4) REP. KATHY HAWKEN: Testimony in support of HB 1278. There is a concern where the county deals with the roads and where the developer can demand a road. This Bill clarifies exactly who has the authority to do the road when it is necessary.

(30.7) TERRY TRAYNOR; ND ASSOCIATION OF THE COUNTIES: Testimony in support of HB 1278. (See attachment #1) Since 1915 the century code had included that section 240706, that says township and county boards may open a parkway or highway along the lines of any such tracks or track when in the judgment of the board, such parkway or highway is necessary. We don't feel that it's appropriate for an individual landowner to request and receive a private drive which would require condemnation, someone else's property to build it with county funds. We feel that this establishes that and puts the discretion back to it's local road authority

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meet standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/2/03
Date

Page 2

House Political Subdivisions Committee

Bill/Resolution Number HB 1278

Hearing Date: January 24, 2003

and allows them to make those decisions. The Attorney General's office reviewed this and feels that on line 9, the word "open" is a non defined word and not necessary.

(34.9) REP. GLEN FROSETH: For clarification, What's the difference between what's considered a highway, or a public road?

(35.4) TERRY TRAYNOR: When we worked with several state's attorney's in putting this together, they felt the public road was more general statement, better defined. It includes trails, highways and all sorts of roads.

(35.9) REP. GLEN FROSETH: We have a lot of service roads in our area, utilities, access roads, etc... What procedure do they go through to get permission to build those roads?

(36.2) TERRY TRAYNOR: They coordinate with the local road authorities. Basically they secure their own easements.

(37.1) REP. GIL HERBEL: If someone is isolated, surrounded by other peoples land, who would have the authority to where that road may go in to get to that land?

(37.5) TERRY TRAYNOR: I assume it is wherever they could get the right to build the road. It would probably be a defining factor because that to me would be the most difficult thing, because you're talking about crossing someone else's land.

(37.9) REP. GIL HERBEL: On my ranch, I have the river running through it all of the way. I have a good working relationship with the guy who's isolated from the main road. I allow him to drive across my property to get to his. But if someday when I want to fence that off to put cattle on that land, will I be able to get the authority to do that?

(38.8) TERRY TRAYNOR: I don't think this would affect that at all. This would allow that land owner to petition the county to open access if you did restrict it in that way. And then the

Page 3

House Political Subdivisions Committee

Bill/Resolution Number HB 1278

Hearing Date: January 24, 2003

commission would have to determine if it was a benefit to the township or the county to invest the public funds for a single land owner. There are other issues though with that about road that's been used for 20 years, it is difficult for a land owner, even if it is their private land to close that.

(39.8) REP. SALLY SANDVIG: Who's responsible for paying for this, is it townships or is it counties?

(39.8) TERRY TRAYNOR: Who ever the local road authority is, and in an organized township, most often it would be the township in area's where the townships are unorganized, then that would fall through the counties. And that's the issue. The way that the Attorney General has interpreted that we would demand that private roads be built.

(40.9) JON MILL; BURLEIGH COUNTY ENGINEER: Testimony in support of HB 1278.

Our concern on this whole issue is triggered by the State's Attorney General's opinion that in effect said "any person with a parcel of land in petition to the county or township could have a public road to that land. That concerns us greatly.

(44.3) REP. CAROL NIEMEIER: Do real estate developers have any obligations to complete a road over to the public highways?

(44.6) JON MILL: Right now that is the approach that you are taking. It's not necessarily the real estate agent as such, it's the developers.

(45.4) REP. DALE SEVERSON: If you require that these people build the roads for public access or whatever, who's road does it become?

(46.1) JON MILL: Most of these types of situations are happening on a section line. If a developer or anybody builds a road with the minimum standards, the township will take it over and hold it and maintain from that point forward.

Page 4

House Political Subdivisions Committee

Bill/Resolution Number HB 1278

Hearing Date: January 24, 2003

(47.5) KEN YANTES; ND TOWNSHIP OF OFFICERS ASSOCIATION: Testimony n

support of HB 1278. (See attachment #2)

(50.8) REP. DALE SEVERSON: If a political subdivision on one of the bills outside of county land, wouldn't it be a benefit to the township to build that road? At what point is it not a benefit?

(51.4) KEN YANTES: To build a road it costs a lot of money. It depends on the rights of the road, the amount of personal subdivisions that can all be derived from commercial land.

When building a road, the potential income is considered.

TAPE 1: SIDE B:

(4.4) REP. GLEN FROSETH: Any testimony in support of HB 1278? Opposition?

(4.8) CURTIS & MELVIN FISCHER; ST. ANTHONY FARMERS: Testimony in opposition of HB 1278. In the Bill, it says "open section line". We want to talk about the definition of "open". We currently have a part of land, which is like a government survey, which are the section line adjacent or adjoining of property. Due to the terrain of the land, it is impossible and over the past years we have been traveling across the neighbors to get to our property, which we have been denied access to it. We feel that this Bill should state that for agricultural purposes a person should be allowed access to their property because it is our livelihood and income to get to this land. **MELVIN:** The county commissioners back in 1976, provided this land, put cattle guards and gates in for us and in 2000 the Commissioner let them take the cattle guards, lock the gates, which the county bought for us to use. All five County commissioners signed it. And now we're locked out of our land, no way to get to our cattle. It's a

La Costa Rickford
Operator's Signature

10/2/03
Date

Page 5

House Political Subdivisions Committee

Bill/Resolution Number HB 1278

Hearing Date: January 24, 2003

little bit less than the governments survey. This is my bread and butter, it's the only thing I can do.

(7.0) REP. GLEN FROSETH: I understand your concern. Every Bill we here has some type of circumstances that will affect citizens differently. It's our duty as a committee to try to sort out what we feel is the best result for the people of ND. We appreciate your concerns and will certainly take them under consideration.

(7.8) REP. BRUCE ECKRE: Didn't Terry Traynor say that if you had access for 20 years, that you should have access?

(7.9) TERRY TRAYNOR: If it was used for 20 years, it's considered public access.

(8.6) REP. WILLIAM KRETSCHMAR: How far do you have to drive across someone else's land? How large of a tract of land do you want to get to? Is it crop land or pasture? **(8.7)**

MELVIN: A quarter of a mile. 156 acres. 60 acres of crop land, and the rest is grazing. We've been driving it a lifetime.

(9.5) REP. RON IVERSON: And why won't the landowner let you cross it?

(9.6) MELVIN: There's a feud going on.

(10.1) REP. ALON WIELAND: Do you not have a written easement to cross the property that you are now crossing?

(10.5) CURTIS: There was an easement written up, but it was not signed. The landowner did not sign it but his Attorney's have signed it.

(10.8) REP. ALON WIELAND: The landowners Attorney signed it on his behalf. He signed it and you have signed it?

Page 6
House Political Subdivisions Committee
Bill/Resolution Number HB 1278
Hearing Date: January 24, 2003

(10.9) MELVIN: No, it was made to the county. The easement was given to the county, it wasn't given to us. By giving it to Morton County, that made it a public road. It was signed in 1976.

(12.0) REP. GIL HERBEL: Is there any other possible access that you can use?

(12.1) CURTIS: There are other section lines going in, but they're longer distances and the terrain is bad.

(13.4) REP. DALE SEVERSON: Is the section line were used, do you think the county would bring that up to snuff to get you into your property?

(13.5) CURTIS: We have contacted the county already and they deny any work being done on it because they don't have the funding in order to do it.

(14.8) REP. GLEN FROSETH: This committee will certainly take this under consideration.

We'll have to review a few state statutes and state laws that effect open section lines.

We will close the hearing on HB 1278. **(15.6)**

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1278

House Political Subdivisions Committee

Conference Committee

Hearing Date: January 30, 2003

Tape Number	Side A	Side B	Meter #
2	X		25.1-29.4
Committee Clerk Signature <i>Mickie Schmidt</i>			2-11-03

Minutes:

(TAPE 2; SIDE A:)

(25.1) REP. GLEN FROSETH: We will open the hearing for **HB 1278**. Does anyone have any concerns with HB 1278.

(26.7) REP. BRUCE ECKRE: Mr. Fischer will have to do what any of us would have to do if we get into a legal situation, hire an attorney.

(26.9) REP. NANCY JOHNSON: Line 9, the word open may be a concern.

(27.1) REP. BRUCE ECKRE: Rep. Hawkins said she would like that taken out and she was the prime sponsor for it.

REP. ALON WIELAND: I was also asked to have us consider removing the word "such" on line 9 and 11 and put in adjoining. In drawing the diagram, it was demonstrated to me that such would mean all lines around the track and the track adjoining.

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

Page 2

House Political Subdivisions Committee

Bill/Resolution Number HB 1278

Hearing Date: January 30, 2003

(28.0) REP. GLEN FROSETH: Rep. Eckre and Terry Traynor, can you work on an amendment and bring it back tomorrow? We will close the hearing on HB 1278.

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

Lu Costa Richardson
Operator's Signature

10/3/03
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1278

House Political Subdivisions Committee

Conference Committee

Hearing Date: February 6, 2003

Tape Number	Side A	Side B	Meter #
3	X		14.2-21.6
Committee Clerk Signature <i>Mickie Schmidt</i>			3:00 PM 2-20-03

Minutes:

TAPE 3; SIDE A:

(14.2) CHAIRMAN GLEN FROSETH: We will open the hearing on HB 1278.

(14.9) TERRY TRAYNOR; ASSOCIATION OF COUNTIES: (Testimony in support) (See attachment #1- an amendment) Explains the amendment.

(15.9) CHAIRMAN GLEN FROSETH: There's a question on the word "such" on lines 9 & 11. It should be changed to adjoining.

(16.2) TERRY TRAYNOR: By putting "to gain access", it's referring back to the track, such track, as in question, isolated track. So it should stay in there.

(17.0) CHAIRMAN GLEN FROSETH: Any questions?

(17.6) REP. MARY EKSTROM: I WOULD MOVE THE AMENDMENT.

(17.6) REP. ALON WIELAND: I SECOND IT.

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

Page 2

House Political Subdivisions Committee

Bill/Resolution Number HB 1278

Hearing Date: February 6, 2003

(17.6) CHAIRMAN GLEN FROSETH: Any discussion on the amendment? We'll take a voice vote on the amendment. All in favor say I; 14-y; 0-n; amendment carries.

(20.5) REP. MARY EKSTROM: I WOULD MOVE A DO PASS AS AMENDED.

(20.5) VICE-CHAIRMAN NANCY JOHNSON: I SECOND IT.

(20.6) CHAIRMAN GLEN FROSETH: Any discussion? Hearing none, I will have the clerk take the Roll Call Vote; 12-y; 2-n; 0-absent; Carrier: Rep. Wieland.

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/2/03
Date

38283.0101
Title.0200

Adopted by the Political Subdivisions
Committee
February 6, 2003

VR
2/7/03

HOUSE

AMENDMENTS TO HOUSE BILL NO. 1278 Po1 Sub 2-6-03

Page 1, line 9, remove "open"

Page 1, line 11, remove "public road" and overstrike "along the lines of" and insert immediately thereafter "public road to gain access to"

Renumber accordingly

Page No. 1

38283.0101

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

Lu Costa Rickford
Operator's Signature

10/3/03
Date

Date: 2-6-03 3:00 pm

Roll Call Vote #: 4

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1278

House "POLITICAL SUBDIVISION" Committee

Check here for Conference Committee

Legislative Council Amendment Number 38283.0101 0200

Action Taken Do Pass As Amended

Motion Made By Rep. Ekstrom Seconded By Rep. Johnson

Representatives	Yes	No	Representatives	Yes	No
Chairman Glen Froseth	✓				
Vice-Chairman Nancy Johnson	✓				
Mike Grosz	✓				
Gil Herbel	✓				
Ron Iverson	✓				
William E. Kretschmar	✓				
Andrew Maragos		✓			
Dale Severson		✓			
Alon Wieland	✓				
Bruce Eckre	✓				
Mary Ekstrom	✓				
Carol A. Niemeler	✓				
Sally M. Sandvig	✓				
Vonnie Pietsch	✓				

Total (Yes) 12 No 2

Absent 0

Floor Assignment Rep. Wieland

If the vote is on an amendment, briefly indicate intent:

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/2/03
Date

REPORT OF STANDING COMMITTEE (410)
February 10, 2003 8:39 a.m.

Module No: HR-25-2076
Carrier: Wieland
Insert LC: 38283.0101 Title: .0200

REPORT OF STANDING COMMITTEE
HB 1278: Political Subdivisions Committee (Rep. Froseth, Chairman) recommends
AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS**
(12 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1278 was placed on the
Sixth order on the calendar.

Page 1, line 9, remove "open"

Page 1, line 11, remove "public road" and overstrike "along the lines of" and insert immediately
thereafter "public road to gain access to"

Renumber accordingly

(2) DESK, (3) COMM

Page No. 1

HR-25-2076

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

LaCosta Rickford
Operator's Signature

10/3/03
Date

2003 SENATE POLITICAL SUBDIVISIONS

HB 1278

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

Ja Costa Rickford
Operator's Signature

10/3/03
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **HB 1278**

Senate Political Subdivisions Committee

Conference Committee

Hearing Date **March 14, 2003**

Tape Number	Side A	Side B	Meter #
1	X		1585 - 4614
Committee Clerk Signature <i>Shirley Borg</i>			

Minutes:

CHAIRMAN COOK called the committee to order. All members (6) were in attendance.

CHAIRMAN COOK opened the hearing on HB 1278, relating to establishment of public road access to isolated tracts of land.

REPRESENTATIVE KATHY HAWKEN, District 46, SE Fargo, ND introduced HB 1278.

This bill deals with roads and who should decide where they are when there is a debate about that. This bill has been brought about by a number of counties and has become somewhat of a problem with developers. She referred the explanation of the bill to Terry Traynor.

Terry Traynor, Association of Counties, spoke in favor of HB 1278. (See attached testimony)

Discussion Tape 1, Side A, Meter # 1937 - 2440.

Ken Yantes, ND Township Officers Association, testified in support of HB 1278. (See attached testimony)

Testimony opposed to HB 1273.

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

Lu Costa Rickford
Operator's Signature

10/3/03
Date

Page 2

Senate Political Subdivisions Committee

Bill/Resolution Number HB 1278

Hearing Date March 14, 2003

Melvin Fischer, Rancher in Morton Co. testified against HB 1278. (Passed out information-see attached) He and his son, Curtis, ranch in Morton county and have a landlocked problem. Mr. Fischer stated that in 1976 an easement was drawn up but was never signed by the states attorney, so now the easement is not valid so they no longer have access to their landlocked land. They have a section line, but it is not travelable. He is against this bill because he feels it would affect access to his property.

SENATOR COOK told Mr. Fischer that HB 1278 would not have any effect on his problem and the committee would let him know if it did affect access to his land.

No further testimony.

CHAIRMAN COOK closed the hearing on HB 1278.

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1278

Senate Political Subdivisions Committee

Conference Committee

Hearing Date March 20, 2003

Tape Number	Side A	Side B	Meter #
2		X	2316 - End
3	X		0-End
4	X		0-886
Committee Clerk Signature <i>Shirley Borg</i>			

Minutes:

CHAIRMAN COOK called the committee to order. All members (6) present.

CHAIRMAN COOK asked the committee to go to HB 1278. He handed out some testimony from attorney generals office and said LeaAnn from the AG's office was there to speak to them.

(See attached)

LeaAnn Schnelder, Attorney Generals Office. This bill would change the intention made in our opinion because the opinion was based on the interpretation of the North Dakota law made by the North Dakota Supreme Court. If we are going to change the law by this bill, then the opinion would be different but that is not a problem. How this occurred was in 2002, we asked for an opinion, there was a tracked of land and there was not access to it and the question was that whether under the law someone had to provide access to this property, the county or the township. In doing the research for this opinion she came across a ND Supreme Court case which was issued in 1970 and interprets the section of the law amended by this bill and this ND

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

Lu Costa Rickford
Operator's Signature

10/3/03
Date

Page 2
Senate Political Subdivisions Committee
Bill/Resolution Number HB 1278
Hearing Date March 20, 2003

Supreme Court case seemed lost because it had never been sighted by their office and any other cases. What the statute says is that 24-07-06 says on its face that if a tract of land is purchased that is less than the governmental survey thereof which the court interpreted it to mean one quarter section (160 acres), if you do not have access to that tract then the county or township may provide that access by a cartway or highway to get there. In 1970 when the ND Supreme Court interpreted this section, they were faced with a factual situation where a person had a 40 acre tract of land and had no means to it as it was surrounded by private property. The ND Supreme Court determined because they had no access that this statute required the county or township to provide access, not may, you had to provide access. This 2002 Attorney Generals opinion that we issued referred to this court case and concluded that you have to provide access when the tract of land is under 160 acres. This became more public and raised this issue with the association of counties and townships that we need to change this statute to make it clear that the townships and counties don't have to provide access in the manner that the supreme court says they do because they do not think that is what was intended by this statute. The key changes made in this bill are on Lines 13 of the bill. The purpose of this change is to ensure that next time the North Dakota Supreme Court looks at this it will clarify it.

SENATOR COOK said that if he understood her the supreme court ruling was for forty acres that was not on the section line.

LeaAnn answered that the supreme court case did not touch upon the word section line. She thinks that adding the word section line on line 9 of the bill then it says section lines can be traveled by anyone anytime.

La Costa Rickford
Operator's Signature

10/2/03
Date

Page 3

Senate Political Subdivisions Committee

Bill/Resolution Number HB 1278

Hearing Date March 20, 2003

SENATOR COOK said there is other language that deals with section lines and what political subdivisions can do when the section line is not traversable.

LeaAnn answered there is no law currently that requires the county or township to improve a section line so that you can travel it. What the law does say is that section lines can be traveled by people unless they are formally closed. The statute says that the section lines are open to thirty three feet on each side of the center line and that people should not obstruct that area to the extent that it would inhibit public travel.

SENATOR COOK said because of existing law we have landowners all over the state that have quarter of sections of landlocked land that they can not access by the section line but there have been other arrangements made either through easements or what ever else to allow them access to their land. If we pass this bill what effect do we have on these type of people who don't know we are talking about this and their ability to continue access to their land or especially to be able to sell the land to someone else who will have continued access.

LeaAnn said if this bill is amended as indicated, that person would not be guaranteed access to their property.

SENATOR COOK asked the committee if they understood it now. He said in his mind the word section line has to come off. There are a lot of people out there who have quarter sections of land who some how have a guaranteed access to it. He is afraid if HB 1278 is passed with the words or section line in it, what these people are guaranteed today will be gone if they ever come to the point of trying to sell that land and it would certainly narrow down the number people who might be interested in buying that quarter of section of land.

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

Page 4
Senate Political Subdivisions Committee
Bill/Resolution Number HB 1278
Hearing Date March 20, 2003

Terry Traynor, Association of Counties, agreed with Chairman Cook that it isn't that important that or section line be in there. As LeaAnn explained public road isn't defined and really it is any traversable, cartway, pathway, roadway, highway that the county is responsible for, technically if it is on a section line the county is responsible for it, so if you take that out he does not think it will harm the bill.

LeaAnn said if you pass the bill just as it is except by removing or section line that isn't guaranteeing that people will continue to have access.

SENATOR COOK said let me ask you this, does this bill take away access that has it right now?

LeaAnn replied it would remove the requirement that the county has to provide access. The county could decide not to.

SENATOR COOK ask Terry Traynor if he was involved in the authoring of this legislation.

Terry answered yes.

SENATOR COOK ask if there was any intent to change any of the access road requirements right now for section line land.

Terry answered no there was no intent to change the access of section lines and no intent to change any access of existing roads. This was just dealing with the establishment of roads off section lines to isolated tracts We are just trying to restore the understanding that we thought was there.

SENATOR COOK asked Terry Traynor if he had a problem with taking or section line out of the bill.

Terry Traynor answered no he did not.

Page 5

Senate Political Subdivisions Committee

Bill/Resolution Number HB 1278

Hearing Date March 20, 2003

SENATOR JUDY LEE asked are you assured that your goal of keeping everything where it is suppose to be is accomplished by deleting or section line?

SENATOR COOK answered he knows that is what the intent of it is.

SENATOR JUDY LEE moved we amend HB 1278 to delete on line 9, or section line.

SENATOR SYVERSON seconded that motion.

Roll call vote: Yes 6 No 0 Absent 0

SENATOR JUDY LEE moved DO PASS AS AMENDED

SENATOR CHRISTENSON seconded the motion

Roll call Vote: Yes 6 No 0 Absent 0

Carrier: **SENATOR COOK**

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

38283.0201
Title.0300

Adopted by the Political Subdivisions
Committee

March 20, 2003


3-25-03

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1278

Page 1, line 9, remove "or section line"

Renumber accordingly

Page No. 1

38283.0201

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

REPORT OF STANDING COMMITTEE (410)
March 26, 2003 8:23 a.m.

Module No: SR-54-5759
Carrier: Cook
Insert LC: 38283.0201 Title: .0300

REPORT OF STANDING COMMITTEE
HB 1278, as engrossed: Political Subdivisions Committee (Sen. Cook, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1278
was placed on the Sixth order on the calendar.

Page 1, line 9, remove "or section line"

Renumber accordingly

(2) DESK, (3) COMM

Page No. 1

SR-54-5759

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

2003 TESTIMONY

HB 1278

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

1-24-03

#1-

**TESTIMONY TO THE
HOUSE POLITICAL SUBDIVISIONS COMMITTEE**

Prepared January 24, 2003 by
Terry Traynor, NDACo Assistant Director
North Dakota Association of Counties

REGARDING HOUSE BILL NO. 1278

Mr. Chairman and members of the committee, thank you for the opportunity to present a very brief explanation of the problem that has arisen as a result of a supreme court decision and a subsequent Attorney General's opinion. House Bill 1278 is an attempt to solve this problem and for this reason our Association strongly supports its passage.

Since at least 1915, the Century Code has included section 24-07-06 that says township and county boards "*may open a cartway or highway along the lines of any such tract or tracts when in the judgment of the such board such cartway or highway is necessary...*"

This section has historically been viewed by local boards to be permissive and allowing the boards to look at township or county wide benefit to determine if building a road to a privately held tract, across another person's private land was an appropriate investment of public funds.

The State Supreme Court ruled that this was not a discretionary decision, but in a case where no access existed, the local board must act to provide access. Since this ruling was made in 1970 regarding a specific situation in Cass County, Attorney General's opinions left local road authorities with the decision-making authority. However, in 2002, the Attorney General reversed previous opinions and local government now appears to be obligated to build roads to private land – across private land held by others – for the benefit of a single landowner.

The Association of Counties has been asked by its Legislative Committee to seek the introduction of a bill clearly establishing the authority of local road authorities to consider township or countywide benefit in making these decisions. House Bill 1278 is that bill, and we urge the committee to give it a Do Pass recommendation.

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

T. Costa Rickford
Operator's Signature

10/2/03
Date

Attachment A**Document 1 of 1**

North Dakota Primary Law/North Dakota Judicial Decisions/SUPREME COURT OF NORTH DAKOTA/1970/177 N.W.2d 547:Hector v. Board of Township Supervisors::June 1, 1970

Fred M. Hector, Jr., Plaintiff and Appellant v. Board Of Township Supervisors Of Stanley Township, Defendant and Respondent
 177 N.W.2d 547; 1970 N.D. LEXIS 117
 Civil No. 8605
 June 1, 1970
 Supreme Court of North Dakota
 Erickstad, Paulson, Knudson, Teigen, J. Opinion of the Court by Strutz, J.

Disposition
 REVERSED AND REMANDED.

Counsel Wattam, Vogel, Vogel & Peterson, Fargo, for Plaintiff and Appellant.
 Jacque Stockman, Fargo, for Defendant and Respondent.

Opinion**Editorial Information: Prior History**

Appeal from the District Court of Cass County, the Honorable Roy K. Redetzke, Judge.

Opinion by: STRUTZ

{177 N.W.2d 548} The plaintiff purchased a tract of forty acres of land described as the Northeast Quarter of the Southwest Quarter (NE 1/4 SW 1/4) of Section 24, Township 138 North, Range 49 west of the Fifth Principal Meridian, in Cass County, North Dakota. The plaintiff, in a petition filed with the board of township supervisors of Stanley Township, asserts that the Wild Rice River flows across and divides this tract approximately in half. In a stipulation of agreed facts and procedural history signed {177 N.W.2d 549} by the attorneys for the respective parties for the purpose of this appeal, the parties stipulate that on March 22, 1968, the plaintiff purchased the property above described and that "The Wild Rice River prevents access to this tract of land from the east. On the north, west and south sides it is surrounded by lands owned by other {1970 N.D. LEXIS 2} landowners. There is no public road which touches upon this tract of land."

The stipulation further states that the plaintiff has been unable to gain access to this tract by purchase of an easement from one of the adjoining landowners in order to gain access to the isolated portion of his land from the public road on the west edge of Section 24, nor has he been able to sell the tract to such adjoining landowner; that the plaintiff has been required to pay taxes on this tract, but he has been unable to use it for any purpose.

After acquiring the land, the plaintiff petitioned the board of township supervisors of Stanley Township to open a cartway from the public road over the land of the adjoining owner, as authorized by Section 24-07-06, North Dakota Century Code. The matter came on for hearing before the township board, and thereafter the plaintiff received the following letter from the clerk of said board:

"At the regular meeting of Stanley township board held in the Farmers Elevator office at 9 o'clock P.M. on May 13, 1969, it was the unanimous decision of the board - declining any right of way on the land rented by Anton Rutten, according to your request."

The plaintiff {1970 N.D. LEXIS 3} duly filed his notice of appeal from such decision of the township board to the district court of Cass County. The township board, through its attorney, moved to dismiss the appeal on the ground that the court lacked jurisdiction over the subject-matter; that the determination of necessity and expedience for opening such cartway is a legislative power not subject to judicial review, notwithstanding the apparent right of appeal as found in Section 24-07-22, North Dakota Century Code.

The motion to dismiss the appeal came on for hearing before the Honorable Roy K. Redetzke, one of the judges of the district court of Cass County, on July 3, 1969. The court issued its memorandum opinion stating that the motion to dismiss would be granted as a motion to strike the cause from the appeal record of the district court, and ordered the matter stricken. From this order, the plaintiff has appealed to this court.

Section 24-07-06, North Dakota Century Code, under the provisions of which the plaintiff filed his petition for a cartway, provides:

"Whenever any tract of land is surveyed or sold in tracts less than the original subdivision as established by the government survey thereof, so that (1970 N.D. LEXIS 4) any part thereof does not touch upon a public road so as to allow the owner of such tract access to a public highway, the board of county commissioners or board of township supervisors, upon petition of such owner, may open a cartway or highway along the lines of any such tract or tracts when in the judgment of such board such cartway or highway is necessary, but no such cartway or highway shall exceed two rods in width unless in the judgment of such board a roadway of such width shall not be sufficient to accommodate the travel thereon."

The first question to be determined on this appeal is whether the above section of law would apply in this case. There is nothing in the record before us which establishes the size of the tracts of land in the original subdivision fixed by the Government survey. However, under the United States Public Lands Act, Title 43, United States Code Annotated, patents to public lands generally were issued for tracts of 160 acres. We therefore believe that this court may take judicial notice of (177 N.W.2d 550) the fact that the tract in question, being a forty-acre tract, is less than the original subdivision contained in the Government survey. The stipulated (1970 N.D. LEXIS 5) facts show that this forty-acre tract is bordered on the north, west, and south by lands belonging to others; that the Wild Rice River prevents access to this land from the east; and that there is no public highway which touches upon this particular tract.

We therefore find that the statute providing for the establishment of a cartway to land sold in tracts less than the original subdivision set by the Government survey, which land does not touch a public road so as to allow the owner access thereto, is applicable to the tract in question. The plaintiff therefore is permitted to make application for a cartway under the provisions of this statute.

The next question for our determination is whether Section 24-07-22, North Dakota Century Code, which provides for an appeal by any person who feels aggrieved by any decision of the board of township supervisors in laying out or in refusing to lay out a cartway, is constitutional. The trial court held that this statute is unconstitutional on the ground that it delegates legislative authority to the courts. It found that the law gives to the township board the right to determine, in its judgment, whether the cartway applied for was necessary (1970 N.D. LEXIS 6) (Sec. 24-07-06, N.D.C.C.); and it further held that since the determination of necessity for such cartway is to be made "in the judgment of such board," such determination is a legislative function to be performed by the township board, and that giving the courts the authority to pass upon such determination on appeal is an unlawful delegation of legislative power, and therefore unconstitutional, citing City of Carrington v. Foster County, 166 N.W.2d 377 (N.D. 1969).

Every statute enacted by the Legislative Assembly is presumed to be constitutional, and will be construed, if possible, as valid. Anderson v. Peterson, 78 N.D. 949, 54 N.W.2d 542; International Printing Pressmen and Assistants Union v. Meler, 115 N.W.2d 18 (N.D. 1962); Menz v. Coyle, 117 N.W.2d 290 (N.D. 1962).

In considering the constitutionality of a statute, every reasonable presumption in favor of its validity will be adopted. Verry v. Trenbeath, 148 N.W.2d 567 (N.D. 1967).

The determination of whether the statute in question is constitutional will depend, we believe, upon whether the decision of the board deals with policy or with facts. If the issue of necessity deals with policy, the question clearly would be (1970 N.D. LEXIS 7) legislative, and the courts may not substitute their judgment for that of the township board. If, on the other hand, the determination of necessity for a cartway depends upon facts, an appeal will lie, but the scope of our review on such appeal from the findings of the township board is limited to determining whether there is substantial evidence to support the findings on the question of necessity. If there is substantial evidence to support the findings of the board, courts will not substitute their judgment for that of the township board. It is only when the determination made by the board clearly is arbitrary, capricious, or unreasonable that courts will disturb such decision on appeal.

We find that the statute under consideration requires the granting of a cartway if there is no other means of access to a tract of land which was surveyed or sold in tracts less than the original subdivision as established by the Government survey. Where the board makes a determination on such issue, its determination of the facts presented may be appealed. On such appeal, as pointed out above, courts will follow the view that the determination of the board will not be overturned unless it is found (1970 N.D. LEXIS 8) to be arbitrary, capricious, or unreasonable. Application of Otter Tail Power Co., 169 N.W.2d 415 (N.D. 1969); Application (177 N.W.2d 551) of Northern States Power Co., 171 N.W.2d 751 (N.D. 1969).

A careful search of the record in this case discloses that there is no evidence to show the basis for the decision of the township board. Whether any evidence at all was presented before the board is not known. If evidence was presented, it was made a part of the record. We concede that the township board has the power, in the exercise of its judgment, to approve on reasonable terms and conditions, or to deny the plaintiff's application for a cartway if there is some other possible means of access to the tract in question. However, such decision on the question of necessity may not be arbitrary, capricious, or

unreasonable. If the rule were otherwise, the township board would be able to deny an application for a cartway where there was no other means of access merely because the board members did not like the applicant's politics or his religion or the color of his hair. Such determination clearly would be arbitrary, capricious, and unreasonable.

reasons stated in this opinion, the {1970 N.D. LEXIS 9} order of the district court treating the defendant's motion to dismiss plaintiff's appeal as a motion to strike the cause from the records of the district court and ordering the appeal stricken, and declaring that the appeal provisions of Chapter 24-07 of the North Dakota Century Code are an unconstitutional delegation of legislative power to the courts, is reversed and the case is remanded to the district court with instructions to return the matter to the township board of Stanley Township for the purpose of allowing the parties to submit evidence for and against the granting of the application for a cartway and for a determination by the township board on such application, based upon the record made thereof.

© 2002 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

<http://127.0.0.1:49152/mbPrint/6a984c7e.htm>

1/8/2003

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

Attachment B

FORMAL OPINION
2002-F-01

DATE ISSUED: January 4, 2002

REQUESTED BY: Mary K. O'Donnell
Rolette County State's Attorney

QUESTIONS PRESENTED

I.

Whether observation wells and water lines owned by the Turtle Mountain Band of Chippewa and located on the 33-foot section line easement constitute obstructions that must be removed to permit development and use of the section line as a public right-of-way, pursuant to N.D.C.C. §§ 24-07-03 and 24-06-28.

II.

Whether a board of township supervisors or a county commission has the duty to construct a road on or off a section line for the purpose of providing access to private property by the owner of that property.

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that the observation wells and water lines located on the 33-foot section line easement and owned by the Turtle Mountain Band of Chippewa must be removed to permit development and use of the section line as a public right-of-way only if and to the extent they effectively deprive the public of the ability to travel on the section line.

II.

It is my further opinion that a board of township supervisors or a county commission has the duty to construct a road on or off a section line for the purpose of providing access

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

FORMAL OPINION 2002-F-01
January 4, 2002
Page 2

to private property by the owner of that property, if the property meets the requirements of N.D.C.C. § 24-07-06.

ANALYSES

I.

In North Dakota, congressional section lines located outside the limits of incorporated cities and outside properly recorded platted townsites, additions, or subdivisions are public roads and are open for public travel to the width of 33 feet on each side of the section lines. N.D.C.C. § 24-07-03. "No person may place or cause to be placed any permanent obstruction . . . within thirty-three feet . . . of any section line, unless written permission is first secured from the board of county commissioners or the board of township supervisors, as the case may be." N.D.C.C. § 24-06-28(1).

Your letter indicates the Turtle Mountain Band of Chippewa purchased a strip of land along the south edge of a section line and developed three water wells placed just south of the 33-foot section line easement. The observation wells are located on the 33-foot section line easement, as are the water lines. You indicate that this strip of land is not within the boundaries of the Turtle Mountain Indian Reservation, nor does it appear to be trust land, or land that is considered Indian country. Thus, the fact that the lands adjoining the section line are owned by the Turtle Mountain Band of Chippewa does not alter the analysis because this land is not subject to tribal jurisdiction. See 18 U.S.C. § 1151.

The extent to which the observation wells and water lines obstruct travel on the section line is relevant in determining whether they must be removed to permit development and use of the section line as a public right-of-way. Burleigh County Water Resource District v. Burleigh County of North Dakota v. Ternes, 510 N.W.2d 624 (N.D. 1994).

A landowner abutting an open section line retains ownership of the property within the easement, subject to the public's right to travel. Small v. Burleigh County, 225 N.W.2d at 297. Compare Hjelle v. J.C. Snyder & Sons, 133 N.W.2d 625, 629 (N.D. 1965) (landowner retains ownership of property included in highway easement). The public's easement is limited to the right to travel, and does not include an absolute right to an object-free zone for the complete length and width of the section line. In Hjelle, we held that a highway right of way is not "obstructed" when a placement did not impede the public's right of passage. 133 N.W.2d at 630. We recently held that cattle guards or gateways do not have to be

FORMAL OPINION 2002-F-01
January 4, 2002
Page 3

sixty-six feet wide to comply with NDCC 24-07-03, when approved by the board. Ames v. Rose Township Board of Township Supervisors, 502 N.W.2d 845, 850 (N.D. 1993). Only when an obstruction effectively deprives the public of the ability to travel on an open section line is their right to travel violated.

Id. at 628. Thus, it is my opinion the observation wells and water lines located on the 33-foot section line easement must be removed to permit development and use of the section line as a public right-of-way only if and to the extent they effectively deprive the public of the ability to travel on the section line.

II.

Three statutes address when the county or township may have a duty to construct a road to provide access to private property.

Two of those sections are N.D.C.C. §§ 24-06-11 and 24-07-03. Section 24-06-11, N.D.C.C., provides:

Whenever a township constructs a ditch or drain in connection with road building, and such ditch, drain, or road interferes with the ingress or egress of any owner of adjoining land, the township shall install crossings at such point or points as will afford the owner or owners of the premises suitable ingress thereto or egress therefrom.

It is my understanding that the facts in this case do not involve the construction of a ditch or drain in connection with road building by a township; therefore, this section of the law is not applicable.

Under N.D.C.C. § 24-07-03, a board of county commissioners may close a section line or portion thereof if the section line is intersected by an interstate highway causing the section line to be a dead end, "providing the closing of the dead end section line does not deprive adjacent landowners access to the landowners' property." It is my understanding that the facts in this case do not involve the closing of a section line; therefore, this section of the law also is not applicable.

The only other statute imposing a duty on a county or township to construct a road to provide access to private property is N.D.C.C. § 24-07-06. That law provides:

Whenever any tract of land is surveyed or sold in tracts less than the original subdivision as established by the government survey thereof, so

that any part thereof does not touch upon a public road so as to allow the owner of such tract access to a public highway, the board of county commissioners or board of township supervisors, upon petition of such owner, may open a cartway or highway along the lines of any such tract or tracts when in the judgment of such board such cartway or highway is necessary, but no such cartway or highway may exceed two rods [10.06 meters] in width unless in the judgment of such board a roadway of such width is not sufficient to accommodate the travel thereon.

The North Dakota Supreme Court has determined that this section of the law requires a township board to provide a means of access to a tract of land which was surveyed or sold in tracts less than the original government subdivision if there is no other means of access. Hector v. Board of Township Supervisors of Stanley Township, 177 N.W.2d 547 (N.D. 1970). In the Hector case, the plaintiff was attempting to gain access to 40 acres of land he had purchased, to which he had no means of access. The Court stated:

[U]nder the United States Public Lands Act, Title 43, United States Code Annotated, patents to public lands generally were issued for tracts of 160 acres. We therefore believe that this court may take judicial notice of the fact that the tract in question, being a forty-acre tract, is less than the original subdivision contained in the Government survey. The stipulated facts show that this forty-acre tract is bordered on the north, west, and south by lands belonging to others; that the Wild Rice River prevents access to this land from the east; and that there is no public highway which touches upon this particular tract. We therefore find that the statute providing for the establishment of a cartway to land sold in tracts less than the original subdivision set by the Government survey, which land does not touch a public road so as to allow the owner access thereto, is applicable to the tract in question. The plaintiff therefore is permitted to make application for a cartway under the provisions of this statute.

.....

We find that the statute under consideration requires the granting of a cartway if there is no other means of access to a tract of land which was surveyed or sold in tracts less than the original subdivision as established by the Government survey. Where the board makes a determination on such issue, its determination of the facts presented may be appealed. On such appeal, as pointed out above, courts will follow the view that the determination of the board will not be overturned unless it is found to be

Lu Costa Rickford
Operator's Signature

10/3/03
Date

FORMAL OPINION 2002-F-01
January 4, 2002
Page 5

arbitrary, capricious, or unreasonable. Application of Otter Tail Power Co., 169 N.W.2d 415 (N.D. 1969); Application of Northern States Power Co., 171 N.W.2d 751 (N.D. 1969).

... We concede that the township board has the power, in the exercise of its judgment, to approve, upon reasonable terms and conditions, or to deny the plaintiff's application for a cartway if there is some other possible means of access to the tract in question. However, such decision on the question of necessity may not be arbitrary, capricious, or unreasonable. If the rule were otherwise, the township board would be able to deny an application for a cartway where there was no other means of access merely because the board members did not like the applicant's politics or his religion or the color of his hair. Such determination clearly would be arbitrary, capricious, and unreasonable.

Hector at 550-551. Thus, it is my conclusion that whether the county or the township is required to provide access to private property in this case depends upon whether the factual requirements of N.D.C.C. § 24-07-06 are met.

It is my further opinion that if N.D.C.C. § 24-07-06 does apply, the duty to provide the means of access will fall upon whichever entity (i.e., the county commission or the township board of supervisors) has jurisdiction under N.D.C.C. § 24-07-05 (generally, the township board of supervisors in organized townships and the county commission in unorganized townships).

EFFECT

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 questions presented are decided by the courts.

Wayne Stenehjem
Attorney General

Assisted by: Lea Ann Schneider
Assistant Attorney General

vkk

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

1-24-03

#2

Testimony on HB(278) North Dakota Township Officers Ass'n
Prepared by Ken Yantes

Mr. Chairman and Members of the House Political Subdivisions Committee.

My name is Ken Yantes and I represent the North Dakota Township Officers Association. On the 15th of January, 12 members of our state board of directors met and were made aware of HB1278. After due consideration, they directed me to seek an affirmative vote on HB1278.

Road building is a very costly thing and a township has limited funding at their disposal for this purpose. However, if the governing body of a county or township feels that a road building project is necessary and that it is of sufficient benefit to them as a whole, the board felt that it should have the authority to proceed. The board also felt that the decision to build a road should rest with the entity that has to pay for it.

Mr. Chairman and committee members, there is a big difference between providing access to a piece of property and building a road to it. When a piece of property is located a long way off the public road system or an open section line, building a road to it could present a burden not easily recoupable by the taxpayers in the township. In the Devils Lake area where flood waters have over run the shore line residents, many houses have been moved to higher ground in nearby townships. Creel Township, located Northwest of town, has been asked to build many miles of access roads and has no funds to do so. How can the township officers tell a small tract land owner that he must give up a large part of what he thought was his yard to allow his neighbor to gain access to adjoining property? Real-estate companies continue to tell property buyers that the townships must provide roads. With what? Does this sound like an unfunded mandate? We need the wording in HB1278 on line 13 to give us the flexibility to decide what is beneficial to the whole entity.

Please vote for passage of HB1278.

Same
testimony
given to
Senate

La Costa Rickford
Operator's Signature

10/3/03
Date

17

#1 2-6-03

3:00pm

Proposed Amendments to House Bill No. 1278

Page 1, line 9, remove "open"

Page 1, line 11, overstrike "along the lines of" and insert immediately thereafter "to gain access to"

Renumber accordingly

The amendment above would result in the bill reading as follows:

1 A BILL for an Act to amend and reenact section 24-07-06 of the North Dakota Century Code,
2 relating to establishment of public road access to isolated tracts of land.

3 BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

4 SECTION 1. AMENDMENT. Section 24-07-06 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 24-07-06. ~~Highway or cartway~~ Public road may be established to give access to
7 highway. Whenever any tract of land is surveyed or sold in tracts less than the original
8 subdivision as established by the government survey thereof, so that any part thereof does not
9 touch upon a public road or section line so as to allow the owner of such tract access to a
10 public highway, the board of county commissioners or board of township supervisors, upon
11 petition of such owner, may open a ~~cartway or highway~~ public road ~~along the lines of~~ to gain access to any such
12 tract or tracts when in the judgment of such board such ~~cartway or highway~~ public road is
13 necessary and that it is of sufficient benefit to the county or township as a whole, but no such
14 ~~cartway or highway~~ public road may exceed two rods [10.06 meters] in width unless in the
15 judgment of such board a roadway of such width is not sufficient to accommodate the travel
16 thereon.

Prepared at Committee Request
January 31, 2003, by the
North Dakota Association of Counties

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

Lu Costa Rickford 10/3/03
Operator's Signature Date

**TESTIMONY TO THE
SENATE POLITICAL SUBDIVISIONS COMMITTEE**

Prepared March 14, 2003 by
Terry Traynor, NDACo Assistant Director
North Dakota Association of Counties

REGARDING ENGROSSED HOUSE BILL NO. 1278

Mr. Chairman and members of the committee, thank you for the opportunity to present a very brief explanation of the problem that has arisen as a result of a supreme court decision and a subsequent Attorney General's opinion. Engrossed House Bill 1278 is an attempt to solve this problem and for this reason our Association strongly supports its passage.

Since at least 1915, the Century Code has included section 24-07-06 that says township and county boards "*may open a cartway or highway along the lines of any such tract or tracts when in the judgment of the such board such cartway or highway is necessary...*"

This section has historically been viewed by local boards to be permissive and allowing the boards to look at township or county wide benefit to determine if building a road to a privately held tract, across another person's private land was an appropriate investment of public funds.

The State Supreme Court ruled that this was not a discretionary decision, but in a case where no access exists, the local board must act to provide access. Since this ruling was made in 1970 regarding a specific situation in Cass County, Attorney General's opinions left local road authorities with the decision-making authority. However, in 2002, the Attorney General reversed previous opinions and local government now appears to be obligated to build roads to private land – across private land held by others – for the benefit of a single landowner.

The Association of Counties has been asked by its Legislative Committee to seek the introduction of a bill clearly establishing the authority of local road authorities to consider township or countywide benefit in making these decisions. Engrossed House Bill 1278 is that bill, and we urge the committee to give it a Do Pass recommendation.

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

T. Costa Rickford
Operator's Signature

10/2/03
Date

Morton County State's Attorney's Office

Morton County Courthouse
210 Second Avenue NW
Mandan, ND 58554
701-667-3350
Fax: 701-667-3323

January 28, 2003

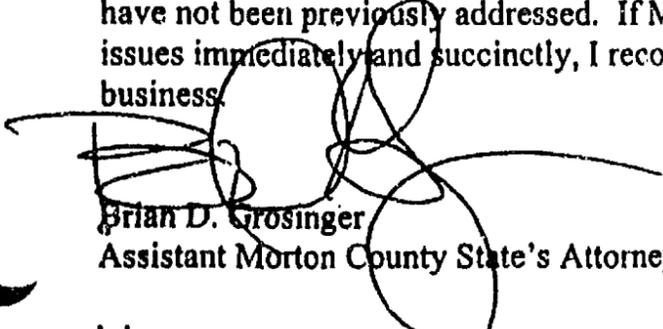
Morton County Commission
Commissioner Richard Tokach, Chair
Commissioner Robert Christensen
Commissioner James Boehm
Commissioner Matt Erhardt
Commissioner Richard Bendish

Subject: Melvin and Antonia Fischer

This letter is in anticipation of Mr. Fischer's appearance before the Morton County Commission per the agenda for February 4, 2003. As a matter of governmental importance, the citizens need to have access to meetings, and need to have the opportunity to be heard. At the same time, that opportunity is not unlimited. Further, it must be recognized that the time and attention of the County Commissioners and other Government officials is limited.

I predict that Mr. Fischer will once again bring up the issue of the county constructing a road to his one specific pasture. Over the years this has been debated at great length, and has been concluded to the satisfaction of everyone, except the Fishers. The time that the Commission spends devoted to continually "rehashing" this issue is time the Commission could spend serving the needs of the rest of Morton County.

In light of this concern, my recommendation for the upcoming meeting is that the Chair inquire of Mr. Fisher what his purpose is for appearing on the agenda. If indeed, as I predict it is the same problem, the Chair may inquire if Mr. Fisher has any new information, or other issues that have not been previously addressed. If Mr. Fischer cannot demonstrate new information or new issues immediately and succinctly, I recommend the chair end his appearance, and move to other business.


Brian D. Grosinger
Assistant Morton County State's Attorney

bdg

cc: Paul Trauger, Auditor
Allen Koppy, State's Attorney

Incident Report
VANDALISM

HB 1278

Incident Supplemental ReportReporting officer: Duane Snider
Reviewed by:Date reported: 11/1/2001 9:29:00 AM
Date reviewed:

Mr. Melvin Fischer called to report that the south cattle guard which straddles Bergers property has been removed along with the adjacent gate. This area has been the subject of much controversy, to which we are awaiting a N.D. Attorney General's opinion on. Melvin stated that Morton County installed these cattle guards back in 1976 to permit him access across Berger's property to his landlocked property. He also showed me photographs showing the installation of these cattle guards by Morton County employees.

In consultation with Morton County Assistant States Attorney Brian Grosinger, he asked that I go to the scene and take photos, to which I completed.

I observed that the south cattle guard was laying near the north cattle guard and had been dragged to that location. The north cattle guard was still intact, but the support railroad ties were removed along with the fencing that accompanied it. The north area was also fenced off preventing Fischer from accessing his landlocked property. In the south cattle guard area, a barbed wire fence was also erected across this area preventing Fischer from accessing it.

Brian also stated that when he gets back from vacation, and if the weather permits, we may go down to the scene so he knows the layout of the land better.

Lu Costa Rickford
Operator's Signature

10/3/03
Date

MB 1278

2002 N.D. Op. Atty. Gen. No. F-01

Office of the Attorney General
State of North Dakota

*1 Formal Opinion No. 2002-F-01
January 4, 2002

Requested by: **Mary K. O'Donnell**
Rolette County State's Attorney

QUESTIONS PRESENTED

I.

Whether observation wells and water lines owned by the Turtle Mountain Band of Chippewa and located on the 33-foot **section line** easement constitute obstructions that must be removed to permit development and use of the **section line** as a public right-of-way, pursuant to N.D.C.C. §§ 24-07-03 and 24-06-28.

II.

Whether a board of township supervisors or a county commission has the duty to construct a road on or off a **section line** for the purpose of providing access to private property by the owner of that property.

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that the observation wells and water lines located on the 33-foot **section line** easement and owned by the Turtle Mountain Band of Chippewa must be removed to permit development and use of the **section line** as a public right-of-way only if and to the extent they effectively deprive the public of the ability to travel on the **section line**.

II.

It is my further opinion that a board of township supervisors or a county commission has the duty to construct a road on or off a **section line** for the purpose of providing access to private property by the owner of that property, if the property meets the requirements of N.D.C.C. § 24-07-06.

ANALYSES

I.

In North Dakota, congressional **section lines** located outside the limits of incorporated cities and outside properly recorded, platted townsites, additions, or subdivisions are public roads and are open for public travel to the width of 33 feet on each side of the **section lines**. N.D.C.C. § 24-07-03. "No person may place or cause to be placed any permanent obstruction ... within thirty- three feet ... of any **section line**, unless written permission is first secured from the board of county commissioners or the

<http://web2.westlaw.com/result/text.wl?RP=/search/default.wl&RS=WLW2.84&VR=2.0&...> 3/20/2003

La Costa Rickford
Operator's Signature

10/2/03
Date

board of township supervisors, as the case may be." N.D.C.C. § 24-06-28(1).

Your letter indicates the Turtle Mountain Band of Chippewa purchased a strip of land along the south edge of a **section line** and developed three water wells placed just south of the 33-foot **section line** easement. The observation wells are located on the 33-foot **section line** easement, as are the water lines. You indicate that this strip of land is not within the boundaries of the Turtle Mountain Indian Reservation, nor does it appear to be trust land, or land that is considered Indian country. Thus, the fact that the lands adjoining the **section line** are owned by the Turtle Mountain Band of Chippewa does not alter the analysis because this land is not subject to tribal jurisdiction. See 18 U.S.C. § 1151.

*2 The extent to which the observation wells and water lines obstruct travel on the **section line** is relevant in determining whether they must be removed to permit development and use of the **section line** as a public right-of-way. Burleigh County Water Resource District v. Burleigh County of North Dakota v. Ternes, 510 N.W.2d 624 (N.D. 1994).

A landowner abutting an open **section line** retains ownership of the property within the easement, subject to the public's right to travel. Small v. Burleigh County, 225 N.W.2d at 297. Compare Hjelle v. J.C. Snyder & Sons, 133 N.W.2d 625, 629 (N.D. 1965) (landowner retains ownership of property included in highway easement). The public's easement is limited to the right to travel, and does not include an absolute right to an object-free zone for the complete length and width of the **section line**. In Hjelle, we held that a highway right of way is not "obstructed" when a placement did not impede the public's right of passage. 133 N.W.2d at 630. We recently held that cattle guards or gateways do not have to be sixty-six feet wide to comply with NDCC 24-07-03, when approved by the board. Ames v. Rose Township Board of Township Supervisors, 502 N.W.2d 845, 850 (N.D. 1993). Only when an obstruction effectively deprives the public of the ability to travel on an open **section line** is their right to travel violated.

Id. at 628. Thus, it is my opinion the observation wells and water lines located on the 33-foot **section line** easement must be removed to permit development and use of the **section line** as a public right-of-way only if and to the extent they effectively deprive the public of the ability to travel on the **section line**.

II.

Three statutes address when the county or township may have a duty to construct a road to provide access to private property.

Two of those sections are N.D.C.C. §§ 24-06-11 and 24-07-03. Section 24-06-11, N.D.C.C., provides:

Whenever a township constructs a ditch or drain in connection with road building, and such ditch, drain, or road interferes with the ingress or egress of any owner of adjoining land, the township shall install crossings at such point or points as will afford the owner or owners of the premises suitable ingress thereto or egress therefrom.

It is my understanding that the facts in this case do not involve the construction of a ditch or drain in connection with road building by a township; therefore, this section of the law is not applicable.

*3 Under N.D.C.C. § 24-07-03, a board of county commissioners may close a **section line** or portion thereof if the **section line** is intersected by an interstate highway causing the **section line** to be a dead end, "providing the closing of the dead end **section line** does not deprive adjacent landowners access to the landowners' property." It is my understanding that the facts in this case do not involve the closing of a **section line**; therefore, this section of the law also is not applicable.

The only other statute imposing a duty on a county or township to construct a road to provide access to private property is N.D.C.C. § 24-07-06. That law provides:

Whenever any tract of land is surveyed or sold in tracts less than the original subdivision as established by the government survey thereof, so that any part thereof does not touch upon a public road so as to allow the owner of such tract access to a public highway, the board of county commissioners or board of township supervisors, upon petition of such owner, may open a cartway or

<http://web2.westlaw.com/result/text.wl?RP=/search/default.wl&RS=WLV2.84&VR=2.0&...> 3/20/2003

highway along the lines of any such tract or tracts when in the judgment of such board such cartway or highway is necessary, but no such cartway or highway may exceed two rods [10.06 meters] in width unless in the judgment of such board a roadway of such width is not sufficient to accommodate the travel thereon.

The North Dakota Supreme Court has determined that this section of the law requires a township board to provide a means of access to a tract of land which was surveyed or sold in tracts less than the original government subdivision if there is no other means of access. Hector v. Board of Township Supervisors of Stanley Township, 177 N.W.2d 547 (N.D. 1970). In the Hector case, the plaintiff was attempting to gain access to 40 acres of land he had purchased, to which he had no means of access. The Court stated:

[U]nder the United States Public Lands Act, Title 43, United States Code Annotated, patents to public lands generally were issued for tracts of 160 acres. We therefore believe that this court may take judicial notice of the fact that the tract in question, being a forty-acre tract, is less than the original subdivision contained in the Government survey. The stipulated facts show that this forty-acre tract is bordered on the north, west, and south by lands belonging to others; that the Wild Rice River prevents access to this land from the east; and that there is no public highway which touches upon this particular tract. We therefore find that the statute providing for the establishment of a cartway to land sold in tracts less than the original subdivision set by the Government survey, which land does not touch a public road so as to allow the owner access thereto, is applicable to the tract in question. The plaintiff therefore is permitted to make application for a cartway under the provisions of this statute.

*4 ...

We find that the statute under consideration requires the granting of a cartway if there is no other means of access to a tract of land which was surveyed or sold in tracts less than the original subdivision as established by the Government survey. Where the board makes a determination on such issue, its determination of the facts presented may be appealed. On such appeal, as pointed out above, courts will follow the view that the determination of the board will not be overturned unless it is found to be arbitrary, capricious, or unreasonable. Application of Otter Tail Power Co., 169 N.W.2d 415 (N.D. 1969); Application of Northern States Power Co., 171 N.W.2d 751 (N.D. 1969).

... We concede that the township board has the power, in the exercise of its judgment, to approve, upon reasonable terms and conditions, or to deny the plaintiff's application for a cartway if there is some other possible means of access to the tract in question. However, such decision on the question of necessity may not be arbitrary, capricious, or unreasonable. If the rule were otherwise, the township board would be able to deny an application for a cartway where there was no other means of access merely because the board members did not like the applicant's politics or his religion or the color of his hair. Such determination clearly would be arbitrary, capricious, and unreasonable. Hector at 550-551. Thus, it is my conclusion that whether the county or the township is required to provide access to private property in this case depends upon whether the factual requirements of N.D.C.C. § 24-07-06 are met.

It is my further opinion that if N.D.C.C. § 24-07-06 does apply, the duty to provide the means of access will fall upon whichever entity (i.e., the county commission or the township board of supervisors) has jurisdiction under N.D.C.C. § 24-07-05 (generally, the township board of supervisors in organized townships and the county commission in unorganized townships).

EFFECT

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 questions presented are decided by the courts.

Wayne Stenehjem
Attorney General

<http://web2.westlaw.com/result/text.wl?RP=/search/default.wl&RS=WLV2.84&VR=2.0&...> 3/20/2003

Assisted by: Lea Ann Schneider
Assistant Attorney General
2002 N.D. Op. Atty. Gen. No. F-01, 2002 WL 46809 (N.D.A.G.)
END OF DOCUMENT

Copr. (C) West 2003 No Claim to Orig. U.S. Govt. Works

<http://web2.westlaw.com/result/text.wl?RP=/search/default.wl&RS=WLW2.84&VR=2.0&...> 3/20/2003

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/2/03
Date

Supreme Court of North Dakota.
 Fred M. HECTOR, Jr., Plaintiff and Appellant,
 v.
 BOARD OF TOWNSHIP SUPERVISORS OF STANLEY TOWNSHIP, Defendant and
 Respondent.
 Civ. No. 8605.
 June 1, 1970.

Proceeding upon appeal from decision of a township board denying application to open a cartway. The District Court, Cass County, Roy K. Redetzke, J., treated a motion to dismiss as a motion to strike the cause from the appeal record and ordered the matter stricken. The applicant appealed. The Supreme Court, Strutz, J., held that statute providing that township supervisors or county commissioners may open cartway or highway along lines of tract or tracts under certain conditions when in judgment of board such cartway or highway is necessary requires granting of cartway if there is no other means of access to tract of land which was surveyed or sold in tracts less than original government subdivision.

Reversed and remanded with instructions.

West Headnotes

[1] KeyCite Notes 

157 Evidence

157I Judicial Notice

157k18 k. Weights, Measures, and Values. Most Cited Cases

Supreme Court could take judicial notice of fact that tract which was less than 40-acre tract was less than original subdivision contained in government survey. NDCC 24-07-06; 43 U.S.C.A. § 1 et seq.

[2] KeyCite Notes 

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(1) k. In General. Most Cited Cases

(Formerly 92k48)

Every statute enacted by legislative assembly is presumed to be constitutional, and will be construed, if possible, as valid. NDCC 24-07-01 et seq., 24-07-06, 24-07-22.

[3] KeyCite Notes 

311 Private Roads

311k2 Establishment

311k2(5) k. Judgment, Order, or Decree, and Review. Most Cited Cases

<http://web2.westlaw.com/result/text.wl?RP=/search/default.wl&RS=WLV2.84&VR=2.0&...> 3/20/2003

In determining necessity for establishment of cartway pursuant to statute, board of **township** supervisors must determine facts, not policy, and if there is substantial evidence to support findings of board, courts will not substitute their judgment for that of **township** board but will disturb such decision on appeal only when same is clearly arbitrary, capricious or unreasonable. NDCC 24-07-01 et seq., 24-07-06, 24-07-22.

[4] KeyCite Notes 

311 Private Roads
311k2 Establishment
311k2(1) k. In General. Most Cited Cases

Statute providing that **township** supervisors or county commissioners may open cartway or highway along lines of tract or tracts under certain conditions when in judgment of board such cartway or highway is necessary requires granting of cartway if there is no other means of access to tract of land which was surveyed or sold in tracts less than original government subdivision. NDCC 24-07-06.

[5] KeyCite Notes 

311 Private Roads
311k2 Establishment
311k2(2) k. Jurisdiction and Powers of Courts and Municipal Authorities. Most Cited Cases

Under statute relating to opening of cartway or highway by **township** supervisors or county commissioners along tract or tracts surveyed or sold in tracts less than government subdivision if there is no other means of access to tract, board has power, in exercise of its judgment, to approve, upon reasonable terms and conditions, or to deny application for such cartway if there is some other possible means of access to tract in question, but decision may not be arbitrary, capricious or unreasonable. NDCC 24-07-06.

*548 Syllabus by the Court

1. In considering the constitutionality of an Act, every reasonable presumption in favor of its constitutionality will prevail.
2. In deciding the necessity for the establishment of a cartway under Section 24--07--06, North Dakota Century Code, the board of **township** supervisors must determine facts, not policy. If there is no other means of access to land which was sold in a tract less than the original subdivision established by the Government survey, our law requires the granting of a cartway to such tract.
3. If such board rejects an application for a cartway because it has found from the facts that there is another means of access to the land in question, its decision will not be disturbed on appeal unless it is found to be arbitrary, capricious, or unreasonable.
4. For reasons stated in the opinion, the order of the district court treating defendant's motion to dismiss plaintiff's appeal from the decision of the **township** board as a motion to strike the cause from the records of the district court and ordering the appeal stricken, and declaring unconstitutional the appeal provisions of Chapter 24--07, North Dakota Century Code, is reversed and the case is remanded with instructions to return the matter to the **township** board for the purpose of permitting the parties to produce evidence for and against the granting of such application and for a determination by the **township** board on such application, based upon the record made thereof. Wattam, Vogel, Vogel & Peterson, Fargo, for plaintiff and appellant.

<http://web2.westlaw.com/result/text.wl?RP=/search/default.wl&RS=WLV2.84&VR=2.0&...> 3/20/2003

Jacque Stockman, Fargo, for defendant and respondent.

STRUTZ, Judge.

The plaintiff purchased a tract of forty acres of land described as the Northeast Quarter of the Southwest Quarter (NE 1/4 SW 1/4) of Section 24, Township 138 North, Range 49 west of the Fifth Principal Meridian, in Cass County, North Dakota. The plaintiff, in a petition filed with the board of township supervisors of Stanley Township, asserts that the Wild Rice River flows across and divides this tract approximately in half. In a stipulation of agreed facts and procedural history signed *549 by the attorneys for the respective parties for the purpose of this appeal, the parties stipulate that on March 22, 1968, the plaintiff purchased the property above described and that 'The Wild Rice River prevents access to this tract of land from the east. On the north, west and south sides it is surrounded by lands owned by other landowners. There is no public road which touches upon this tract of land.' The stipulation further states that the plaintiff has been unable to gain access to this tract by purchase of an easement from one of the adjoining landowners in order to gain access to the isolated portion of his land from the public road on the west edge of Section 24, nor has he been able to sell the tract to such adjoining landowner; that the plaintiff has been required to pay taxes on this tract, but he has been unable to use it for any purpose.

After acquiring the land, the plaintiff petitioned the board of township supervisors of Stanley Township to open a cartway from the public road over the land of the adjoining owner, as authorized by Section 24--07--06, North Dakota Century Code. The matter came on for hearing before the township board, and thereafter the plaintiff received the following letter from the clerk of said board: 'At the regular meeting of Stanley township board held in the Farmers Elevator office at 9 o'clock P.M. on May 13, 1969, it was the unanimous decision of the board--declining any right of way on the land rented by Anton Rutten, according to your request.'

The plaintiff duly filed his notice of appeal from such decision of the township board to the district court of Cass County. The township board, through its attorney, moved to dismiss the appeal on the ground that the court lacked jurisdiction over the subject-matter; that the determination of necessity and expedience for opening such cartway is a legislative power not subject to judicial review, notwithstanding the apparent right of appeal as found in Section 24--07--22, North Dakota Century Code.

The motion to dismiss the appeal came on for hearing before the Honorable Roy K. Redetzke, one of the judges of the district court of Cass County, on July 3, 1969. The court issued its memorandum opinion stating that the motion to dismiss would be treated as a motion to strike the cause from the appeal record of the district court, and ordered the matter stricken. From this order, the plaintiff has appealed to this court.

Section 24--07--06, North Dakota Century Code, under the provisions of which the plaintiff filed his petition for a cartway, provides:

'Whenever any tract of land is surveyed or sold in tracts less than the original subdivision as established by the government survey thereof, so that any part thereof does not touch upon a public road so as to allow the owner of such tract access to a public highway, the board of county commissioners or board of township supervisors, upon petition of such owner, may open a cartway or highway along the lines of any such tract or tracts when in the judgment of such board such cartway or highway is necessary, but no such cartway or highway shall exceed two rods in width unless in the judgment of such board a roadway of such width shall not be sufficient to accommodate the travel thereon.'

[1] ^{KC} The first question to be determined on this appeal is whether the above section of law would apply in this case. There is nothing in the record before us which establishes the size of the tracts of land in the original subdivision fixed by the Government survey. However, under the United States

<http://web2.westlaw.com/result/text.wl?RP=/search/default.wl&RS=WLW2.84&VR=2.0&...> 3/20/2003

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/3/03
Date

Public Lands Act, Title 43, United States Code Annotated, patents to public lands generally were issued for tracts of 160 acres. We therefore believe that this court may take judicial notice of *550 the fact that the tract in question, being a forty-acre tract, is less than the original subdivision contained in the Government survey. The stipulated facts show that this forty-acre tract is bordered on the north, west, and south by lands belonging to others; that the Wild Rice River prevents access to this land from the east; and that there is no public highway which touches upon this particular tract.

We therefore find that the statute providing for the establishment of a cartway to land sold in tracts less than the original subdivision set by the Government survey, which land does not touch a public road so as to allow the owner access thereto, is applicable to the tract in question. The plaintiff therefore is permitted to make application for a cartway under the provisions of this statute.

The next question for our determination is whether Section 24--07--22, North Dakota Century Code, which provides for an appeal by any person who feels aggrieved by any decision of the board of township supervisors in laying out or in refusing to lay out a cartway, is constitutional. The trial court held that this statute is unconstitutional on the ground that it delegates legislative authority to the courts. It found that the law gives to the township board the right to determine, in its judgment, whether the cartway applied for was necessary (Sec. 24--07--06, N.D.C.C.); and it further held that since the determination of necessity for such cartway is to be made 'in the judgment of such board,' such determination is a legislative function to be performed by the township board, and that giving the courts the authority to pass upon such determination on appeal is an unlawful delegation of legislative power, and therefore unconstitutional, citing City of Carrington v. Foster County, 166 N.W.2d 377 (N.D.1969).

[2] Every statute enacted by the Legislative Assembly is presumed to be constitutional, and will be construed, if possible, as valid. Anderson v. Peterson, 78 N.D. 949, 54 N.W.2d 542; International Printing Pressmen and Assistants Union v. Meier, 115 N.W.2d 18 (N.D.1962); Menz v. Coyle, 117 N.W.2d 290 (N.D.1962).

In considering the constitutionality of a statute, every reasonable presumption in favor of its validity will be adopted. Verry v. Trenbeath, 148 N.W.2d 567 (N.D.1967).

[3] The determination of whether the statute in question is constitutional will depend, we believe, upon whether the decision of the board deals with policy or with facts. If the issue of necessity deals with policy, the question clearly would be legislative, and the courts may not substitute their judgment for that of the township board. If, on the other hand, the determination of necessity for a cartway depends upon facts, an appeal will lie, but the scope of our review on such appeal from the findings of the township board is limited to determining whether there is substantial evidence to support the findings on the question of necessity. If there is substantial evidence to support the findings of the board, courts will not substitute their judgment for that of the township board. It is only when the determination made by the board clearly is arbitrary, capricious, or unreasonable that courts will disturb such decision on appeal.

[4] We find that the statute under consideration requires the granting of a cartway if there is no other means of access to a tract of land which was surveyed or sold in tracts less than the original subdivision as established by the Government survey. Where the board makes a determination on such issue, its determination of the facts presented may be appealed. On such appeal, as pointed out above, courts will follow the view that the determination of the board will not be overturned unless it is found to be arbitrary, capricious, or unreasonable. Application of Otter Tail Power Co., 169 N.W.2d 415 (N.D.1969); *551 Application of Northern States Power Co., 171 N.W.2d 751 (N.D.1969).

[5] A careful search of the record in this case discloses that there is no evidence to show the basis for the decision of the township board. Whether any evidence at all was presented before the board is

<http://web2.westlaw.com/result/text.wl?RP=/search/default.wl&RS=WLV2.84&VR=2.0&...> 3/20/2003

not known. If evidence was presented, it was not made a part of the record. We concede that the township board has the power, in the exercise of its judgment, to approve, upon reasonable terms and conditions, or to deny the plaintiff's application for a carway if there is some other possible means of access to the tract in question. However, such decision on the question of necessity may not be arbitrary, capricious, or unreasonable. If the rule were otherwise, the township board would be able to deny an application for a cartway where there was no other means of access merely because the board members did not like the applicant's politics or his religion or the color of his hair. Such determination clearly would be arbitrary, capricious, and unreasonable.

For reasons stated in this opinion, the order of the district court treating the defendant's motion to dismiss plaintiff's appeal as a motion to strike the cause from the records of the district court and ordering the appeal stricken, and declaring that the appeal provisions of Chapter 24--07 of the North Dakota Century Code are an unconstitutional delegation of legislative power to the courts, is reversed and the case is remanded to the district court with instructions to return the matter to the township board of Stanley Township for the purpose of allowing the parties to submit evidence for and against the granting of the application for a cartway and for a determination by the township board on such application, based upon the record made thereof.

TEIGEN, C.J., and ERICKSTAD, PAULSON and KNUDSON, JJ., concur.
N.D. 1970.

Hector v. Board of Tp. Sup'rs of Stanley Tp.,
177 N.W.2d 547
END OF DOCUMENT

Copr. (C) West 2003 No Claim to Orig. U.S. Govt. Works

<http://web2.westlaw.com/result/text.wl?RP=/search/default.wl&RS=WLV2.84&VR=2.0&...> 3/20/2003

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

La Costa Rickford
Operator's Signature

10/2/03
Date