

**LETTER OPINION
2012-L-05**

May 9, 2012

Ms. Lisa Gibbens
Acting Assistant Rolette County State's Attorney
PO Box 1079
Rolla, ND 58367-1079

Dear Ms. Gibbens:

Thank you for your letter raising several questions about the disposition of undistributed tax revenues raised by a levy for county emergency medical services under N.D.C.C. § 57-15-50 and allocated under N.D.C.C. § 23-27-04.7, and for your recent follow-up letter. You ask whether Rolette County is obligated to distribute tax revenue to two of the ambulance services serving parts of Rolette County since these ambulance services have not submitted a budget or otherwise requested funding from this tax levy. You also ask whether Rolette County may place the undistributed revenue in the county's general fund.

For the reasons indicated below, it is my opinion that Rolette County is not obligated to distribute the funds to the two ambulance services if the county commission makes a factual determination that these ambulance services have waived any statutory right to receive their share of the revenues. It is my further opinion that Rolette County may not place the undistributed revenue in the county's general fund until the county ceases to utilize the tax levy to subsidize ambulance services in the county.

ANALYSIS

Section 57-15-50, N.D.C.C., authorizes the board of county commissioners of each county to levy annually a tax for the purpose of subsidizing county emergency medical services.¹ The tax must be approved by a majority of the electors of the county voting on the question.² This provision goes on to state:

The county may budget, in addition to its annual operating budget for subsidizing emergency medical service, no more than ten percent of its annual operating budget as a depreciation expense to be set aside in a dedicated emergency medical services sinking fund deposited with the treasurer for the replacement of equipment and ambulances. The ten

¹ N.D.C.C. § 57-15-50. The maximum mill levy for this purpose is ten mills. N.D.C.C. § 57-15-06.7(23).

² Id.

percent emergency medical services sinking fund must be in addition to the annual operating budget for subsidization, but the total of the annual operating budget and the annual ten percent emergency medical services sinking fund may not exceed the approved mill levy.³

You indicate that for the 2010 budget year, Rolette County levied 7.72 mills producing revenue of approximately \$88,000. According to information you submitted from the county auditor, the county had been levying 7-8 mills for this purpose for the past several years.⁴

The funds generated by the property tax levy for emergency medical service coverage are allocated under a different statute, N.D.C.C. § 23-27-04.7, which provides in part as follows:

A taxing district that levies a special emergency medical services or ambulance service levy shall ensure that every ambulance service that has portions of its service area in that taxing district receives a portion of the revenue from this tax. The taxing district shall allocate the special tax levy revenue to each ambulance service based upon the taxable value of the property within each township of the taxing district, allocating the taxable value of each township to the ambulance service that serves the largest area within that township.⁵

You initially indicated that as part of determining the appropriate levy for this purpose, the county would request budgets⁶ from each of the ambulance services located or operating within the county. You also indicated that two of the ambulance services, Belcourt and Bottineau, did not submit a budget or otherwise request funding from this tax levy. In your follow-up letter you explained that the county subsequently informed you that only the Rolla and Rolette ambulance services were sent notifications for budgets because only those two ambulance services were historically part of the two mill levy votes occurring in November of 1980 and June of 2002. However, the county indicated the other ambulance services were aware of the availability of the Rolette County mill levy funds.⁷ Section 23-27-04.7 requires, generally, that a taxing district ensure that each ambulance service

³ Id.

⁴ In your follow-up letter of March 8, 2012, you indicate that historically the county was authorized to levy 5 mills for this purpose in 1980 and then an additional 5 mills in 2002.

⁵ N.D.C.C. § 23-27-04.7.

⁶ Since the tax revenue is primarily a subsidy for the operating budget of the ambulance services in the county, it would be reasonable for the county to request budgets from the ambulance services to assist the county in ascertaining the financial condition of the ambulance services and their need for subsidization. See N.D.C.C. § 57-15-50.

⁷ Letter from Lisa Gibbens, Acting Asst. Rolette Cnty. State's Atty., to John J. Fox, Asst. Atty. Gen. (Mar. 8, 2012).

that has portions of its service area in the taxing district receives a portion of the tax revenue.

I.

You first ask whether Rolette County is obligated to pay the undistributed tax revenues to the Belcourt and Bottineau ambulance services.

Statutory rights or benefits may generally be waived by the party entitled to such benefits unless such a waiver is against public policy or the statute declares or implies that it may not be waived.⁸ “[T]he benefits of statutory provisions may be waived. NDCC § 1-02-28. However, waiver requires knowledge of the rights intended to be waived and a voluntary and intentional relinquishment of those known rights.”⁹ A person generally may waive property rights. A waiver occurs when a person voluntarily and intentionally relinquishes a known right or privilege.¹⁰

However, it may be questioned whether a county’s duty to “ensure that every ambulance service . . . receives a portion of the revenue,”¹¹ implies that an ambulance service may not waive its right to receive these funds. As pointed out in your letter, there is a latent ambiguity¹² created by the next sentence in N.D.C.C. § 23-27-04.7, which requires the tax revenue to be allocated by township, with the revenue raised in each township going entirely to the ambulance service which serves most of the township. It is theoretically possible that an ambulance service may serve portions of a county but not serve a majority of any one township within that county. This ambiguity implies that the county’s duty to ensure that every ambulance service receives some of this tax revenue is not absolute. Therefore, it is my opinion that an ambulance service may waive its right to receive funding under N.D.C.C. § 23-27-04.7.

⁸ Brunson v. Scarlett, 465 N.W.2d 162, 167 (N.D. 1991). There is no language in either N.D.C.C. §§ 23-27-04.7 or 57-15-50 prohibiting a waiver of receipt of these funds, nor am I aware of any public policy that would be violated by such a waiver.

⁹ Breene v. Plaza Tower Ass’n, 310 N.W.2d 730, 734 (N.D. 1981). See also N.D.A.G. 91-2 (benefits available under statute may be voluntarily waived as an intentional relinquishment of a known right); N.D.C.C. § 1-01-08 (rights of property and of person may be waived, surrendered, or lost by neglect); N.D.C.C. § 1-02-28 (benefits of provisions of law may be waived unless such waiver would be against public policy); N.D.C.C. § 31-11-05(4) (anyone may waive the advantage of a law intended solely for that person’s benefit). While your letter alludes to the Belcourt ambulance service being a federally funded service that may be restricted from accepting local funds, you included no reason why Bottineau may have waived receipt of these funds.

¹⁰ In re Peterson’s Dogs, 758 N.W.2d 749, 751 (N.D. 2008).

¹¹ N.D.C.C. § 23-27-04.7.

¹² Kroh v. Am. Family Ins., 487 N.W.2d 306, 308 (N.D. 1992) (statutes that are clear and unambiguous may contain a latent ambiguity when applied to a particular situation).

The existence of a waiver is generally a question of fact.¹³ “This office has a long-standing policy not to determine factual matters in legal opinions, unless it is an area where the Attorney General serves in a regulatory capacity with authority to conduct factual investigations.”¹⁴

The two ambulance services in Rolette County which have not requested funding or supplied a budget may or may not have waived any right to receive that money. It would be up to the county commission to determine that, as a matter of fact, it was a valid waiver for each tax year, i.e., a voluntary and intentional relinquishment of the right or benefit to receive the revenues under N.D.C.C. § 23-27-04.7. Thus, it is my opinion that Rolette County is not obligated to distribute tax levy funds to these two ambulance services if the county commission makes a factual determination that these ambulance services have waived any statutory right or benefit to their share of the revenues.

II.

You next ask whether the county may place the undistributed emergency medical service revenue into the county’s general fund (assuming the two ambulance services properly waived their right to receive the tax revenues).

Section 11-23-09, N.D.C.C., provides in part as follows:

At the closing of the auditor’s books on December thirty-first, the balance to the credit of each annual appropriation shall become a part of the general unappropriated balance in the county treasury. A special appropriation, however, shall not lapse until the work for which it was made has been completed, the bill paid, and the account closed¹⁵

This statute has not been construed in this context by the North Dakota Supreme Court or by this office. However, I do not believe this statute would permit placement of the undistributed tax revenues in the county’s general fund at this point. The emergency service subsidies could be reasonably construed as a special appropriation and payable out of an ongoing fund which will not conclude until the point the county no longer levies the tax for such purpose. The main purpose of this tax levy is to provide ongoing subsidization of the operating budgets of the ambulance services which serve the county and its residents. Until the point that the county is no longer subsidizing these operating

¹³ Peterson’s Dogs, 758 N.W.2d at 751.

¹⁴ N.D.A.G. 2002-L-36, n.6 (citations omitted). The questions you raise do not implicate any regulatory capacity of this office.

¹⁵ N.D.C.C. § 11-23-09 (emphasis added).

budgets, the special appropriation does not lapse nor would the work necessarily be considered completed or the special account closed.¹⁶

Moreover, in another context dealing with diversion of funds from a tax levy supporting a county road program, the North Dakota Supreme Court has ruled that:

[H]aving submitted the program with such general description to the electors, together with a proposed tax levy of five mills to pay for its construction, a substantial compliance of the proposed program must be made. The proceeds of such levy must be used for the particular purpose authorized by the voters. Using the proceeds of such levy for any other purpose would be an unlawful and wrongful diversion of tax monies raised by such levy.¹⁷

Similarly, in the analogous context of surplus funds raised from special assessments, such funds are sometimes regarded as a trust fund to be governed by equitable principles, and any surplus in excess of the amount to retire any bonds issued to fund such special assessment projects belongs to the taxpayer, not the city.¹⁸ North Dakota does have two statutes which provide that while special assessment warrants or bonds are outstanding, all assessments and taxes pledged to repayment are a special fund that may not be

¹⁶ As noted later in this opinion, courts in other jurisdictions have approved carrying over surplus funds to the ensuing year to reduce the amount necessary to levy for the subsequent year. This would be another reason to consider the ongoing special account open.

¹⁷ Huber v. Miller, 101 N.W.2d 136, 142 (N.D. 1960). See also N.D.A.G. 82-8 (monies generated under a county road program cannot be expended for purposes other than those specified by the statute and as approved by the citizens of the county); see also N.D.A.G. 93-L-139 (expenditure of surplus funds would require the approval of the electorate as provided in the law existing at the time farm-to-market road program was approved by county electorate).

¹⁸ See 14 McQuillin, Municipal Corporations § 38:352 (3d ed. 2008) (citing City of Stuttgart v. McCuing, 234 S.W.2d 209 (Ark. 1950)); Spitzer v. City of El Reno, 138 P. 797 (Okla. 1913) (question as to the right of the city to these sums belongs in equity at least to those property owners who under color of law were compelled to pay it, and not to the city). See also 16 McQuillin, Municipal Corporations § 44:186 (3d ed. 2003) ("Except by state legislative authorization, if such authorization is permissible, taxes levied for a specific purpose cannot be used for other purposes, and state constitutions sometimes expressly so provide. In general, tax money in a special fund is not available for current expenses; money collected for a contemplated improvement which did not materialize may not be diverted to another wholly different purpose; and the uses of taxes specially authorized to be separately levied for payment of refunding bonds are to be used solely for the payment of such bonds and no others.") (citing, e.g., City of Pensacola v. Fillingim, 46 So.2d 876 (Fla. 1950); In re Opinion of the Judges, 240 N.W. 600 (S.D. 1932)).

diverted to any other purpose, but when all such warrants or bonds are fully paid, any surplus may then be transferred to the general fund of the municipality.¹⁹

Based on the foregoing, it is my opinion that any funds not distributed to ambulance services in a county because of a waiver by those ambulance services of any right or benefit to receive the tax revenues may not be placed in the county general fund to be used for general purposes until the point when the county ceases to utilize the tax levy to subsidize ambulance services in the county.

III.

Finally, you question what to do with any surplus funds that are not distributed to the Bottineau or Belcourt ambulance services. Assuming that, as indicated above, the county determines these ambulance services have waived any right or benefit to receipt of the tax revenues, you list two possible methods for disposition of these undistributed funds. You first ask whether Rolette County can reallocate the unclaimed revenues among the ambulance services that have not waived receipt of the funds. In your letter, you set out a method for reallocating these revenues among the participating ambulance services. While this method for utilizing these undistributed funds has some initial appeal, N.D.C.C. § 23-27-04.7 only allocates tax revenue for a township to an ambulance service “that serves the largest area within that township.”²⁰

You also raise the question of whether the county could roll over the unclaimed revenues into the following year’s operating budget for subsidizing emergency medical services and apply those revenues to reduce the following year’s levy. As you note, there are apparently no provisions in North Dakota law that specifically address this possibility.

¹⁹ N.D.C.C. §§ 40-24-18, 40-27-05; see N.D.A.G. 2005-L-13 (“Because the language in N.D.C.C. §§ 40-24-18 and 40-27-05 regarding disposition of surplus special assessment funds to the general fund is not phrased in mandatory language, this office has on several occasions opined that in addition to transferring the money to a municipality’s general fund, any surplus may, and in some cases must, be refunded to property owners in the special assessment district.”).

²⁰ N.D.C.C. § 23-27-04.7. One question you described in your initial letter concerns whether the funds for Gilbert, Hillside, and Ingebretson Townships would be reallocated among Rolette, Rolla, and Rugby ambulance services. You indicated that there would have to be some reasonable reallocation for these three townships. However, in order to comply with the law and distribute revenues for those three townships, it would appear to be necessary that the three ambulance services provide services to “the largest area” within those three townships as required by N.D.C.C. § 23-27-04.7. In your follow-up letter, you indicate that the Rolla and Rolette ambulance services would respond to calls in those three townships, but that the Rugby ambulance service would not provide services there. However, under the statute, unless these ambulance services serve the largest area within those townships, that revenue is not available to them.

Rolling the revenues over the following year would ensure that special funds would be used for the purpose for which they were raised and would not be used for any other purpose. As you also note, there is some authority from other states permitting such a rollover of special funds into the next budgeting year.²¹

Thus, the second method you mention in your letter for distribution of any surplus tax revenues for ambulance service subsidization would appear to be an appropriate and reasonable way to handle any undistributed funds and more in accordance with the law.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²²

²¹ See 16 McQuillin, Municipal Corporations § 44.186 (3d ed. 2003) (“Although unexpended taxes should sometimes be refunded, they are usually brought forward to pay expenses of the following year similar to those for which such taxes were levied.”) (citing, e.g., Union City v. Capitol Theatre Amusement Co., 57 A.2d 226 (Dep’t Taxation 1948) (“Obviously, the amount actually raised by taxation in any given year may not coincide exactly with the amount set forth in the municipal budget, but may be affected by increases or decreases in the assessed valuations as fixed by the County Board or by us on appeal. Any surplus revenue resulting therefrom is carried over into the municipal budget for the following year.” Id. at 230.)); Spitzer v. City of El Reno, 138 P. 797 (Okla. 1913). See also 72 Am. Jur. 2d State and Local Taxation § 639 (2d ed. 2001) (“It is the duty of the excise board to treat as estimated surplus the amount by which it calculates the payments to be made during the current year on account of taxes levied for the preceding year, and as yet uncollected, will exceed the unpaid expenses for the latter year, and to deduct this surplus, if any, from the amount of the tax levy for the ensuing year.”) (citing Bd. of Comm’rs v. Central Nat’l Bank, 41 P.2d 853 (Okla. 1935)).

²² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).