LETTER OPINION
96-L-219

November 21, 1996

Mr. J. Thomas Traynor, Jr.
Devils Lake City Attorney
PO Box 838
Devils Lake, ND 58301-0838

Dear Mr. Traynor:

Thank you for your letter posing several questions concerning the Ramsey County farm-to-market and federal-aid road program election of November 3, 1964. You state that the subject program received a favorable vote by the Ramsey County electors at that time.

Your first question asks when the tax levy approved by the Ramsey County voters terminates. At the time of the election in question, N.D.C.C. § 57-15-06.3 (as amended by 1963 N.D. Sess. Laws ch. 382) provided:

> If the majority of the electors voting on the question approved such program and levy, annually thereafter until such program is completed the board shall levy a tax not in excess of ten mills, which shall not be subject to the county mill levy limitations. . . .

(Emphasis supplied.) Additionally, the ballot which you attached to your letter states the question to the voters as:

> Shall the County of Ramsey in the State of North Dakota approve the County Farm-To-Market Federal aid road program as set forth above and authorize the County Commissioners to levy a tax therefore of not to exceed 10 mills annually upon the net taxable valuation of all property in the county, until such program is completed, which levy shall not be subject to the County mill levy limitations. . . .

(Emphasis supplied.) The above-noted quotations from the law in effect at the time of the election and the ballot upon which the electors of Ramsey County voted make it apparent that the mill levy for the farm-to-market road program continues until that program is completed. As discussed below, the specifics of what constitutes that program could conceivably be altered by later action of the county commission.

Your second question asks whether the ten mill levy authorized by the voters in 1964 may be increased to 13 mills without a vote of the Ramsey County electorate. N.D.C.C. § 57-15-06.3(2) allows the board of county commissioners to change the details of the farm-to-market and federal-aid roads programs previously approved by the electors subject to a public hearing. N.D.C.C. § 57-15-06.3(3) provides for changes in the programs without a public hearing if the program was not completed within ten years of the election. Various opinions of this office have described the portions of N.D.C.C. § 57-15-06.3 and the circumstances under which some of those provisions have been made retroactive by later legislative acts. See 1987 N.D. Op. Att'y Gen. 96; 1993 N.D. Op. Att'y Gen. L-139.

Those opinions state that the specific retroactivity provided for changing substantive provisions of the farm-to-market road program under N.D.C.C. § 57-15-06.3 do not apply to other matters voted on by the county electorate. These matters include the use of surplus funds as well as the amount of the mill levy authorized for funding the farm-to-market road program. 1982 N.D. Op. Att'y Gen. 151 stated:

> It is my opinion that a board of county commissioners, pursuant to section 57-15-06.3(2), N.D.C.C., may not increase the mill levy for a county road without holding an election on the proposed mill levy increase.

In the body of the opinion, it was noted that although the approval of the program and the levying of taxes are submitted as one measure, they do not merge into one for the purpose of authorizing the board of county commissioners to increase the tax levy without having an election on the question. See also Letter from Attorney General Robert O. Wefald to Merle A. Torkelson (March 6, 1984).

These two opinions, however, did not consider temporary legislation passed by the Legislature every session since 1981 which permitted taxing districts to raise their maximum mill levies otherwise provided by law by specific percentages. In 1995, this legislation was made permanent by the enactment of N.D.C.C. § 57-15-01.1. In 1981 N.D. Sess. Laws ch. 564, § 3, subsection 5, the Legislature stated:

> The provisions of this section shall supersede any applicable mill levy limitations otherwise provided by law for 1981 and 1982. . . .

Similarly, 1983 N.D. Sess. Laws ch. 591, § 1, subsection 5, stated:

> The provisions of this section supersede any applicable mill levy limitations otherwise provided by law. . . .

From 1985 until the enactment of N.D.C.C. § 59-15-01.1 the subject language stated:

> Under the provisions of this section a taxing district may supersede any applicable mill levy limitations otherwise provided by law, or a taxing district may levy up to the mill levy limitations otherwise provided by law without reference to this section. . . .

1985 N.D. Sess. Laws ch. 612, § 3(5); 1987 N.D. Sess. Laws ch. 673, § 1(6); 1989 N.D. Sess. Laws ch. 689, § 1(6); 1991 N.D. Sess. Laws ch. 653, § 1(6); and 1993 N.D. Sess. Laws ch. 548, § 1(6). The taxing district board action needed to employ either the temporary law or current N.D.C.C. § 57-15-01.1 is described in the attached recent opinion concerning school district mill levies. Letter from Attorney General Heidi Heitkamp to David Nething and Lyle Hanson (April 26, 1996).

It is my opinion that if a county taxing district properly employed the above-noted succession of temporary mill levy increase laws or N.D.C.C. § 57-15-01.1, the mill levy limitations otherwise provided by N.D.C.C. § 57-15-06.3 could be superseded and increased pursuant to that legislation. To the extent this opinion conflicts with 1982 N.D. Op. Att'y Gen. 151 and Letter from Attorney General Robert O. Wefald to Merle A. Torkelson (March 6, 1984), those prior opinions are overruled.

Your third question asks whether the surfacing of roads within the farm-to-market road program with any material other than bituminous surfacing satisfies the program authorized by the electors when the ballot in question indicates that all roads voted on will be surfaced with bituminous surfacing.

The two methods for changing an approved farm-to-market road program were discussed in the 1987 Attorney General's opinion noted above under the analysis for question two. Those methods are contained in subsections 2 and 3 of N.D.C.C. § 57-15-06.3. It was noted that use of the procedures provided in N.D.C.C. § 57-15-06.3(2) was applicable to farm-to-market road programs approved after July 1, 1971. However, the second method of changing the farm-to-market road

program, provided by N.D.C.C. § 57-15-06.3(3), could be used by a board of county commissioners if the farm-to-market road program had been in effect for a period of ten years and the limitations provided in N.D.C.C. § 24-05-16 were observed. It was noted that no detailed procedure for a public hearing was required. Subsection 3 of N.D.C.C. § 57-15-06.3 was given retroactive application to farm-to-market road programs approved prior to July 1, 1981, pursuant to 1987 N.D. Sess. Laws ch. 674, § 2.

The 1987 opinion stated:

> With the exception of meeting the requirements of N.D.C.C. § 24-05-16, a board of county commissioners is granted a plenary power to change the significant aspects of the farm-to-market road program as part of their ordinary business affairs and without a public hearing.

Consequently, if the farm-to-market road program in question fulfills the criteria for application of N.D.C.C. § 57-15-06.3(3), then the program as voted upon may be changed by the county commission. It is my opinion that the type of construction is one of the items of the program that may be changed by the county commission pursuant to that section. (Note that 1982 N.D. Op. Att'y Gen. 24 and 1984 N.D. Op. Att'y Gen. 1 concluded differently with respect to the application of N.D.C.C. § 57-15-06.3. These determinations were made prior to legislative action specifically applying N.D.C.C. § 57-15-06.3(3) to farm-to-market road programs approved before July 1, 1981. 1987 N.D. Sess. Laws ch. 674, § 2.)

Your fourth question asks whether the city of Devils Lake has the responsibility to maintain and operate extensions of county roads when those roads continue past the city limits and into the city of Devils Lake. As part of this question, you state that your county auditor informed you that the Ramsey County Commission has never made a designation of its county road system. Upon inquiry to the North Dakota Department of Transportation, I was provided with copies of correspondence from the Ramsey County Commission and the State Highway Department (now Department of Transportation) concerning the designation of the Ramsey County road system. I am attaching for your information copies of a resolution to designate the county road system dated December 4, 1979, signed by the chairman of the board of county commissioners and the county auditor, as well as a copy of a letter dated July 1, 1980, from the State Highway Department secondary roads engineer indicating the Highway Department's approval of the Ramsey County designated highway system on June 26, 1980.

Both documents indicate the procedure was undertaken pursuant to N.D.C.C. § 24-05-16.

In a 1989 opinion to the Traill County state's attorney, the Attorney General stated:

> The general rule is that where the power of regulating streets within a city is vested by statute in the city, the power of the city over its streets is exclusive. The general power of the county, within which the city lies, to control the highways within this territory is thereby divested so far as such streets are concerned. . . .
>
> Consequently, it is my opinion that those streets with[in] a city that connect with county highways are solely within the city's jurisdiction to control.

Letter from Attorney General Nicholas J. Spaeth to State's Attorney Stuart A. Larson (May 19, 1989) (copy attached).

It is therefore my opinion that, absent agreement providing otherwise, a city is responsible for the maintenance and operation of roads within its limits and a county is responsible for maintenance and operation of roads included within its designated county highway system. See N.D.C.C. §§ 24-05-16, 24-05-17, and 40-05-14.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/pg
Enclosures