N.D.A.G. Letter to Wilkes (March 14, 1991)

March 14, 1991

Mr. Richard C. Wilkes
Burke County State's Attorney
P.O. Box 190
Bowbells, ND 58721-0190

Dear Mr. Wilkes:

Thank you for your February 15, 1991, letter asking whether the board of county commissioners can change the priority of road projects which will be constructed under a schedule approved by the county electorate pursuant to North Dakota Century Code § 57-15-06.3, without violating the holding in 1984 N.D. Op. Att'y Gen. 1 (copy attached).

Your subsequent March 7, 1991, letter clarified your original inquiry by eliminating the reference to N.D.C.C. § 57-15-06.3(4). That statute regulates the disposition of surplus monies not required to match federal funds. You stated in your March 7, 1991, letter that the county does not have any "surplus funds," and that all farm-to-market road monies being held by the county are dedicated to construction projects under the road program. Consequently, it is unnecessary to address the disposition of funds under N.D.C.C. § 57-15-06.3(4).

Prior to 1987, the tax proceeds generated under N.D.C.C. § 57-15-06.3, the county farm-to-market road program, could only be expended on the farm-to-market road system or be used for purposes of matching federal aid for the farm-to-market road program. This limitation was in effect at the time 1984 N.D. Op. Att'y Gen. 1 was issued. This limitation is no longer in effect, having been repealed by 1987 N.D. Sess. Laws ch. 674.

The conclusion reached in 1984 N.D. Op. Att'y Gen. 1 relied upon the rationale expressed by the North Dakota Supreme Court in City of Grand Forks v. Grand Forks County, 139 N.W.2d 242 (N.D. 1965). In its opinion, the supreme court rested its reasoning upon the language limiting the expenditures of the proceeds of the tax funds generated under N.D.C.C. § 57-15-06.3. That limitation was repealed by the 1987 legislature. See N.D. Sess. Laws ch. 674. Additionally, when 1984 N.D. Op. Att'y Gen. 1 was written, the legislature had not given a retroactive application to the provisions of N.D.C.C. § 57-15-06.3(3). Therefore, in 1984, no statutory authority existed whereby a board of county commissioners could retroactively change a farm-to-market road program without submitting the matter to the county electorate. As a consequence of these legislative changes, the opinion reached in 1984 N.D. Op. Att'y Gen. 1 is no longer pertinent to the question you present.

When the legislature amended N.D.C.C. § 57-16-06.3 in 1987, a presumption arose that the legislature had knowledge of the prior construction of the statute by the supreme

court. The courts have generally held that the legislature is presumed to have considered prior court constructions in the enactment of the amended statute and may be considered by courts in the construction of the latter statute on the same subject. Skinner v. American State Bank, 189 N.W.2d 665 (N.D. 1971); Lapland v. Sterns, 54 N.W.2d 748 (N.D. 1952). "A legislature is presumed, in enacting a statute, to have in mind court decisions pertaining to the subject legislated on and to have acted with reference thereto." Id. at 753. Therefore, it can be concluded that the legislature intended to remove the limitation on the expenditure of farm-to-market funds previously imposed by statutory and case law.

Under N.D.C.C. § 57-15-06.3(3) a board of county commissioners is authorized to change the farm-to-market road program if it has not been completed within ten years of its creation. In the case of Burke County, the program was created in 1968. (See ballot attached.) Additionally, the statute requires that the board comply with the provisions of N.D.C.C. § 24-05-16 if there is a change in the original designation of a county road system.

By enacting the 1987 amendment to N.D.C.C. § 57-15-06.3 the Legislature was presumptively aware of the limitations imposed on the monies generated under the statute and the supreme court's affirmation of that limitation in Grand Forks County. Consequently, it is my opinion that the Legislature's intent was to provide a board of county commissioners with the authority to change the county road program pursuant to N.D.C.C. § 57-15-06.3(3). Thus, it is my opinion the proposal outlined in your February 15, 1991, letter whereby the county commissioners propose to use "tax revenues generated under an approved but incomplete program for construction of farm-to-market roads" for maintenance on previously constructed farm-to-market roads is legal.

Sincerely,

Nicholas J. Spaeth

krb
cc: Rep. June Enget