

N.D.A.G. Letter to Woods (April 16, 1992)

April 16, 1992

Mr. William E. Woods, Jr.
City Attorney
PO Box 10
Parshall, ND 58770

Dear Mr. Woods:

Thank you for your February 5, 1992, letter asking whether the city of Parshall may issue revenue bonds under N.D.C.C. ch. 40-35 to finance the cost to over-coat certain city streets. I understand that you have also discussed this matter with a member of my legal staff.

In 1986 the city replaced its water lines. This project involved cutting through and removing approximately one-third of the asphalt surface of the city's streets. At that time, only the surface area of the streets that was actually cut through and removed was replaced. The proposed over-coat would cover the entire surface area of the streets involved in the 1986 project.

You indicate that the city believes that the proposed over-coat project would be the final phase of the water line replacement project. The city would impose a water fee surcharge and pledge the revenues to be collected from the surcharge to the payment of the revenue bonds issued to finance the cost of the over-coat project.

You indicate that it would not be feasible for the city to finance this project through the issuance of general obligation bonds or the levy of special assessments because of the considerable amount of Indian trust lands within the city which are not subject to local taxation.

Pursuant to N.D.C.C. ch. 40-35, a municipality may issue revenue bonds to finance the cost of an undertaking, as that term is defined in N.D.C.C. § 40-35-02. The bonds are payable from the revenue collected by the municipality in the operation of the undertaking.

A water distribution system is an undertaking. N.D.C.C. § 40-35-02(1). However, by itself, the construction or improvement of city streets is not an undertaking. Certainly the cost of cutting through and replacing city streets incurred at the time water lines were being replaced would properly be considered a cost of that undertaking. The question is whether over-coating these streets which in 1986 the city determined to simply patch or repair can be considered to be a part or phase of the original undertaking and eligible to be financed through the issuance of revenue bonds.

The problem with considering the over-coat project as a phase of the 1986 undertaking is that the street work which was done as a part of that undertaking was in fact performed as it was intended to be performed. The over-coat project is a new, additional project. In other words, the street phase of the 1986 undertaking was completed and now, six years later, the city is proposing to take on a new street improvement project. Therefore, it is my opinion that the proposed over-coat project does not meet the definition of an undertaking pursuant to N.D.C.C. § 40-35-02 and the city may not issue revenue bonds to finance the cost of the over-coat project.

It is my understanding that the problem you are facing is not unusual for cities located within the boundaries of Indian reservations. If you have not already done so, I recommend that you discuss this matter with the BIA to determine whether any federal money is available for this project. You might also consider discussing this matter with an attorney who specializes in municipal bond law or with a firm which offers financial advisory service to municipalities.

Sincerely,

Nicholas J. Spaeth

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