

N.D.A.G. Letter to Larson (May 19, 1989)

May 19, 1989

Mr. Stuart A. Larson
Trail County State's Attorney
P.O. Box 847
Hillsboro, ND 58045

Dear Mr. Larson:

Thank you for your April 12, 1989, letter regarding county roads through city limits. Your first question is whether a North Dakota city may legally refund money a county has given it for resurfacing that part of the county's road lying within the city's limits if the county subsequently abandons that portion of the county road which was resurfaced and which, after being abandoned by the county, will continue to form and be used as an important part of the city's street system.

Your question assumes that the road through the city is within the county's jurisdiction. N.D.C.C. § 40-05-01(8) provides that the governing body of a city has the power "to lay out, establish, open, alter, repair, clean, widen, vacate, grade, pave, park, or otherwise approve and regulate the use of streets." 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. The fact that a highway (which in an urban area may be called a "street," N.D.C.C. § 24-01-01.1) is constructed through a city by a county does not divest the city of its jurisdiction. 39 Am. Jur.2d Highways, Streets, and Bridges, 203 (1968).

The power to control streets within a city's limits by its very nature would seem inconsistent with joint or concurrent exercise by the two bodies unless legislative language specified that this jurisdiction was concurrent. Board of Com'rs v. Chicago M. & St. P. Ry. Co., 132 N.W. 675, 677 (S.D. 1911). N.D.C.C. § 24-01-03 specifically designates the state's and city's jurisdiction with respect to state highways through cities (urban connecting streets), but extends no joint jurisdiction to counties. Additionally, legislative action granting a city the power to contract with a county for the construction or maintenance of streets within the city illustrates legislative intent that the county have no jurisdiction to construct or maintain streets within a city's limits without the city's consent. N.D.C.C. § 40-05-14.

Consequently, it is my opinion that those streets with a city that connect with county highways are solely within the city's jurisdiction to control. Thus, to the extent that your question asks whether the city can refund money to the county for improvements made on a street that the county intends to vacate, the question is partially moot because the county has no jurisdiction to vacate a street within the city limits.

The question then becomes whether the city has the authority to enter into an agreement to reimburse the county for resurfacing a city street. On this question, I agree with your analysis that N.D.C.C. §§ 40-05-14, 40-22-01(2), and 40-22-06 provide cities with the authority to contract with counties to perform city improvements, and those statutes provide the means for the city to pay for the work performed by the county.

The second question concerns a county road which passes through a city. You ask which governmental entity, the county or the municipality, has control and authority of the weight restrictions over that portion of the county road passing through and contained within the city limits.

N.D.C.C. § 40-05-01(8) grants a city the power to regulate the use of its streets, and N.D.C.C. § 40-05-02(14) grants the city council and board of city commissioners the additional power to regulate, control, or restrict within designated zones the use of streets by various classes of traffic. Based on these statutes and my discussion regarding your first question, it is my opinion the city is the governing body that has the exclusive right and jurisdiction to set weight limits on streets within the city limits as authorized by N.D.C.C. §§ 39-12-01 and 39-12-05.3(4).

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

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