

**OPINION
72-130**

September 15, 1972 (OPINION)

Mr. C. E. Crane

State's Attorney

Hettinger County

Commercial Bank Building

Mott, ND 58646

Dear Mr. Crane:

This is in response to your letter requesting an opinion of this office as to whether your county, which owns highway building and maintenance machinery and equipment intended and purchased for the maintenance and construction of county roads can use this equipment and county employees operating same in the construction and maintenance of township roads, and to perform services for several of the cities.

You letter indicates that the township will pay the county from township road funds and presumably the cities would also pay for the repair or construction of their streets and possibly the digging of garbage pits.

You indicate that a private road construction contractor has complained to the county commissioners that if they use county road equipment and employees to perform work for townships and/or cities they will be competing with private enterprise and putting him out of business and that he cannot meet the lower prices charged by the county. You letter states that the private contractor contends that the county commissioners in performing road construction work for townships and/or cities at a price exceeds their lawful authority and power and in so doing, the county would be using public property to compete with private enterprise.

You state that the county commissioners therefore desire our opinion as to whether or not they have lawful authority and power to perform construction work for townships and/or cities with the use of county owned road machinery and county employees, with the cost thereof to be paid by the township and/or city. You mention further that the township roads are not a part of the designated county road system.

There is no overall prohibition against the county engaging in business. Rather, Section 185 of the North Dakota constitution provides:

"Section 185. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in

aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

We should also consider, however, that counties are almost entirely dependent on tax raised funds, and to the current date the Legislative Assembly has not authorized the levy of taxes for the purpose of putting counties into the road building or contracting business. They have, however, specifically authorized the purchase and acquisition of road building and maintenance equipment for the purpose of constructing and maintaining the county roads.

Quite obviously, the basic obligation and responsibility of a county highway department, its equipment and employees is the maintenance and construction of county highways. Considering the size of equipment, projects, etc., involved in a county road program, it is not at all unusual for a county to run into situations where it either has a surplus or shortage of equipment, help and material on many occasions. There is no question that the county can contract for road building or maintenance within the limits of the funds available therefor, when they have a shortage of equipment, help or material. Also, they have a problem, when they have a surplus of such equipment, help or material, and considering the basic costs, depreciation of equipment, etc., this can be a very large item. We feel that there is no question that a surplus in this line can be disposed of, rather than being allowed to go to waste, dissipate, etc. Thus, we note at 56 Am. Jur.2d. 273, Municipal Corporations, Counties and Other Political Subdivisions, Section 213, the statement that:

"Section 213. DISPOSITION OF SURPLUS OR BYPRODUCT RESULTING FROM LEGITIMATE PUBLIC ENTERPRISE. According to some authorities, where, as a necessary result of carrying on a legitimate public enterprise in a reasonably prudent manner, a surplus of the material used or distributed is acquired, or a byproduct created, a municipal corporation may lawfully engage in the business of disposing of such surplus or byproduct for profit, without special legislative authority."

The legislature of the state has specifically recognized township contracts with counties and other specified political subdivisions, for this type of work by providing that such contracts can be entered into without the necessity of advertising for bids. See section 24-06-09 of the North Dakota Century Code. See also in this regard subsection 1 of section 11-31-03 of the North Dakota Century Code. On such basis we do not think that the right of the county to agree with townships by contract to utilize its surplus road construction and maintenance equipment facilities in the construction and maintenance of township roads can be questioned.

The matter is not quite so clear with regard to the county dealing with a city in such matter, and, of course, also, the city street system does not generally so closely relate to the county highway system as a township road system. Where, of course, a particular situation falls within the provisions of a particular statute such as, for example, Section 40-22-26 of the North Dakota Century Code, entitled "Municipality may enter into agreement with highway

department or county for certain improvements" or a "Joint Function" under Section 54-40-08 of the 1971 Supplement to the North Dakota Century Code, there should be no question. In other instances, however, that do not so clearly shall under these statutes, the right of the county to assume the responsibility of a contractor to perform and complete a particular project, for a specified price, might be open to question. On the other hand, we would not question the right of the county to lease surplus usage of its machinery at least to the extent appropriate to offset depreciation costs, to sell surplus road materials, etc., or to allow county employees leaves of absence to work for a city during slack county work periods.

With regard to both phases of the question, we are, of course, assuming that the construction or maintenance work would be without cost to the taxpayers of the county, and in effect entirely at the expense of the city or township benefiting thereby.

We hope the within and foregoing will be sufficient for your purposes. See Section 24-05-04.1 N.D.C.C. in this regard also.

Sincerely yours,

HELGI JOHANNESON

Attorney General