

**OPINION  
73-554**

March 5, 1973           (OPINION)

Mr. George M. Ackre  
State's Attorney  
Towner County  
Cando, ND 58324

Dear Mr. Ackre:

This is in response to your letter asking for an opinion whether or not a tax levy spread pursuant to Section 57-15-06.3 of the North Dakota Century Code pertaining to a levy for federally assisted farm to market roads should be spread on the 1972 real estate taxes payable in 1973, or on the 1973 taxes which are payable in 1974, in the specific instance where the election was held on November 7, 1972, in which the approval of the electorate was given. You also provide us with a copy of your opinion to the county commissioners which concludes that the special levy under Section 57-15-06.3 may not be implemented until after the county commissioners have had an opportunity to consider the matter and provide for it in its budget.

Section 57-15-05 sets forth when the county commissioners are to determine the levies within the authorization of law needed to carry out the activities of the county. It provides that this could be accomplished on the fourth Tuesday in July of each year or within ten days thereafter. In determining the amount to be levied, the budget shall show the complete expenditure and the programs for which the taxes are needed, as well as the source of the revenue from which each program will be financed.

The aforementioned provisions apparently apply to all of the general activities and administrative affairs of the county. We are not prepared to say that its provisions, particularly as to the time in which it is to be accomplished, applies to a special program submitted to the electorate for approval.

The provisions of Section 57-15-06.3 provide for a special procedure to be employed and requires the approval of the electorate before the program may be implemented. In your letter, you do not state the question as it was submitted to the electorate, nor does your opinion contain this information. Conceivably, a detailed program, together with the question, was submitted to the electorate whether or not a levy not to exceed ten mills should be made. If approved, it would grant authority to make the levy. The development of the program and the submission to the Bureau of Roads does involve the process of budgeting in the general sense.

A careful examination of Section 57-15-06.3 discloses that a program has to be developed and submitted to the Bureau of Public Roads for approval. After such approval has been given, the matter is submitted to the electorate. The program as submitted to the electorate could and probably should contain the specific mill levy, but not to exceed ten mills. Significantly, this section also provides:

"\* \* \*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 levy shall not be subject to the county mill levy limitations, and the proceeds of such tax shall be used, except as herein provided, only for matching federal aid available for such program which shall be the official county road program.\* \* \*" (Emphasis ours)

The sentence clearly indicates that once approved, the levy shall be made annually thereafter.

The decision to determine the amount of money needed for the special program is not one affecting the general administration and management of county affairs. It would not appear that the budgeting process as stated in Section 57-15-05 and at the time specified therein would first have to be satisfied.

We note that excess levies authorized for counties under Section 57-17-02 may be held not later than September 1 of each year. September 1 would be substantially later than ten days following the fourth Tuesday in July. It would appear that any election held on September 1, and if favorably acted upon by the electorate, it would be a physical impossibility to have the matter considered by the county commissioners under the provisions of Section 57-15-05, unless the implementation of the tax is delayed for a year.

We think that the reference to time when election may be held under Section 57-17-02 clearly indicates that the subject matter need not be first considered and disposed of under the proceedings in Section 57-15-05.

It also appears that the September 1 date was designed to give the officials involved sufficient time to perform the necessary mechanics of carrying out the wishes of the electorate. Even the September 1 date cannot be considered as mandatory in every instance. It appears to have characteristics of a directory provision rather than a mandatory one.

In the final analysis it appears that the major concern could be whether or not the officials who are charged with performing certain functions have adequate time in which to accomplish those matters.

There is a further item to consider. If the tax in fact has been levied, it would create greater havoc to attempt to undo the levy that has already been made. It is not a matter of paying more less taxes. The number of tax dollars levied will probably be the same in any instance.

The only difference is whether the tax will begin at an earlier date and be completed at an earlier date or be started at a later date and continued to a later date. We need to give consideration to what has already been done.

We also note that no provision is made in Section 57-15-06.3 as to the time within which the election must be held.

It is therefore our opinion that the county farm to market road program under Section 57-15-06.3 is not subject to the provisions of Section 57-15-05 before it may be implemented.

Sincerely yours,

ALLEN I. OLSON

Attorney General