

Date Issued: February 5, 1982 (AGO 82-8) (AMENDED OPINION)

Requested by: Raymond R. Rund, Steele County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a board of county commissioners may deviate from a county road program (requiring the resurfacing of roads with bituminous materials) approved by the county electorate pursuant to section 57-15-06.3 of the North Dakota Century Code.

II.

Whether the amendments to section 57-15-06.3, N.D.C.C., enacted after the electorate approved the county road program, may be given retroactive application to the approved county road program.

III.

Whether an increase in the county road program mill levy from ten to fifteen mills would authorize a board of county commissioners to use the increased revenues for purposes other than those originally approved by the electorate.

- ATTORNEY GENERAL'S OPINION

I.

It is my opinion that a board of county commissioners may not deviate from a county road program (requiring the resurfacing of roads with bituminous materials) approved by the county electorate pursuant to section 57-15-06.3, N.D.C.C.

II.

It is my further opinion that amendments to section 57-15-06.3, N.D.C.C., enacted after the electorate approved the county road program, may not be given retroactive application to the approved county road program.

III.

It is my further opinion that an increase in the county road program mill levy from ten to fifteen mills would not authorize the board of county commissioners to use the increased revenues for purposes other than those originally approved by the electorate.

- ANALYSIS -

I.

Section 57-15-06.3, N.D.C.C., deals with county farm-to-market and federal-aid roads. This section in its entirety reads as follows:

57-15-06.3. COUNTY ROAD PROGRAM OF FARM-TO-MARKET AND FEDERAL-AID ROADS - TAX LEVY - USE OF EXCESS FUNDS.

1. The board of county commissioners of any county in this state may prepare a proposed county construction program of farm-to-market and federal-aid roads on the county road system, setting forth a general description of the roads to be constructed, the location of bridges constituting a part of the program, the approximate total mileage, and the priority of construction. After approval of the program by the state highway department and the federal highway administration, the board may submit the program to the electors of the county with the question of levying a tax of not to exceed fifteen mills upon the net taxable assessed valuation of all property in the county for the completion of the program by matching, from the proceeds of the tax, federal funds available for federal-aid, secondary and feeder roads, farm-to-market roads, and all roads as provided for under federal aid highway Acts. If the majority of the electors voting on the question approved the program and levy, the board shall levy a tax not in excess of fifteen mills. The levy shall not be subject to the county mill levy limitations. The proceeds of the tax shall be used, except as provided in this section, only for matching federal aid available for the program which shall be the official county road program.
2. If the board of county commissioners determines that a substantial change is necessary in the details of the program of farm-to-market and federal-aid roads previously approved by the electors of the county, the board shall set a date for a public hearing on the proposed amendment to the program. Notice shall be published in the official newspaper of the county once a week for three consecutive weeks before the date of public hearing. The board, after approval of the amendment by the state highway department and the federal highway administration, may officially amend the program. The program, as amended by the board, shall become the official county road program.

3. The board of county commissioners may change the program if the program has not been completed within ten years of the election establishing the program and the board complies with the requirements specified for changes in the original designation of a county road system under section 24-05-16.
4. Any proceeds of a tax levy in excess of the amount needed to match federal funds in any year may be used by the county, at any time the proceeds may become available, for providing paved or any other type of road surfacing on, or for maintenance of, roads included within the county road program for which the tax levy was originally made.

A question involving the authority of a board of county commissioners to deviate from a prior approved county road program was considered by the North Dakota Supreme Court in Huber v. Miller, 101 N.W.2d. 136 (N.D. 1960), wherein the court stated:

But here the electors had voted upon the proposed county construction program of farm-to-market roads. The levy which they had approved was to be used only in carrying out the program which had been approved, since the law specifically provided ". . . the proceeds of such tax shall be used only . . . for such program which shall be the official county road program."

* * *

However, having submitted the program with such general description to the electors, together with a proposed tax levy of five mills to pay for its construction, a substantial compliance of the proposed program must be made. The proceeds of such levy must be used for the particular purpose authorized by the voters. Using the proceeds of such levy for any other purpose would be an unlawful and wrongful diversion of tax moneys raised by such levy. 101 N.W.2d. 136, 142.

In view of the Supreme Court's simple but emphatic statement relative to diversion, it is clear that moneys raised under the county road program, pursuant to section 57-15-06.3, N.D.C.C., approved by the people as to bituminous material, cannot be utilized for surfacing a highway with other than a bituminous material. It is my opinion that moneys generated under a county road program cannot be expended for purposes other than those specified by the statute and as approved by the citizens of the county.

It should be noted that this conclusion would not prohibit the county from pursuing a "staged" construction type of program, where the roadbed itself would be constructed one year with the subsurfacing material placed thereon, and at a later time the bituminous surface would be put in place.

Section 57-15-06.3(2), N.D.C.C., provides a method for a substantial change in the details of the program approved by the voters. Insofar as it would now be cheaper to use some

other material other than bituminous material as approved by the voters of a particular county, that change can be made pursuant to this section. Since the provision for change is clearly set out in the law, no other interpretation of this section to authorize a change is other than provided for in the law would be permissible.

II.

Section 1-02-10, N.D.C.C., addresses the question of retroactive application of the Century Code. That section states:

1-02-10. CODE NO RETROACTIVE UNLESS SO DECLARED. No part of this code is retroactive unless it is expressly declared to be so.

While the Legislature may have authorized the method of taxation for the financing of a county road program, the ultimate decision of whether or not to implement such a program rested with the citizens of the various counties. Once the citizens approved the tax, established the purposes for which it could be expended, and the other details of the program, a subsequent legislative act cannot be construed in a manner that would change the benefits the electorate have conferred upon themselves.

III.

The decision of the North Dakota Supreme Court in Huber v. Miller supra, is controlling. It is not possible to divert a part of the funds raised pursuant to the program approved by the electorate. Therefore, if the voters increase the mill levy under the authority of the 1964 county road program, the increased revenues would be dedicated to the original program and its purpose.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the questions presented are decided by the courts.

ROBERT O. WEFALD
Attorney General

Prepared by: Myron E. Bothun
Assistant Attorney General