

Date Issued: March 30, 1984 (AGO 84-18)

Requested by: Tom P. Slorby
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- QUESTION PRESENTED -

Whether a county may purchase highway equipment with its share of dedicated highway funds allocated to the county under the provisions of section 54-27-19 of the North Dakota Century Code.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a county may purchase highway equipment with its share of dedicated highway funds allocated to the county under the provisions of section 54-27-19, N.D.C.C.

- ANALYSIS -

Article X, Section 11 (formerly Article 56), of the North Dakota Constitution states as follows:

Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, . . . shall be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways.

Prior to the adoption of this constitutional amendment in 1940, counties had the authority to acquire highway equipment. Section 1946(a)(1) of the 1913 Compiled Laws, 1925 Supp., provided:

Contracts to be advertised. All purchases of road machinery and other articles or contracts for the improvements of the highways, which shall exceed the sum of one hundred dollars, shall be advertised in the manner as now provided by law for the purchase of county supplies.

In McKenzie County v. Lamb, 298 N.W. 241 (N.D. 1941), the court in considering Article X, Section 11, observed:

. . . The purpose of the amendment was to prevent any use of the gas tax revenues for other than highway purposes. . . . Accompanying it in the Publicity Pamphlet were the arguments advanced by its sponsors in favor of its adoption. These clearly show that the sole purpose of the amendment was to dedicate the revenue from the gas tax to public highway purposes. There is no reference therein to the State Highway System. And it is inconceivable that the sponsors, county commissioners, particularly

interested as they are in all public highways, intended to make it impossible for the legislature to say where and how on such highways this revenue should be used. 298 N.W. 241, 243

A county still has the authority, under the provisions of section 24-05-04, N.D.C.C., to purchase highway or road equipment.

The North Dakota Supreme Court in *Newman v. Hjelle*, 133 N.W.2d. 549 (N.D. 1965), considered the purpose of the constitutional amendment embodied in Article X, Section 11 and stated as follows:

It is clear the purpose of the amendment was to prevent any use of the earmarked revenues for anything but highway purposes and not to restrict the terms of the amendment by narrow construction of the purpose for which the revenues may be used within the area designated. 133 N.W.2d. 549, 557

The authority to acquire road machinery was in place on June 25, 1940, when the initiated measure was approved by the voters. None of the subsequent legislative assemblies has seen fit to repeal the county's authority to purchase highway equipment. The affect of these circumstances was noted by the court in *Newman supra*, the court saying:

By article 56 of the Constitution, the people froze into a constitutional provision a subject already covered by statute. 133 N.W.2d. 549, 558-9

The rationale of both the McKenzie County and Newman cases, *supra*, was adopted by the Burleigh County District Court in the unreported case of *Dean Miller v. Walter R. Hjelle*, (Civil No. 19289, 1966), wherein the district court decided the question of whether or not funds subject to Article X, Section 11, of the Constitution could be used for erection of the State Highway Department Building on the Capitol grounds. The court held:

It is my opinion that the Legislature in determining that that building was necessary, fixing the location of the building, and appropriating money therefor, have found that such an expenditure is for "highway purposes," and to hold otherwise would be placing the "narrow construction" on the language contained in Article 56 which the Supreme Court referred to in the Newman case. Dean Miller v. Walter R. Hjelle *supra*, Slip Op. at 5.

As such, it is my opinion that a county may purchase highway equipment with its share of dedicated highway funds allocated to the county under the provisions of section 54-27-19, N.D.C.C.

- 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 have been the subject of a judicial decision.

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