Office of Attorney General
State of North Dakota

Opinion No. 87-21

Dated Issued: October 15, 1987

Requested by: Michel W. Stefonowicz
Divide County State's Attorney

--QUESTIONS PRESENTED--

I.

Whether N.D.C.C. § 57-15-06.3(3) authorizes a board of county commissioners to make substantive changes in a farm-to-market road program that was approved by the county electorate prior to 1981.

II.

Whether a change in the farm-to-market road program instituted under N.D.C.C. § 57-15-06.3(3) is subject to the public hearing requirements set forth in N.D.C.C. § 57-15-06.3(2).

III.

Whether surplus funds available under N.D.C.C. § 57-15-06.3(4) may be used to fund new road construction projects incorporated in an amended farm-to-market road program approved by a board of county commissioners pursuant to N.D.C.C. § 57-15-06.3(3).

IV.

Whether a change of the original farm-to-market road program under N.D.C.C. § 57-15-06.3(3) will extend the time of the mill levy provided for in the original farm-to-market road program.

V.

Whether the surplus funds available under N.D.C.C. § 57-15-06.3(4) must be expended on an annual basis.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that N.D.C.C. § 57-15-06.3(3) authorizes a board of county commissioners to make substantive changes in a farm-to-market road program that was approved by a county electorate prior to 1981.

II.

It is my further opinion that a change in the farm-to-market road program instituted under the provisions of N.D.C.C. § 57-15-06.3(3) is not subject to the public hearing requirements of N.D.C.C. § 57-15-06.3(2).

III.

It is my further opinion that any surplus funds available under N.D.C.C. § 57-15-06.3(4) may not be used to fund new road construction projects adopted as part of an amended farm-to-market road program approved by a board of county commissioners.

IV.

It is my further opinion that a change to the original farm-to-market road program under N.D.C.C. § 57-15-06.3(3) will not extend the time of the mill levy provided for in the original farm-to-market road program.

V.

It is my further opinion that the surplus funds available under N.D.C.C. § 57-15-06.3(4) need not be expended on an annual basis.

--ANALYSES--

I.

North Dakota law provides counties with the authority to prepare a proposed county construction program of farm-to-market roads. N.D.C.C. § 57-15-06.3. Action by the 1987 Legislative Assembly resulted in the retroactive effect given to any farm-to-market road program approved by the electorate prior to 1981.

PARTIAL RETROACTIVE APPLICATION OF ACT. Subsection 3 of section 57-15-06.3, originally enacted as subsection 2 of section 57-15-06.3 by chapter 569 of the 1981 Session Laws of North Dakota, is retroactive to road programs that were the subject of elections held before July 1, 1981.

1987 N.D.Sess. Laws ch. 674, § 2.

The above provision precisely meets the requirements of N.D.C.C. § 1-02-10 which requires an expressed declaration as to a statute's retroactive application. Such a declaration has been accomplished in this instance.

The legislative purpose in providing for the retroactive application of N.D.C.C. § 57-15-06.3(3) is readily apparent from a historical perspective. Prior judicial decisions had severely constrained a board of county commissioners' authority to change any substantive aspect of a farm-to-market road program that had been approved by the electorate prior to 1981. See Miller v. Huber, 101 N.W.2d 136 (N.D.1960); City of Grand Forks v. Grand Forks County, 139 N.W.2d 242 (N.D.1965). In 1981, the Forty-seventh Legislative Assembly sought to avoid the limitations imposed by the rulings in Huber and City of Grand Forks by amending § 57-15-06.3 to provide the boards of county commissioners with greater discretion in altering a farm-to-market road program that had been approved by the electorate. This particular amendment was ultimately codified under N.D.C.C. § 57-15-06.3(3).

In 1982, the Attorney General ruled that N.D.C.C. § 57-15-06.3(3) could only be applied prospectively and could not be given a retroactive effect whereby a board of county commissioners could change the farm-to-market road program that had been approved by the electorate prior to July 1, 1981. See 1982 N.D.Op.Att'y Gen. 151 (copy attached).

The exactitude of 1987 N.D.Sess.Laws ch. 674, § 2, coupled with the prior legislative and judicial history of N.D.C.C. § 57-15-06.3(3), requires that the statute be given a retroactive application, thereby permitting substantive changes to be made in a farm-to-market road program. The changes permitted would include the addition of new road projects to and the deletion of road projects from the existing farm-to-market road program.

II.

The provisions of N.D.C.C. §§ 57-15-06.3(2) and 57-15-06.3(3), address separate and independent methods that may be employed by a board of county commissioners to alter the provisions of a farm-to-market road program. The distinguishing features between the two statutory provisions relate to the time the statute becomes operative and the procedure to be followed under the respective statutes.

N.D.C.C. § 57-15-06.3(2), allowing a board of county commissioners to make substantial changes in the farm-to-market road programs, can be utilized at any time after the farm-to-market road program has been approved by the voters. It contains no restriction as to when its authority can be implemented by a board of county commissioners. It requires that the proposed changes be published for two weeks prior to the required public hearing. It is after the hearing that the proposed changes are submitted to the State Highway Department and the Federal Highway Administration for their approval. If approved, the board of county commissioners may then adopt the proposed amendments.

In its present form, N.D.C.C. § 57-15-06.3(2) is applicable to farm-to-market road programs approved after July 1, 1971. See 1971 N.D.Sess.Laws ch. 540. Farm-to-market road programs receiving voter approval prior to July 1, 1971, would be subject to the prior opinions of the Attorney General holding that a change under the prior law would require approval of the county electorate. See 1982 N.D.Op.Att'y Gen. 24 and 1984 N.D.Op.Att'y Gen. 1 (copies attached).

It is noted, parenthetically, that N.D.C.C. § 57-15-06.3(2) refers to "a substantive change ... in the details of the program." It is my opinion that such language does not limit a board of county commissioners' authority to the change of minor aspects of the farm-to-market program. To the contrary, the statute contemplates substantial changes in the major items constituting the program. These items would consist of the proposed road and bridges to be constructed, their location and date of proposed construction, and other similar aspects of the program. This interpretation is consistent with the court's holding in Huber, at 143, where it was recognized that a board of county commissioners could make minor changes in the program. Consequently, the only meaningful purpose for the legislative enactment of this section is to provide for a substantive change in the farm-to-market road program.

The second method by which the details of a farm-to-market road program may be altered is N.D.C.C. § 57-15-06.3(3). The provisions of N.D.C.C. § 57-15-06.3(3) cannot be invoked by a board of county commissioners unless the farm-to-market road program has been in effect for a period of ten years. Unlike its companion statute, N.D.C.C. § 57-15-06.3(2), no detailed procedure for a public hearing is required. Rather, the

limitation is that the changes made by a board of county commissioners must be in compliance with the provisions of N.D.C.C. § 24-05-16. The latter law provides for a limitation on the total mileage of a county road system and requires that the designation of a county road be based upon traffic volumes, the conservation and development of natural resources, the general economy of the communities, and the integrating of the county roads into the general scheme of the statewide network of county roads. With the exception of meeting the requirements of N.D.C.C. § 24-05-16, a board of county commissioners is granted a plenary power to change the significant aspects of the farm-to-market road program as part of their ordinary business affairs and without a public hearing. As noted under part I of this analysis, N.D.C.C. § 57-15-06.3(3) has been made retroactive, which further indicates its independence of N.D.C.C. § 57-15-06.3(2).

III.

The authority to expend surplus funds granted by N.D.C.C. § 57-15-06.3(4) originated with the enactment of 1963 N.D.Sess.Laws ch. 382, which amended N.D.C.C. § 57-15-06.3. The amendatory language provided:

> 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 such proceeds may become available, for providing paved or any other type of road surfacing on roads included within the county road program for which the tax levy was originally made. Such paved or other type road surfacing may be used only after the question has been submitted to the electors of the county at a special election called for that purpose by the county commissioners. The use of such excess funds shall be approved by a majority of the electors voting at such special election.

The above statutory provision remained in effect until it was amended in 1981 by allowing the surplus funds to also be used for maintenance purposes. See 1981 N.D.Sess.Laws ch. 569. In the same act, the Legislature repealed the requirement that the expenditure of such funds be approved by the county electorate at a special election.

Consequently, farm-to-market road programs approved by the county voters prior to July 1, 1981, would remain subject to the limitations created by 1963 N.D.Sess.Laws ch. 382. This conclusion is consistent with 1987 N.D.Sess.Laws ch. 674, § 2, which provided for the partial

retroactive application of the act. As noted previously in this opinion, the retroactive feature was limited to subsection 3 of N.D.C.C. § 57-15-06.3 and, therefore, has no effect upon subsection 4 of the same statute.

This office has consistently ruled that the expenditures of tax monies raised under a farm-to-market road program is controlled by the statutory law existing at the time such road program is approved by the electorate. See 1982 N.D.Op.Att'y Gen. 24 (specifically question II) and 1984 N.D.Op.Att'y Gen. 1. Both of these opinions are applicable to the questions presented and are deemed controlling.

IV.

In a prior opinion of this office, 1982 N.D.Op.Att'y Gen. 151 (copy attached), a similar question was posed, and it was held that the tax levied pursuant to N.D.C.C. § 57-15-06.3(2) could not be increased by a board of county commissioners without the approval of the electorate of the county. While the question may be distinguished in that the duration of the mill levy would be extended without raising the mill levy, such action will result in an increase of the total tax collected. Consequently, 1982 N.D.Op.Att'y Gen. 151 is controlling on this issue.

V.

There is no statutory provision controlling the frequency for the expenditure of surplus funds available under N.D.C.C. § 57-15-06.3(4). The original authorization for the expenditure of surplus funds permitted the expenditure to be made at any time, if federal matching fund were made available for the purpose of paying for the surfacing of the roadway. See 1963 N.D.Sess.Laws ch. 382. In 1971, the Legislature repealed the requirement that the surplus funds be used to match federal aid monies. See 1971 N.D.Sess.Laws ch. 540.

In 1981, the Legislature further amended N.D.C.C. § 57-15-06.3(4) by repealing the requirement that the expenditure of the surplus funds be submitted to the voters on a special ballot and provided that the surplus funds could be used for the maintenance of the roads comprising the farm-to-market road program. See 1981 N.D.Sess. Laws ch. 569.

Throughout the history of this legislation, the provision that the surplus funds could be spent at any

time for the purposes stated in the statute has remained constant.

As previously noted in this opinion, the expenditures of tax monies raised under a farm-to-market road program are controlled by the statutory law existing at the time such road program is approved by the electorate. See 1982 N.D.Op.Att'y Gen. 24 and 1984 N.D.Op.Att'y Gen. 1. Therefore, a farm-to-market road program enacted by the county electorate prior to 1981 would require the electorate's approval for the expenditure of surplus funds.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts or the applicable provisions of law are amended or repealed.

Nicholas J. Spaeth
Attorney General

Assisted by: Myron E. Bothun
Assistant Attorney General