

**OPINION  
60-29**

August 22, 1960 (OPINION)

CITIES AND VILLAGES

RE: Contracts - County Road Fund

We are in receipt of your letter of August 3, 1960, in which you requested an opinion regarding the authority of a village to contract with a county under certain circumstances.

You stated that a proposal had been made to the County Commissioners that a contract be entered into between the county and the village whereby the county agrees to take over the maintenance of streets and highways in a given village, if the said village agrees that the twenty percent of the tax collected (as provided for in section 24-0501 of the 1957 Supplement to the N.D.R.C. of 1943) on account of real or personal property situated in the said village, be paid into the "County Road Fund."

You asked two questions:

- (1) Whether the village government could validly enter such a contract?
- (2) Whether the County Treasurer could validly set over the 20% to the 'County Road Fund'?"

You further stated that in your opinion, the village would not have the authority to do this, based on the idea that the duty of a governing body to provide street and highway maintenance within its boundaries, cannot be delegated.

We wish to state at the onset, that this office is in basic agreement with the conclusions you have reached. However, we first wish to refer you to excerpts from an opinion issued from this office on May 10, 1956, and we quote:

A county may enter agreements with the state (Section 24-0518, 1952 Supp. N.D.R.C.) or with certain municipalities (section 40-0514, 1953 Supp. N.D.R.C.) for the purpose of cooperating in highway and street construction or improvement within the county.

A county may also expend its road funds for grading, ditching and surfacing such highways or parts thereof, howsoever established, as constitute the principal thoroughfares of the county, for which the means otherwise provided are not sufficient in the opinion of the board of County Commissioners. (Section 24-0502, N.D.R.C. 1943).

"It is the opinion of this office that a board of County Commissioners has the authority to enter into an agreement with a village for street improvement and to make payments pursuant to such agreement."

It is to be noted that the above quoted statutes have been amended and are presently in the 1957 Supplement to the North Dakota Revised Code of 1943, but in substance no changes are noted. Further, the opinion quoted from though not directly in point does shed light on the particular problem.

At this point we cite to you the following:

First, Section 40-0514 of the 1957 Supplement to the N.D.R.C. of 1943 which provides:

AGREEMENTS BETWEEN MUNICIPALITIES AND COUNTIES; CONSTRUCTION; MAINTENANCE. The governing body of any municipality of 10,000 population or less and the boards of county commissioners of the several counties may enter into agreements for the construction and maintenance of streets within such municipalities by the boards of county commissioners. Said municipalities shall pay, on a reimbursable basis, such sums as are agreed upon."

It is to be noted that section 40-0514 was enacted March 5, 1953, chapter 253, section 1, 1953 Session Laws.

Second, section 24-0501 of the 1957 Supplement to the North Dakota Revised Code of 1943 which provides:

COUNTY ROAD TAX: ALLOCATION AND USE OF FUNDS. . . . Of the proceeds of such tax collected on account of real or personal property situated within any city or village, by the county treasurer . . . . twenty percent shall be turned over . . . . to the treasurer of such city or village, in the manner provided in section 11-1306 to be expended under the direction of the governing body of such subdivision in the improvement of the streets and highways thereof. All other proceeds of such tax shall be kept in a distinct fund to be known as the 'county road fund' and shall be expended in the improvement of highways as provided in this chapter under the direction of the board of county commissioners. . . . The provisions of this section in regard to allocation shall apply to the proceeds of any tax originally levied for other purposes if appropriated or transferred to the county road fund or for expenditure for road and bridge purposes."

It is to be noted that section 24-0501 was enacted and approved on March 6, 1953, chapter 179, section 1, 1953 Session Laws.

In comparing the statutes, it seems clear that section 40-0514 permits agreements or contracts. It also is clear, however, that section 24-0501 has a mandatory requirement

that the 20% of the proceeds referred to is to be set aside for the benefit of the municipality, to be expended therein. It appears that the 20% is not to be included as a part of the "county road fund" for the reason that the section provides, "All other proceeds of such tax shall be kept in a distinct fund" and in effect, the 20% is excluded. Further, since section 24-0501 is the later of the two enactments, it would prevail in the event of any conflict between the two sections. It appears then that a contract made by the village in which the village agrees to transfer the 205 from real and personal property taxes to the county commissioners in consideration for the county taking over the maintenance of streets and highways would be invalid, as an improper delegation of the duty of a governing body to provide its own street and highway maintenance. Technically, our objection goes to the contracting away of the specific 20%, prior to the allocation of the proceeds which are derived from the said 20%. This answer does not preclude a village from contracting, prior to the allocation, for a certain sum or amount, to be paid to the county for maintenance, so long as the terms of the contract are reasonable and just.

It is the opinion of this office that section 24-0501 is controlling, and that this section would not allow the contracting away of the specific 20%. After the allocation has been made, however, and the procedural steps of section 11-1306 of the N.D.R.C. of 1943 have been followed, there appears to be no good reason why the local governing body of the village could not take the actual funds which were derived from the said 20%, and pay such funds to the county on a reimbursable basis pursuant to the terms of a contract which had been entered into before the allocation by the county treasurer of the specific 20%. In other words, it would be permissible for the village to contract for a certain sum to pay to the county, but the village could not validly contract away the specific 20%, in the face of the mandatory provisions of section 24-0501.

In our opinion, the answer to both of your questions would be in the negative, subject to the comments contained herein.

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