

**OPINION
70-290**

June 18, 1970 (OPINION)

Mr. Wallace D. Berning

Assistant State's Attorney

Ward County

RE: Roads - Farm to Market - Use of Levy for Right-of-Way Acquisitio

This is in response to your letter in which you attached a sample ballot of the measure that was approved by the electors of Ward County on November 8, 1966. The ballot sets forth the road construction program which is to be financed from a four mill levy under the provisions of section 57-15-06.3 of the North Dakota Century Code. The ballot contained the following information: priority number, federal aid and route number, general description, type of construction and approximate mileage. The ballot also contained the notation that the foregoing road projects also include any necessary regrading, reshaping or other incidental items.

You asked the following question:

The specific inquiry we have received from our county highway superintendent is: Would he be allowed to use money received from the aforementioned tax levy, which was received as a result of the election in which the attached ballot was used, for highway right-of-way acquisition as well as merely paving and surfacing. The funds, which are available, are more than ample to cover right-of-way acquisition as well as surfacing, and I am somewhat inclined to give a liberal interpretation to the statute, however, I can find no concrete authority on this matter."

The manner in which the question is asked leaves some doubt in our minds whether you are concerned only with the excess of the amount needed to match Federal funds or whether the question refers to the revenues produced from the authorized levy.

The first portion of section 57-15-06.3 of the North Dakota Century Code does not limit the proceeds of the levy to any specific use, such as paving, grading, etc. It speaks of a construction program, as follows:

* * *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. * * *The use of such excess funds shall be approved by a majority of the electors voting at such special election."

The general description of the roads would indicate where same will be located. The electors should know, or could easily obtain, the information as to whether or not the proposed road will entail the acquisition of right-of-way or whether it will be located on existing roads. It is common knowledge that land surface is necessary to construct the road and if the county does not own the road, it must either acquire the property or obtain an easement or right-of-way. A right-of-way or easement is an integral part of a road construction program if the land upon which the road is to be constructed does not belong to the party constructing the road. We must assume that the electors are knowledgeable, whether the proposed road program will be constructed on section lines or existing roads or whether the easements or right-of-way must first be acquired. The ballot gives general information where the proposed roads are to be constructed.

The North Dakota Supreme Court in *Northwest Bell Telephone Co. v. Wentz*, 103 N.W.2d. 245, held that the cost of relocating telephone poles was an authorized expenditure and did not violate Article 56 of the North Dakota Constitution. Article 56 limits the use of revenue from gasoline and other motor fuel excise taxes to the construction, reconstruction, repair and maintenance of public highways and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways.

Section 57-15-06.3 uses the term "county construction program, county road system, and roads to be constructed." These terms all embrace more than one specific item. Such terms, out of necessity, embrace all that is necessary to produce a finished product, namely the road as generally described in the ballot. The incidentals necessary to accomplish this are directly related to such program and are included in such terms. The ballot does not limit or restrict the use of the funds for only certain specified items, but rather states, "includes any necessary regrading, reshaping or other incidental items".

Assuming your question pertains to the general revenues produced as a result of the levy, it is our opinion that the revenues produced from the tax levy under section 57-15-06.3, (as distinguished from the excess of the amount needed to match Federal funds), may be used to acquire the necessary right-of-way or easements upon which the designated road is to be constructed. If, however, your question pertains only to the excess needed to match Federal funds, the last portion of section 57-15-06.3 would be controlling. This portion provides as follows:

* * *Any proceeds of a tax levy (sic) 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."

By comparing the above quoted portion with the first part of section

57-15-06.3, the thought prevails that the excess may be used only to surface roads. This implies that a road is already existing and that merely the necessary work be performed to permit surfacing. The quoted portion speaks about paved or any other type road surfacing. The surfacing is limited to roads which are included within the county program from which the tax was originally levied.

In examining the ballot, each of the designated roads are to have bituminous surfacing. We do not have available the details of the road program as approved by the Bureau of Public Roads, consequently we do not know if each road as designated is to have bituminous surfacing immediately upon construction, etc., or whether the bituminous surfacing is to be accomplished at a later date. We also recognize that if the excess funds are not used for bituminous surfacing, these funds would be available the next year, which would increase the amount of money the county has to match Federal funds. The priority has been established by the program which has been approved by the electorate. Any deviation from such priorities would be contrary to the authorization given by the electorate. We are, however, impressed with the language of section 57-15-06.3, which limits the use of such excess funds for paving or any other type of road surfacing. The statutory provision, "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", appears to be the controlling language. The further language, "such paved or other road surfacing" also further supports the proposition that the excess funds may be used only for paving or road surfacing.

It is, therefore, our opinion that any funds which are not needed in any year to match funds received from the Federal Government for farm to market roads may be used only for paving or some other type of road surfacing on roads which were designated in the road program for which the tax levy was originally made. The notation on the ballot, "includes any necessary regrading, reshaping or other incidental items", cannot be employed to circumvent the specific statutory provisions.

It appears to us that the section in question pertains to two major programs. The first portion, which is substantially the same as it was enacted in 1951, relates to the federally aided road construction program generally limited to a matching of Federal funds. The second portion, which came into being as a result of Chapter 382 of the 1963 Session Laws, relates to the excess funds (not needed to match Federal funds), and authorizes the use of such excess funds. We note there is a substantial difference in the manner in which excess funds may be used as compared to the basic funds which are used for road construction, etc. with Federal assistance.

It is conceivable that the Legislature had in mind that the farm to market roads would initially be constructed with only the bare road, without any special surfacing, at least not more than just gravel. The 1963 amendment seems to authorize the surfacing of roads with paving or other surfacing which have already been constructed.

HELGI JOHANNESON

Attorney General