

N.D.A.G. Letter to Stefonowicz (Feb. 25, 1987)

February 25, 1987

Mr. Michael W. Stefonowicz
Divide County State's Attorney
115 South Main
P.O. Box 289
Crosby, ND 58730

Dear Mr. Stefonowicz:

Thank you for your letter of January 20, 1987, wherein you made an inquiry as to a board of county commissioner's authority to alter the terms of a farm-to-market road program approved by the voters on September 1, 1970. You also inquire concerning the farm-to-market road program, concerning the expenditure of excess funds from the tax levy, the existence of rules and regulations applicable thereto, and lastly, if a board of county commissioners has authority to determine when the program is completed.

The question of a board of county commissioners' authority to alter a farm-to-market road program was the subject of a prior opinion of this office in 1982. Amended Attorney General's Opinion 82-8 (copy enclosed) concluded that a board of county commissioners could not deviate from the farm-to-market road program as approved by the electorate. It should be noted that Divide County's farm-to-market road program was approved in 1970. The then existing statutory provision authorizing the farm-to-market road program did not invest any discretionary authority in the board of county commissioners authorizing such a body to make substantive changes to the program as approved by the voters. See 1963 N.D. Sess. Laws 382 (copy enclosed). Therefore, Amended Attorney General's Opinion 82-8 would be applicable to and deemed controlling on the question you raised.

The provisions of 1963 N.D. Sess. Laws 382 limited the expenditure of any excess funds to surfacing the roads constructed under the original farm-to-market road program and then only after submitting the matter to the electorate. As noted on page 4 of Amended Attorney General Opinion 82-8, the "monies 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." A prior opinion of this office specifically addressed a similar question and held that the expenditure of the proceeds of such a tax levy can be used only for the particular purposes authorized by the voters. Attorney General's Opinion 84-7 (copy enclosed).

Neither the Highway Department nor the Federal Highway Administration have adopted any rules or regulations relative to the administration of the farm-to-market road programs authorized by N.D.C.C. § 57-15-06.3.

Attorney General's Opinion 84-1 (copy enclosed) addresses the question of using excess tax monies for maintenance purposes when the construction phase of the program has not been completed. The opinion concluded that such expenditures could not be made on the basis that the statutory authority for the program existing at the time the electorate approved the farm-to-market road program did not encompass the expenditure of the funds for maintenance purposes. Rather, the statutory provision limited the expenditure of the funds for the purpose of matching federal aid. See 1963 N.D. Sess. Laws 382.

The question of the board of county commissioners having the authority to terminate a farm-to-market road program is controlled by Attorney General's Opinion 84-7. That opinion held that such a program could not be terminated without submitting the matter to the electorate.

Finally, your attention is directed to Senate Bill No. 2081 (copy enclosed). If enacted, this bill would give retroactive effect to N.D.C.C. § 57-15-06.3(3) which was originally enacted as N.D.C.C. § 57-15-06.3(2) by 1981 N.D. Sess. Laws 569. Senate Bill No. 2081 would have retroactive application to those road programs that were created before July 1, 1981.

Senate Bill No. 2081 was passed by the Senate on January 28, 1987. The bill is now in the House and has been referred to the House Transportation Committee. To my knowledge, the hearing on the bill has yet to be scheduled.

If enacted into law, Senate Bill No. 2081 would nullify the Attorney General's opinions referred to in this letter and the rulings of the supreme court in Huber v. Miller, 101 N.W.2d 136 (N.D. 1960) and City of Grand Forks v. Grand Forks County, 139 N.W.2d 242 (N.D. 1965). Thus, Senate Bill No. 2081 would allow a board of county commissioners to make modifications to a farm-to-market road program without the need of a vote by the citizens.

Sincerely,

Nicholas J. Spaeth

ja
Enclosures