

N.D.A.G. Letter to Neugebauer (Nov. 4, 1991)

November 4, 1991

Mr. Brian D. Neugebauer
City Attorney
P.O. Box 458
West Fargo, ND 58078-0458

Dear Mr. Neugebauer:

Thank you for your September 5, 1991, letter wherein you ask whether it would be permissible for the city of West Fargo to expend a portion of the funds it receives from the state highway tax distribution fund to pay the cost of operating a limited mass transit system between West Fargo and Fargo. For the reasons stated below it is my opinion that monies a city derives from the highway tax distribution fund may not be expended for the purpose of supporting the operation of a mass transit bus service.

The monies in the highway tax distribution fund are derived from taxes levied on motor vehicle fuels, use taxes, and fees related to the registration and use of motor vehicles. N.D.C.C. § 54-27-19. While N.D.C.C. § 54-27-19 makes reference to "use taxes" as a source of income for the highway tax distribution fund, that source of revenue no longer exists. Before July, 1989, 50 percent of the motor vehicle excise tax collected on vehicles purchased or acquired outside the state was deposited to the motor vehicle registration fund. N.D.C.C. § 57-40.3-10 (1988). In 1989 the statute was amended to allocate all of the motor vehicle excise tax to the general fund. 1989 N.D. Sess. Laws ch. 723.

A city receiving money from the highway tax distribution fund may expend those funds only for the construction, reconstruction, repair, and maintenance of public highways. N.D.C.C. § 54-27-19. This limitation on the use of such fund is consistent with North Dakota Constitution art. X § 11. That constitutional provision directs that the monies generated from gasoline and other motor fuel excise and license taxes, and motor vehicle registration and license taxes are to be appropriated and used solely for the construction, reconstruction, repair, and maintenance of public highways.

In Newman v. Hjelle, 133 N.W.2d 549 (N.D. 1965), the North Dakota Supreme Court discussed the historical background giving rise to the initiation and passage of N.D. Const. art. X § 11, and concluded:

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 a narrow construction of the purpose for which the revenues may be used within the area designated.

Newman v. Hjelle at 557. Thus, the North Dakota Supreme Court interpreted the terms "construction, reconstruction, repair and maintenance" to include the right to use the funds to control advertising and billboard use on land abutting on the right of way of a public highway. See Newman v. Hjelle, 133 N.W.2d 549 (N.D. 1965). The funds could also be used to pay a portion of the cost of a highway approach (see McKenzie County v. Lamb, 298 N.W. 241 (N.D. 1941)); to construct and maintain a bridge or culvert where a drain crossed the highway (see Brenna v. Hjelle, 161 N.W.2d 356 (N.D. 1968)); and to pay the nonbetterment costs for the relocation of utility facilities on interstate highways (see Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960)).

In addition, the Attorney General has issued several opinions regarding the use of funds derived pursuant to N.D.C.C. § 54-27-19 and N.D. Const. art. X, 11. It is lawful to use such funds to pay salary and equipment costs attributable to the maintenance and repair of city streets, for example. See 1984 N.D. Op. Att'y Gen. 100; see also 1984 N.D. Op. Att'y Gen. 51. "It . . . appears that the Supreme Court of this state has approved utilization of such funds for actual building of highway structure and accessories and acquisitions of various rights for so doing . . . [A]ll prior rulings on this subject . . . have indicated that such funds usage must relate to the creation and retention of highways rather than the use thereof." Jan. 30, 1975 N.D. Op. Att'y Gen. to Lieutenant Governor Wayne Sanstead. Based on the foregoing analysis, it is my opinion that monies from the highway tax distribution fund may not be used to support the operation of a mass transit bus service.

Additional support for this conclusion is found in the legislature's enactment of two statutes concerning the funding of transit programs in North Dakota. The legislature has specifically prohibited the director of North Dakota Department of Transportation from expending any money derived from the state gas tax or motor vehicle licensing for the establishment or operations of a bus transportation system. N.D.C.C. § 24-04-03. Conversely, the legislature did provide for financial assistance to public transportation through the public transportation fund but did so by levying a fee of one dollar on each motor vehicle registered in the state. N.D.C.C. § 39-04.2-03. Both of the foregoing legislative enactments demonstrate the legislature's recognition of the constitutionally-imposed limitation upon the expenditure of those funds constituting the highway tax distribution fund under N.D.C.C. § 54-27-19 and N.D. Const. art. X § 11 the expenditure of such funds for the purpose of supporting the operation of a mass transit bus service is not allowed.

I trust this answers your question.

Sincerely,

Nicholas J. Spaeth

vkk