

**OPINION
68-138**

December 17, 1968 (OPINION)

Mr. Robert L. Eckert

State's Attorney

Richland County

RE: Counties - Road Funds - Share of Cities

This is in reply to your letter of December 12, 1968, relative to county funds.

You state the following facts and questions:

"The problem, as I understand it, is that the county now has a substantial amount of money that the county commissioners would like to place in a special road fund. They understand that before this money can be placed into that fund that it must first be included in the budget. The special road fund would be used to maintain, repair or construct roads specifically designated by the county commissioners. In other words, this fund would be segregated from the regular road and bridge fund.

"The commissioners want to know whether, under such a set of facts, the cities of the county would be entitled to their 20 percent share as provided by 24-05-01 of the North Dakota Century Code."

Section 24-05-01 of the North Dakota Century Code provides for the levying of a county road tax. It further provides that of the proceeds of such tax collected on account of real or personal property situated within any city, twenty percent shall be turned over to the treasurer of such city to be expended under the direction of the governing body of such city for the improvement of the streets and highways thereof. The sections also provides:

"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." (emphasis supplied)

We assume in this instance that the tax was not originally levied for road purposes since it is not a part of the county road fund. While the county would not place this money in the road fund under the proposal, it is nevertheless proposed to use it for road and bridge purposes. Section 24-05-01 specifies that distribution must be made to the cities if the tax money not originally levied for road purposes is transferred to the county road fund or if it is expended for road and bridge purposes. Therefore, even though the money is placed in a special fund other than the regular county road fund, if it is, in fact, used for road and bridge purposes, the cities are entitled to their 20 percent allocation regardless of the fund from

which moneys are appropriated. If this were not true, the county could circumvent the statute and prevent the city from receiving their share of the tax moneys for road purposes by merely creating a new fund into which the moneys to be expended for road purposes would be placed. That the city is entitled to its proportionate share of the tax moneys expended for roads and bridges, whether transferred first to the county road fund or not, is sustained by the decision of the North Dakota Supreme Court in City of Grand Forks v. Grand Forks County 139 N.W.2d. 242 (N.D. 1965).

There might be some question as to whether the city would be entitled to its share of the funds at the time they are placed in the special fund or whether they are entitled to such share only at the time the moneys are actually expended by the county. However if the avowed intention of the county is to use these moneys in the special fund for road and bridge purposes, the question would appear to be procedural rather than substantive. A paraphrasing of that portion of section 24-05-01, quoted above, would appear to read that the provisions regarding allocation shall apply to the proceeds of any tax originally levied for other purposes if appropriated or transferred to expenditure for road and bridge purposes. In such instance the city would be entitled to their proportionate share at the time the county sets the money aside for expenditure for road and bridge purposes by appropriation or transfer.

In summary, it is our opinion that the cities are entitled to their 20 percent share of the moneys appropriated or transferred for road and bridge purposes whether such moneys are transferred to the county road fund or to a special road fund.

HELGI JOHANNESON

Attorney General