

Office of the Attorney General
State of North Dakota

Opinion No. 81-123

Date Issued: November 18, 1981

Requested by: John A. Zuger
City Attorney for the City of Bismarck

--QUESTION PRESENTED--

Whether a county and city may enter into an agreement for the improvement of a road, part of which lies entirely within the city, part of which lies entirely within the county, and part of which, to the center line, lies within the city with the other part lying in the county.

--ATTORNEY GENERAL'S OPINION--

It is the Attorney General's opinion that a county and city may enter into an agreement for the improvement of a road, part of which lies entirely within the city, part of which lies entirely within the county, and part of which, to the center line, lies within the city with the other part lying in the county.

--ANALYSIS--

Section 24-05-01 of the North Dakota Century Code provides in pertinent part:

Of the proceeds of such tax collected on account of real or personal property situated within and city, by the county treasurer of the county in which such city is located, twenty percent shall be turned over by such treasurer to the auditor of such city, in the manner provided in section 11-13-06 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.

Section 24-05-02, N.D.C.C., states how the county road fund may be expended. This section allows the county road fund to be used for highways, however established, provided such highway is considered a principal thoroughfare of the county, is used by the inhabitants of the county, and the alternative provided is insufficient. The board of county commissioners has broad discretion in determining whether the existing or alternative highways are insufficient.

Section 40-05-14, N.D.C.C., enacted in 1953, specifically allows municipalities which have a population of 10,000 or less and counties to enter into agreements of mutual construction and maintenance of streets within such municipalities. Section 54-40-08, N.D.C.C., would also provide for such an agreement but is far more expansive.

Section 54-40-08, N.D.C.C., provides that political subdivisions may agree to jointly carry out their duties. This section states in part:

54-40-08. JOINT FUNCTIONS--WHO MAY PARTICIPATE.--

1. Any municipality, county, park district, school district, or other political subdivision of this state upon approval of its respective governing body may enter into agreements with one another for joint or cooperative action, on a cost-sharing basis, or otherwise, to carry out any function or duty which may be authorized by law or assigned to one or more of them, and to expend funds of such municipality, county, park district, school district, or other political subdivision pursuant to such agreement to use unexpended balances of their respective current funds, to enter into leaseoption to buy and contract for deed agreements between themselves and with private parties, and to accumulate funds from year to year for the provision of services and facilities, and to otherwise share or contribute property in accordance with such agreement in jointly and cooperatively carrying out such function or duty.

Section 54-40-01, N.D.C.C., appears to limit the object of the 'agreement' to the acquisition, construction, and maintenance of a building for joint use. Section 54-40-08, N.D.C.C., is not limited to the definition of 'agreement' as set forth in Section 54-40-01, N.D.C.C. Section 54-40-01, N.D.C.C., was originally enacted in 1953 along with Sections 54-40-02 through 54-40-07, N.D.C.C. Section 54-40-08, N.D.C.C., was later enacted in 1963 as a separate act and not as an addition to Chapter 54-40. Although the code revisers codified this act as Section 54-40-08, N.D.C.C., it is not limited by the other sections of Chapter 54-40.

It is the Attorney General's opinion that Section 54-40-08, N.D.C.C., gives a city and a county the authority to agree to jointly improve a road that lies partly within and partly outside the city limits without regard to the population of the city. See *City of Fargo v. Cass County*, 286 N.W.2d 494, 500 (N.D. 1979); *Dahl v. City of Grafton*, 286 N.W.2d 774, 778 (N.D. 1979). This interpretation of Section 54-40-08, N.D.C.C., is consistent with the legislative intent of creating an integrated system of roads and streets as expressed in Section 24-01-01, N.D.C.C.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the court.

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