

LETTER OPINION
93-L-139

April 22, 1993

Ms. Mary K. O'Donnell
Rolette County State's Attorney
Box 1079
Rolla, ND 58367

Dear Ms. O'Donnell:

Thank you for your recent letter in which you asked whether the Rolette Board of County Commissioners may use surplus funds in the county farm-to-market budget to pave a one-mile section of a highway which is part of the county farm-to-market road system. You also asked whether the expenditure of the surplus funds, if otherwise proper, would need to be preceded by a public hearing under North Dakota Century Code § 57-15-06.3(2).

The questions you raised were previously addressed in 1987 N.D. Op. Att'y Gen. 96, which discussed various issues involving the retroactive effect of 1987 N.D. Sess. Laws ch. 674, § 2, upon N.D.C.C. § 57-15-06.3. (Copy enclosed.) In that opinion, under the analysis of question 1, the attorney general concluded on page 98 that:

The exactitude of 1987 N.D. Sess. Laws ch. 674, § 2, coupled with the prior legislative and judicial history of N.D.C.C. § 57-15-06.3(3), requires that the statute be given a retroactive application, thereby permitting substantive changes to be made in a farm-to-market road program. The changes permitted would include the addition of new road projects to and the deletion of road projects from the existing farm-to-market road Program.

Under the foregoing holding, the board of county commissioner's would be authorized to change the priorities concerning the construction, improvement, paving, etc., of projects previously authorized as a part of the farm-to-market road program. This authority would include the ability to provide for the paving of a segment of an approved project at an earlier date and before the remainder of the segment is to be paved.

The last paragraph of the analysis of question 2 of the opinion addresses the necessity of a public hearing if the changes in the farm-to-market road program are made pursuant to N.D.C.C. § 57-15-06.3(3). Thereunder, the opinion states:

[a] board of county commissioners is granted a plenary power to change the significant aspects of the farm-to-market road program as part of their ordinary business affairs and without a public hearing. . .

Further, this authority has been made retroactive under 1987 N.D. Sess. Laws ch. 674, § 2.

In 1963, N.D.C.C. § 57-15-06.3 was amended to provide for the disposition and expenditure of tax money not needed to match federal aid in any one year. The amendatory language provided:

Any proceeds of a tax levy 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.

Therefore, the above amendment was incorporated into the general law and became part of the proposition upon which the electorate of Rolette County voted in the November 5, 1968, election establishing the county farm-to-market road program. In fact, N.D.C.C. § 57-15-06.3 is referenced in the introductory paragraph of the ballot. Additionally, the proposition put to the voters specifically provided, inter alia, that:

[p]roceeds in excess of the amount needed to match Federal funds in any year made available to the county for providing paved or other types of road surfacing on the roads included in the above program all in accordance with section 57-15-06.3 of the North Dakota Century Code

In the analysis of question 3 of the opinion, Attorney General Spaeth held that a farm-to-market road program approved by the electorate prior to July 1, 1981, would remain subject to the limitations created by 1963 N.D. Sess. Laws ch. 382, § 1. Because the retroactive provision of 1987 N.D. Sess. Laws ch. 674, § 2 was limited in its application to N.D.C.C. § 57-15-06.3(3), it has no effect upon subsection 4 of the same statute. Consequently, the statute in force at the time the farm-to-market road program was approved by the electorate would be controlling as to the disposition of any surplus funds. It is also noted that the last paragraph of the analysis of question 5 observes that the farm-to-market road program enacted by the county electorate prior to 1981 would require the electorate's approval for the expenditure of surplus funds.

I would therefore conclude that while substantive changes may be made to the farm-to-market road program under the provisions of N. D. C. C. § 57-15-06.3(3) without the necessity of a public hearing, the same is not true when expending surplus funds under N.D.C.C. § 57-15-06.3(4). Expenditure of the surplus funds would require the

approval of the electorate as provided for in the statutory law existing at the time the farm-to-market road program was approved by the Rolette County electorate in 1968.

I recognize that this limits the discretion of the county commissioners in the use of funds for the farm-to-market programs which were developed prior to 1981. However, only the Legislature can grant greater discretion or eliminate the necessity of a new election.

Sincerely,

Heidi Heitkamp
Attorney General

meh/krb
Enclosures