

**LETTER OPINION
2004-L-69**

November 12, 2004

Mr. John Mahoney
City Attorney
PO Box 355
Center, ND 58530-0355

Dear Mr. Mahoney:

Thank you for requesting an opinion concerning the time the city of Center (City) is obligated to maintain a portion of a federal-aid highway in the City under a cooperative agreement with the Department of Transportation (Department).¹ In my opinion the City is obligated to maintain the federal-aid highway in the City under the cooperative agreement with the Department so long as the highway is part of the federal-aid system.

ANALYSIS

The City entered into a NonEncroachment and Maintenance Agreement (Agreement) with the Department on June 3, 1969, relating to Federal Aid Project No. S-714(7). The Agreement requires the City to maintain a portion of North Dakota Highway 48 which the Department "at the request of the City of Center . . . proposes to construct, reconstruct or improve." Preamble to Agreement.

The Agreement provided in part that:

[I]t is hereby agreed that for and in consideration of [the Department's] undertaking of this Project under the requirements of the Act [Federal-Aid Highway Act, 23 U.S.C.S. §§ 101 *et seq.*], that insofar as its legal jurisdiction over the Project is concerned the City assents to the requirements of the Act and pledges its good faith to carrying out the purposes stipulated in the Act, and to this end the City hereby agrees:

....

¹ Then known as the State Highway Department. See N.D.C.C. § 24-02-01.1, 1989 N.D. Sess. Laws ch. 72.

9. That the Municipality will, at its own expense, maintain such portions of the highway within the corporate limits as are described [in the contract], in a manner satisfactory to the [Department] and the Bureau of Public Roads, and will make provision for such maintenance each year: . .

..
10. That the City will enact such ordinances and take such steps as are necessary to properly enforce any and all of the above provisions or any supplements to this agreement.

As you note, the Agreement appears to be perpetual because there is no period of time specified when the City's obligation ends. You also note N.D.C.C. § 24-04-01 authorizes the Department to "make all contracts and to do all things necessary to cooperate with the United States government in the construction of" federal-aid highways.²

Under federal law, the Department is responsible for maintaining highways on which federal funds have been expended. 23 U.S.C.S. § 116(a). See also Balf Co., Inc. v. Gatta, 637 F. Supp. 370, 381 (D. Conn. 1986) (when the Federal Highway Administration approves a project, an obligation is imposed on the state and the municipality to comply with federal laws and regulations as a condition to receiving federal funds). The Department's "obligation to the United States to maintain any [federal-aid highway] shall cease when it no longer constitutes a part of a Federal-aid system." 23 U.S.C.S. § 116(a). While the Department is responsible to maintain federal-aid highways, it "may provide for such maintenance by formal agreement with any . . . municipality." 23 C.F.R. § 1.27.³

In addition, under state law, the Department and a city may enter into agreements regarding maintenance of highways within their respective jurisdictions. N.D.C.C. § 24-01-03 (the Department is responsible for maintaining the state highway system and is authorized to enter into a cooperative agreement with any municipality for the maintenance of any urban connecting street, i.e., a state highway located within a city⁴; N.D.C.C. § 24-01-34 ("highway authorities of the state, or any county, or municipality

² 23 U.S.C.S. §§ 100 et seq. supersedes the earlier federal-aid highway acts referred to in N.D.C.C. § 24-04-01.

³ See also 23 C.F.R. 633.208 (providing the Department "may arrange for maintenance of [federal-aid] roads or portions thereof, by agreement with a local governmental unit."); 23 U.S.C.S. § 116(b) (providing that where the Department is without authority to maintain a federal-aid highway in a city, it "shall enter into a formal agreement for its maintenance with the appropriate officials of the . . . municipality in which such project is located.").

⁴ Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991)

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are authorized to enter into agreements with each other, or with the federal government, respecting the financing, planning, establishment, improvement, maintenance, use, regulation, or vacation of controlled-access facilities or other public ways in their respective jurisdictions”) (emphasis added).

The agreement between the Department and the City provides for maintenance of the federal-aid highway running through the City as contemplated under both state and federal law. The City agreed in consideration of the Department’s undertaking of the federal-aid highway project to the delegation of the Department’s obligation under the Federal-Aid Highway Act to maintain the portion of the federal-aid highway in the City.

It is my opinion based on the foregoing state and federal law that the City is contractually obligated to maintain that portion of the federal-aid highway in the City for so long as the portion of the highway is designated part of the federal-aid highway system.

Sincerely,

Wayne Stenehjem
Attorney General

tam/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).