

**LETTER OPINION
2005-L-13**

April 29, 2005

Mr. Lonnie W. Olson
Ramsey County State's Attorney
524 4th Avenue #16
Devils Lake, ND 58301-2490

Dear Mr. Olson:

Thank you for your letter asking whether the county acted lawfully under N.D.C.C. § 40-24-18 in transferring surplus special assessment funds to the county's general fund following retirement of the special assessment warrants rather than granting the funds to the county water resource district for modifications or repairs to the rural sewer system financed with the special assessments. For the reasons stated below, it is my opinion that the county acted lawfully under N.D.C.C. § 40-24-18 in transferring surplus special assessment funds to the county general fund following retirement of the special assessment warrants rather than granting the funds to the county water resource district for modifications or repairs to the rural sewer system financed with the special assessments.

ANALYSIS

Counties have the authority under N.D.C.C. § 11-11-55.1 to make and finance improvements by levying special assessments. That statute states, in part:

In providing for the improvements, the county shall have the authority granted to municipalities in chapters 40-22, 40-23, 40-23.1, 40-24, 40-25, 40-26, 40-27, and 40-28, and the county shall comply with the provisions of those chapters in making the improvements. Whenever action is required of city officials in those chapters, the comparable county officials shall take the action.

N.D.C.C. § 11-11-55.1. Section 40-24-18, N.D.C.C., provides as follows:

All special assessments and taxes levied and other revenues pledged under the provisions of this title to pay the cost of an improvement shall constitute a fund for the payment of such cost, including all principal of and interest on warrants and other obligations issued by the municipality to finance the improvement, and shall be diverted to no other purpose. The city auditor shall hold all moneys received for any such fund as a special fund to be applied to payment for the improvement. Each such fund shall be designated by the name and number of the improvement district in or for which said special assessments, taxes, and revenues are collected. When all principal and interest on warrants and other obligations of the fund have been fully paid, all moneys remaining in a fund may be transferred into the general fund of the municipality.

(Emphasis added.)

Similarly, N.D.C.C. § 40-27-05 provides that if bonds are issued to purchase special assessment warrants, “any money [which] remains in the special fund after the payment of the principal of all the bonds and the interest thereon . . . may be transferred to the general fund.”

In your letter you indicate that in the 1980s, the county created a special assessment district for the purpose of installing a rural sewer system in the county. Special assessment funds were then collected for financing the improvements. You also indicated that due to some efficiencies over time, the assessment warrants were paid off early and that surplus funds of approximately \$70,000 had accumulated.

You also stated that in reliance on the above-quoted provisions in N.D.C.C. § 40-24-18, the county transferred the surplus funds to the county’s general fund. The county was then approached by the Ramsey County Water Resource District, which manages the rural sewer system, requesting that the money be transferred back to the district for the purpose of making flood-related modifications and repairs to the sewer system. The water resource district asserts that the monies were collected for the sewer system and should be spent on the sewer system.

The water resource district’s position, however, overlooks the purpose of the applicable statutes. Under N.D.C.C. §§ 40-24-18 and 40-27-05, the special assessment funds are created for the purpose of paying principal and interest on the assessment warrants or bonds issued to finance the improvements. When the warrants or bonds have been paid off, both statutes authorize the surplus funds to be transferred to the general fund of the political subdivision. There is no explicit provision authorizing the use of surplus funds for modifications or repairs to the improvements. Further, special assessments collected for

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the purpose of financing the improvements “shall be diverted to no other purpose.” N.D.C.C. §40-24-18; see also N.D.A.G. 76-19 (interest earned from investing special assessment funds can only be used for purposes of paying the warrants).

Because the language in N.D.C.C. §§ 40-24-18 and 40-27-05 regarding disposition of surplus special assessment funds to the general fund is not phrased in mandatory language, this office has on several occasions opined that in addition to transferring the money to a municipality’s general fund, any surplus may, and in some cases must, be refunded to property owners in the special assessment district. See N.D.A.G. 76-19; N.D.A.G. 85-27; and N.D.A.G. 96-L-243 (copies enclosed). See generally 70C Am. Jur. 2d Special or Local Assessments §§ 216-219 (2d ed. 2000); 14 Eugene McQuillin, The Law of Municipal Corporations §§ 38.336 and 38.337 (3d ed. 1998).

I found no North Dakota authority permitting surplus special assessment funds to be used for a purpose other than transfers to a municipality’s general fund or for refunds to the special assessment payers. Consequently, it is my opinion that the county acted lawfully under N.D.C.C. § 40-24-18 in transferring surplus special assessment funds to the county general fund following retirement of the special assessment warrants rather than granting the funds to the county water resource district for modifications or repairs to the rural sewer system financed with the special assessments.

Sincerely,

Wayne Stenehjem
Attorney General

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Enclosures

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).