

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-13

Date issued: June 26, 1996
Requested by: Senator Gary J. Nelson

- QUESTIONS PRESENTED -

I.

What is a workable definition of the term "public highways" as that term is used in Article X, Section 11 of the North Dakota Constitution.

II.

Whether the public transportation fund and revenue appropriated to the Department of Transportation from motor vehicle registration fees for the operating costs of the Motor Vehicle Division are dedicated or non-dedicated revenue under Article X, Section 11 of the North Dakota Constitution.

III.

Whether the Department of Transportation's total amount of spending for purposes other than the construction, reconstruction, repair, and maintenance of public highways is limited to non-dedicated revenue amounts which have been appropriated by the Legislature for such purposes.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that, for purposes of Article X, Section 11 of the North Dakota Constitution, the term "public highway" includes all roads, bridges and other structures, and everything appropriately connected with or necessarily incidental thereto, designated and built for and used by the public for the passage of motor vehicles.

II.

A. It is my further opinion that the \$1.00 fee assessed to the owner of a motor vehicle at the time the motor vehicle is registered constitutes a motor vehicle registration tax and the fees constitute dedicated funds under Article X, Section 11 of the North Dakota Constitution.

- B. It is my further opinion that the revenue appropriated to the Department of Transportation from motor vehicle registration fees for the operating costs of the Motor Vehicle Division are not "dedicated funds"; the appropriation is the cost of administration and collection of dedicated revenue, as permitted by Article X, Section 11 of the North Dakota Constitution.

III.

It is my further opinion that the Department of Transportation may spend for non-highway purposes only the non-dedicated revenue appropriated by the Legislature for such purposes. It is my further opinion the Legislature may appropriate funds from sources other than those mentioned in Article X, Section 11, to be used for highway purposes. It is my further opinion the Legislature could appropriate dedicated funds to a state agency other than the Department of Transportation if the appropriation requires that the funds be used for highway purposes.

- ANALYSES -

I.

Article X, Section 11, of the North Dakota Constitution provides:

Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, except revenue from aviation gasoline and unclaimed aviation motor fuel refunds and other aviation motor fuel excise and license taxation used by aircraft, after deduction of cost of administration and collection authorized by legislative appropriation only, and statutory refunds, shall be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways.

This provision dedicates the revenues from the specified sources to use for what the North Dakota Supreme Court has termed "highway purposes." Newman v. Hjelle, 133 N.W.2d 549 (N.D. 1965).

In McKenzie County v. Lamb, 298 N.W. 241 (N.D. 1941), the North Dakota Supreme Court addressed whether "public highways" were limited to roads designated as part of the State Highway System. The court

explained that all public roads are "public highways." Id. at 243. Thus, any roads "designated and built for and used by the public" constitute public highways. Id.

For historical purposes, a highway could be considered a foot path or way for vehicles drawn by animals. See Opinion of the Justices to the Senate, 352 N.E.2d 197, 201 (Mass. 1976). However, the obvious intent of Article X, Section 11 is that the dedicated funds be used for the maintenance, construction, reconstruction, and repair of highways over which motor vehicles travel, not foot paths or similar roads that are not connected with or incidental to motor vehicle use. Cf. South Dakota Auto. Club, Inc. v. Volk, 305 N.W.2d 693, 699 (S.D. 1981) ("[T]he obvious intent of the framers and the voters was to dedicate the proceeds of the taxes on fuel used by motor vehicles on the highways for the maintenance, construction, and supervision of the highways and bridges over which those motor vehicles traveled."); In re Opinion of the Justices, 85 N.E.2d 761 (Mass. 1949) (highway understood to mean "roadway for persons and vehicles rather than structures erected for the exclusive use of railways").

Prior decisions by the North Dakota Supreme Court evidence that the term "highway" is not limited to the actual path of travel. In Brenna v. Hjelle, 161 N.W.2d 356 (N.D. 1968), the court addressed whether the construction of a culvert where a drainage ditch crosses the highway constitutes a highway purpose. The court found it was, rejecting the argument that bridges or culverts had to be beneficial to a highway to constitute part of the highway. Id. at 360. According to the court, the "only question is whether such bridges and culverts would be a part of the highway, not whether they would benefit the highway." Id. Bridges and culverts having traditionally been considered part of the road, the court held their construction constitutes a highway purpose. Id.

Addressing the meaning of the terms "construction, reconstruction, repair or maintenance" as used in Article X, Section 11, the court found in Newman v. Hjelle, 133 N.W.2d 549 (N.D. 1965), that the terms should be interpreted broadly. After reviewing the history of the predecessor to Section 11, the court stated:

It is clear that the purpose of the amendment was to prevent any use of the earmarked revenues for anything but highway purposes and not to restrict the terms of the amendment by a narrow construction of the purpose for which the revenues may be used within the area designated.

Id. at 557. In light of the State Department of Highways' statutory power to control billboards and advertising on or adjacent to highway

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rights of way, the court found such actions to be a legitimate use of dedicated funds. Id. at 558.

In Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960), the court addressed whether dedicated funds could be used for the costs of relocating utility facilities in connection with interstate and defense highway projects. Noting that the Constitution does not define or restrict the meaning of "construction" in any way, the court found the term embraces "everything appropriately connected with, and necessarily incidental to, to complete accomplishment of the general purpose for which the fund exists." Id. at 256 (citing 40 C.J.S. Highways § 176h(2)(a); State ex rel. Syvertson v. Jones, 23 N.W.2d 54 (N.D. 1946)). Because a statute obligated the State to pay the non-betterment costs incurred in relocating facilities along and across the interstate system, the court held dedicated funds could be constitutionally used for that purpose. See also Opinion of the Justices, 132 A.2d 613 (N.H. 1957); State ex rel. Appalachian Power Co. v. Gainer, 143 S.E.2d 351 (W.Va. App. 1965).

Decisions in other jurisdictions also demonstrate the term "highway" is not limited to the actual path of travel. See Opinion of the Justices to the Senate, 352 N.E.2d 197 (Mass. 1976) ("highway purpose" includes construction of bike paths); Opinion of the Justices, 254 A.2d 273, 277 (N.H. 1969) (dedicated funds may be used for construction of public parking areas); State ex rel. Appalachian Power Co. v. Gainer, 143 S.E.2d 351, 361 (W.Va. App. 1965) ("Highway" includes "the right of way, roadbed, and all necessary culverts, sluices, drains, ditches, waterways, embankments, slopes, retaining walls, bridges, tunnels and viaducts. No doubt it must be recognized that such terms would embrace additional items which are deemed usual and necessary parts of highway construction such, for instance, as guardrails, traffic signals and mulching and seeding cuts and fills.").

A previous opinion of this office to A. W. Wentz, Highway Commissioner, issued October 28, 1957, held that an expenditure of revenue dedicated under Article X, Section 11, of the North Dakota Constitution could be made for the payment of certain employment taxes. The opinion stated:

It is highly inconceivable that the provisions outlined in Article 56 [Article X, Section 11, N.D. Const.] "used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligation incurred in the construction, reconstruction, repair and maintenance of public highways" do not include

the employment necessary to carry out these provisions. It must be recognized as a fact that in order to carry out these provisions, employment of services is necessary.

See also Chilstrom v. Dept. of Transp., 271 N.W.2d 4 (S.D. 1978) (dedicated funds may be used for salaries for the employees of the division of highways from the maintenance crews to director of the division).

In an opinion of this office to Tom Slorby, Ward County State's Attorney (1984 N.D. Op. Att'y Gen. 25), issued March 30, 1984, it was determined that a county could utilize dedicated funds for the purchase of highway equipment. Along the same rationale, an opinion to Elgin City Attorney, Ronald J. Weikum (1984 N.D. Op. Atty. Gen. 100), found that a city may use dedicated funds for salary and equipment costs attributable to the maintenance and repair of city streets. See also Idaho Branch Inc. v. Nampa Highway Dist. No. 1, 846 P.2d 239 (Idaho App. 1993) (constitutional to use dedicated funds for purchase of gravel crushing equipment).

This office has previously found that dedicated funds may not be used for the establishment of rapid transit bus services on the highways. Letter from Attorney General Helgi Johanneson to Walter R. Hjelle, State Highway Commissioner (September 9, 1971). This is because the usage of dedicated funds "must relate to the creation and retention of highways rather than the use thereof." Letter from Attorney General Allen I. Olson to the Honorable Wayne G. Sanstead, Lieutenant Governor (January 30, 1975). See also Opinion of the Justices, 377 A.2d 137 (N.H. 1977) (dedicated funds may not be used for programs designed to provide transportation for the elderly and handicapped); State ex rel. O'Connell v. Slavin, 452 P.2d 943 (Wash. 1969) (dedicated funds may not be used for the maintenance of public transportation system).¹

¹ For other cases finding the use of dedicated funds unconstitutional, see State v. Jonasson, 299 P.2d 755 (Idaho 1956) (dedicated funds may not constitutionally be placed in a Development and Publicity Fund to advertise the state); Automobile Club of Oregon v. State, 840 P.2d 674 (Or. 1992) (highway purpose does not include aid to service stations in meeting federal environmental requirements); Rogers v. Lane County, 771 P.2d 254 (Or. 1989) (highway purpose does not include construction of an airport parking lot and covered walkways from the parking lot to the airport terminal); Automobile Club of Washington v. City of Seattle, 346 P.2d 695 (Wash. 1959) (dedicated funds cannot be used to pay death and bodily injury judgment rendered against city by reason of negligence by the city's bridge tenders in operation of movable span bridge).

The above cases and opinions provide substantial guidance in determining what constitutes a legitimate highway purpose. First, the activity must relate to the creation or retention, rather than the use, of a road designated and built for and used by the public for the passage of motor vehicles. Second, the construction, reconstruction, repair or maintenance must be on part of a public highway or appropriately connected with, and necessarily incidental to, the construction, reconstruction, repair or maintenance of a public highway. And third, what constitutes part of a public highway will be determined both by a historical and statutory analysis. Accordingly, dedicated funds can only be used constitutionally for the construction, reconstruction, repair or maintenance, or activity appropriately connected with, and necessarily incidental to, the construction, reconstruction, repair or maintenance of part of a road designated and built for and used by the public.

II.

A. Public Transportation Fund.

N.D.C.C. § 39-04.2-02 establishes the public transportation fund which is to be administered by the director of the Department of Transportation. The fund is to be used to make the payments disbursed under N.D.C.C. ch. 39-04.2. See N.D.C.C. § 39-04.2-02. Proceeds for the public transportation fund stem from a \$1.00 fee that must be paid by the owner of a motor vehicle at the time the motor vehicle is registered. See N.D.C.C. § 39-04.2-03.

Pursuant to Article X, Section 11, motor vehicle registration taxes constitute dedicated funds. The fact that N.D.C.C. § 39-04.2-03 refers to the \$1.00 charge assessed to motor vehicle owners at the time of registration as a "fee" is not determinative of whether it is a "fee" or a "tax." "Whether an exaction is called a 'fee' or a 'tax' is of little weight in determining what it really is." Scott v. Donnelly, 133 N.W.2d 418, 423 (N.D. 1965). It is the nature of the charge rather than its designation that determines whether it is a "fee" or a "tax." Id.

The North Dakota Supreme Court has defined a "tax" as "an enforced contribution for public purposes which in no way is dependent upon the will or consent of the person taxed." Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 409 (N.D. 1971); see also Menz v. Coyle, 117 N.W.2d 290, 297 (N.D. 1962). Thus, "any payment exacted by the state as a contribution toward the cost of maintaining governmental functions, where special benefits derived from their performance are merged in the general benefit, is a tax." Menz, 117 N.W.2d at 297.

Conversely, fees "are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society,' they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (citations omitted).

The \$1.00 fee assessed when an owner registers a motor vehicle is not charged in exchange for registering the vehicle; the registration fee presumably covers that cost. Rather, the fee is charged as a contribution toward the cost of maintaining governmental functions, evidenced by the fact that the fee goes to the public transportation fund. The fee is also an enforced contribution being assessed to all individuals who register a motor vehicle.

The fact the law designates the fee as an "additional registration fee" does not change the fee's character as a motor vehicle registration tax. The fee is paid at the time a motor vehicle is registered, and is only paid by those who register motor vehicles. Because the fee is only assessed against those who register motor vehicles, it is a motor vehicle registration tax.

The \$1.00 fee assessed to the owner of a motor vehicle at the time the motor vehicle is registered constitutes a "tax." Because the \$1.00 fee is a motor vehicle registration tax, all proceeds from the fees constitute dedicated funds.

The above conclusion is supported by a letter opinion from former Attorney General Allen I. Olson to Lieutenant Governor Wayne G. Sanstead. Attorney General Olson found an assessment in the amount of \$1.00 on the annual registration fee of each motor vehicle required to be registered in the state constituted dedicated funds. This was because the funds derived from motor vehicle registration and license taxes. Letter from former Attorney General Allen I. Olson to Lieutenant Governor Wayne G. Sanstead (January 30, 1975).

B. Motor Vehicle Registration Fees.

1995 N.D. Sess. Laws ch. 14 appropriates revenue to the Department to defray the expenses of operating the Motor Vehicle Division.² Pursuant to N.D.C.C. § 24-02-01.4(1), operating expenses of the

² The Department's Breakdown of Revenue form refers to the appropriated revenue as "motor vehicle registration fees."

Division must be funded by appropriations from collections made under chapters 39-04 (motor vehicle registration) and 39-05 (title registration) before the collections are deposited into the highway tax distribution fund.³ Each month the Division determines its operating costs and deducts that amount from the dedicated revenue collected prior to depositing the collected funds with the State Treasurer.

The Motor Vehicle Division is responsible for motor vehicle titling, registration, and licensing. N.D.C.C. § 24-02-01.4(1). Revenues from motor vehicle registration and license taxes are dedicated revenues. The operating expenses of the Motor Vehicle Division, therefore, constitute the cost of administration and collection of dedicated funds. Section 11 specifically authorizes the Legislature, through appropriation, to deduct from dedicated revenue the cost of administration and collection of the funds.

The appropriation in question does not constitute "dedicated funds." Rather, the appropriation is the cost of administration and collection of dedicated revenue, as permitted by Article X, Section 11. Accordingly, the appropriation is to be used for administrative expenses, not "highway purposes."⁴

³ The highway tax distribution fund is established by N.D.C.C. § 54-27-19. Pursuant to section 54-27-19, the fund is the depository for the "collections of motor vehicle registration and related fees, fuels taxes, special fuels taxes, use taxes, and special fuels excise taxes." The highway tax distribution fund also receives money from other sources, such as fees from the registration of motorcycle dealers and license fees collected and penalties imposed under N.D.C.C. ch. 57-43.2. See N.D.C.C. §§ 39-22.3-06; 57-43.2-18. Although most of the moneys deposited in the highway tax distribution fund are dedicated funds, not all are.

⁴ Other jurisdictions have permitted dedicated funds to be used for operating expenses and the cost of collection either because the constitutional provision in question specifically authorizes it or because such costs are construed to constitute legitimate highway purposes. See Rich v. Williams, 341 P.2d 432 (Idaho 1959) (use of highway fund for construction of office building to be used to register motor vehicles, collect taxes and fees relating thereto, and collect highway funds was not improper diversion of dedicated highway revenues); Cory v. King, 35 N.W.2d 807 (Minn. 1949) (use of dedicated funds to reimburse services rendered by the gasoline tax division in collection of taxes on gasoline and gasoline substitutes is constitutional); State v. King, 238 N.W. 334 (Minn. 1931) (use of dedicated funds to reimburse Secretary of State for collection of motor vehicle taxes is constitutional); Chilstrom v. State of

III.

Revenues that come from the sources noted in Article X, Section 11, of the North Dakota Constitution are dedicated revenues. In a literal sense, all other revenues are "non-dedicated revenues." If the term "non-dedicated revenue" is used to mean revenues received from sources other than those outlined in Article X, Section 11, the Legislature can appropriate to the Department for non-highway purposes only non-dedicated revenue. This is because the constitution would require all other revenue to be used for highway purposes.

However, the Department's form entitled Breakdown of Revenue, attached to this opinion, does not categorize all revenue as either "dedicated revenue" or "non-dedicated revenue." The Breakdown of Revenue includes a category for "Miscellaneous Revenue."⁵ Included in the miscellaneous revenue category is revenue from miscellaneous license fees. The miscellaneous license fees include motor vehicle dealers' certificates to do business, motor vehicle dealer license plates, and licensing of private trailers. The license plate fees received from motor vehicle dealers should be categorized as dedicated revenue. The license plate fees for private trailers is

Transp., 271 N.W.2d 4 (S.D. 1978) (dedicated funds may be used for salaries for the employees of the division of highways from the maintenance crews to director of the division); Contractors Ass'n v. West Virginia Dept. of Pub. Safety, 434 S.E.2d 357, 368 (W.Va. 1993) ("The term 'maintenance' includes the following activities which are directly related to ensuring the safety of our public highways: the road patrol, traffic, and traffic court activities of the Department of Public Safety; and the motorcycle safety and licensing program, but the term 'maintenance' will not be construed to include activities which are remotely connected to highway safety such as the construction and operation of police barracks."); State ex rel. State Bldg. Comm'n v. Moore, 184 S.E.2d 94, 105 (W.Va. 1971) (finding "the cost of the construction, maintenance and operation of an office building and related facilities for the sole and exclusive use and occupancy of the West Virginia Department of Highways constitutes a reasonable, necessary and proper incident of the construction, reconstruction, repair and maintenance of the public highway system of the state").

⁵ The miscellaneous revenue category includes, among other things, revenue from miscellaneous license fees, sale of publications, interest income, land and building rent, mineral lease royalties, conference registration fees, sale of land and buildings, sale of equipment and road materials, and hay bids.

not dedicated revenue because trailers are not "motor vehicles." The remaining revenue in the "Non-dedicated Revenue" category and the "Miscellaneous Revenue" category is non-dedicated revenue. Thus, with the limited exception of license plate fees received from motor vehicle dealers, the Legislature could appropriate for non-highway purposes the revenue in the "Non-dedicated Revenue" and "Miscellaneous Revenue" categories.

All revenue appropriated to the Department must be spent in accordance with the appropriation. If all non-dedicated revenue appropriated to the Department is appropriated for non-highway purposes, the Department must spend the non-dedicated revenue for non-highway purposes. On the other hand, if the Legislature appropriated funds from sources other than those mentioned in Article X, Section 11, to be used for highway purposes, such funds must be used for highway purposes. State ex rel. Syvertson v. Jones, 23 N.W.2d 54, 61 (N.D. 1946). The Legislature could appropriate dedicated funds to a state agency other than the Department of Transportation if the appropriation requires that the funds be used for highway purposes. McKenzie County v. Lamb, 298 N.W. 241, 244 (N.D. 1941); State ex rel. Parker v. Youngquist, 11 N.W.2d 84 (S.D. 1943) (transfer of dedicated funds to general fund without restriction that transferred funds be used for highway purposes is unconstitutional).⁶

- EFFECT -

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 questions presented are decided by the courts.

⁶ One court upheld the transfer of money from the Highway Fund to the General Fund where the Legislature appropriated more money in the fiscal year for transportation purposes than it received from transportation sources. According to the court, "[a]s long as, in any given fiscal year, expenditures for [highway] purposes at least equal revenue received from [dedicated] sources, it is of no constitutional significance to and from which funds these amounts were credited and spent." Mitchell v. Secretary of Admin., 597 N.E.2d 400, 402 (Mass. 1992).

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