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November 12, 2021

Josh Kaul, Attorney General
State of Wisconsin
Department of Justice
114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857

Re: Request for legal opinion - 82.08 county aid for town bridge construction

Dear Attorney General Kaul:

This request seeks clarification of whether Wis. Stat. 82.08, county bridge aid sharing, is applicable to a town bridge project that receives funding from the department of transportation under Wis. Stat. 84.18. Otherwise stated, does 82.08 allow towns to seek county bridge aid for the outstanding project balance after 84.18 grants funds are applied?

The Town of Cedarburg received grant approval from the department of transportation under 84.18 for a bridge construction project. Under 84.18 (3), the department provides funding for local bridge projects equal to “the percent established under 23 USC 144 (f),” which is 80%. The grant approval does provide 80% funding of the Town’s local bridge project. The Town then petitioned the County under 82.08 to share equally the remaining 20% project balance through the county bridge aid statute.

When a petition for 82.08 county bridge aid meets certain parameters related to size and past county practice, the 82.08 (3) provision states that the town and county “shall each pay one-half of the cost of construction or repair.” The County highway commissioner has determined that the Town’s project meets the size and past practices parameters.

“applicant” to include counties, towns, villages, etc. . . In this project, the County is the coordinating agency and the Town is the applicant. Trans 213.03 (5) provides that “The remainder of the cost [after application of 84.18 funds] shall be provided by the applicant.”

Another Chapter 84 bridge funding program that local governments may participate in is 84.14. The 84.14 (3) provision provides that

Whenever a municipality has participated in the cost of the constructions, reconstructions, or purchase of a bridge under 84.11 or 84.12, the property in such municipality shall thereafter be subject to taxation by the county for the construction and repair of bridges within the county under 82.08.

A similar provision is not found in 84.18.

In construing an earlier version of 82.08, Section 13, St. 1898, the Wisconsin Supreme Court determined that

The statute goes quite to the limit of power to levy taxes upon one of a group of subdivisions of the state forming a majority public corporation for the benefit of a minor one. For that reason as well as on general principles the extent of the power must be regarded as measured by the precise terms of the law. No equitable considerations will warrant the court in coercing the county to go further than the written specifications prescribed by the Legislature.

State v. Board of Sup'rs of Vernon County, 145 Wis. 191 (1911), 130 N.W. 104. In *Vernon*, the Town of Hamburg sued to enforce the county bridge funding statute in its favor.

The Supreme Court noted the statutory requirements as follows

The dominant conditions are: (a) The town must first provide one-half of the cost of the bridge; (b) before proceeding to contract for the work the town must file its petition with the county board setting forth the fact as to its having proceeded as aforesaid, and others specified; (c) the county board must act upon such petition, granting the same if it satisfied all calls of the statute, and at the same time appoint two of its members to act as

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The 82.08 (5) provision requires the Town and the County to collaborate on specified aspects of projects funded under 82.08 as follows

design, sizing, letting, inspecting, and accepting the construction or repair, but the town board may leave the matter entirely in the hands of the county highway committee. The county highway committee and the town board must agree on the cost of the project and must consult each other during construction.

The 82.08 (5) provision was amended by 2003 Wis. Act 214 which contained explanatory notes clarifying the requirements that “the town and county mutually agree on costs and consult with each other during construction.”

The 84.18 (6) provision requires a collaborative relationship between the town and the department as follows

Subject to s. 30.2022 and the control exercised by the United States, the construction under this section of any local bridge project shall be wholly under the supervision and control of the department. The secretary shall make and execute all contracts and have complete supervision over all matters pertaining to such construction and shall have the power to suspend or discontinue proceedings or construction relative to any bridge project at any time in the event any county, city, village or town fails to pay the amount required of it for any project eligible for construction under this section, or if the secretary determines that sufficient funds to pay the state's part of the cost of such bridge project are not available. . .

The 84.18 (8) provision indicates that “Nothing in this section prevents construction or rehabilitation projects under other bridge programs if applicable.” It is not clear what this means, whether it just informs applicants that they do not have to operate under this statute and may pursue a different bridge funding program altogether or may pursue a different bridge funding program in addition to 84.18. What is clear is that any other program pursued must be “applicable.”

The 84.18 (7) provision indicates that the “department shall adopt rules to implement this section.” The department adopted Trans 213.

The 84.18 (2)(a) provision assigns the role of “coordinating agency” to counties. A coordinating agency receives the 84.18 applications, prioritizes them and presents them to the department consistent with Trans 213.03 (3). The 84.18 (2)(b) provision defines

commissioner with the town board in letting, inspecting and accepting the work.

The Supreme Court concluded that the town's petition was not "contemplated . . . within the statute" because the bridge petition was filed "after its construction" and not "concurrent with appointment by the county board of two of its own members to represent the county in respect to administering the matter inclusive of making the agreement for its erection." *Id.*

The facts of *Vernon* coincide with the Town of Cedarburg's petition in that the County is not engaged with the Town in the construction of its bridge project as contemplated by 82.08 (5). Under *Vernon*'s strict construction rule, the Town's petition does not come within the statute and the County is without authority to levy a tax for the project.

On August 11, 1950, the Attorney General addressed a similar question in an opinion issued to Juneau County. The situation involved a town applying for funding under 81.38, the precursor to 82.08, and simultaneously applying for state disaster funding under then Wis. Stat. 86.24 to replace a flooded out bridge. In its opinion, the Attorney General concluded that the 81.38 county bridge aid statute was applicable because the 86.24 state disaster funding statute provided that

The County, Town Village or City shall pay the remainder of the cost not allowed as aid, but this shall not invalidate any other provision of the statutes whereby the cost may be shared by the county and the town, village or city.

Unlike other state statutes incorporating the applicability of 82.08, there does not appear to be any authority stating that 82.08 county bridge aid is applicable to 84.18 projects. The black and white language of 82.08 requires a contract, of sorts, between the town and county. The black and white language of 82.08 also provides that the total cost of the bridge project be born 50/50 by town and county.

The Town's project involves a contract between the Town and the department not the Town and the County. The Town is receiving 80% funding for the project from the department, therefore, the total cost of the project is not available to share 50/50 with the County. There is no provision in 84.18 specifying that county cost sharing provisions are applicable to the balance. Trans 213 makes the applicant (Town) liable for the balance. It is my opinion based on the foregoing that the 82.08 county bridge aid statute does not apply to 84.18 projects.

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Sincerely,

A handwritten signature in black ink, appearing to read "Rhonda K. Gorden". The signature is fluid and cursive, with the first name being the most prominent.

Rhonda K. Gorden
Ozaukee County Corporation Counsel

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