

N.D.A.G. Letter to Solberg (Feb. 19, 1991)

February 19, 1991

Honorable Ken Solberg
Senate Chambers
State Capitol
600 E Boulevard
Bismarck, ND 58505

Dear Senator Solberg:

Thank you for your January 31, 1991, letter requesting my opinion on the expenditure of funds to support or oppose initiated and referred measures.

Specifically, you have raised the following questions:

1. Is it lawful for the Association of Counties to expend moneys and use the resources of the Association to support or oppose initiated and referred measures?
2. Does the contribution of money by counties to the Association of Counties and by cities to the League of Cities violate the provisions of article X section 18 of the Constitution?
3. Is it lawful for government self-insurance pools to contribute funds derived from premium payments made by political subdivisions to political campaigns or to support or oppose initiated or referred measures?

The Association of Counties is a private corporation specifically authorized and permitted under N.D.C.C. § 11-10-24. This statute authorizes counties to organize and participate in "an association of counties." This section also mandates that such organizations be organized under the North Dakota Nonprofit Corporation Act, N.D.C.C. chs. 10-24 through 10-28. No further statutory restrictions apply to an association of counties. The powers given to nonprofit corporations under N.D.C.C. § 10-24-05 are broad, including "to have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized." N.D.C.C. § 10-24-05(16). The articles of incorporation of the North Dakota Association of Counties state its purposes as follows:

[T]o aid in the administration of county government in North Dakota by:

- A. Providing a medium for the exchange of ideas, information and experience of all county officials;
- B. Promoting training of county officials in new developments in their fields of endeavor;

- C. Facilitating cooperation with other levels of government;
- D. Proposing and supporting legislation for county governments; and
- E. Engaging in such other activities as will help achieve more effective county government in North Dakota.

No constitutional nor statutory limitations exist on who may expend funds to support or oppose initiated or referred measures. N.D.C.C. § 16.1-08-04 explicitly states that the prohibition against corporations making political contributions does not apply to making "expenditures and contributions for the purpose of promoting passage or defeat of initiated or referred measures . . ." Consequently, it is my opinion that it is lawful for the Association of Counties to expend moneys and use the resources of the Association to support or oppose initiated and referred measures.

In response to your second question regarding the contribution of money to the Association of Counties and League of Cities, counties and cities are specifically authorized by statute to contribute to such associations. See N.D.C.C. §§ 11-11-14(15) and 40-05-01(76). This authority is consistent with N.D. Const. Art. X, § 18, which states:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

(Emphasis added.) Article XX referred to in section 18 was repealed in 1932. See 1933 N.D. Sess. Laws Art. Amd. 47. Thus, cities and counties may constitutionally engage "in any industry, enterprise or business" authorized by statute. The North Dakota Supreme Court interpreted N.D. Const. Art. X, § 18 (previously known as N.D. Const. § 185) in Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964).

Section 185 does not prohibit the making of loans or giving of credit or making donations in connection with a city's engaging in any industry, enterprise, or business except engaging in liquor traffic. What it does prohibit is for a city "otherwise" to make loans or give its credit or make donations. In other words, making loans or giving credit may be done in connection with the city's engaging in any permissible industry, enterprise, or business, but not otherwise.

126 N.W.2d at 237-38.

As stated earlier, N.D.C.C. § 11-10-24 authorizes a county to engage in the enterprise of organizing and participating in "an association of counties." N.D.C.C. § 40-01-23 specifically authorizes cities to engage in the enterprise of organizing and participating in an organization of city governments. The League of Cities is such a permissible organization having been formed under N.D.C.C. chs. 10-24 through 10-28.

Consequently, it is my opinion that the contribution of money by counties to the Association of Counties and by cities to the League of Cities does not violate the provisions of Article X section 18 of the North Dakota Constitution.

Your last question actually incorporates several questions which I will answer separately. First, for what lawful purpose may funds be contributed by political subdivisions to government self-insurance pools.

N.D.C.C. § 32-12.1-07 authorizes self-insurance "which may be funded by appropriations to establish or maintain reserves for self-insurance purposes." N.D.C.C. § 32-12.1-07(1)(a). Subsection 2 of this section states in part: "Nothing in this chapter shall be construed to prohibit a political subdivision or state agency from uniting with other political subdivisions and state agencies in order to . . . self-insure." N.D.C.C. § 32-12.1-07(2). N.D.C.C. § 32-12.1-08 provides for establishment of an insurance reserve fund and provisions for funding it.

1. A political subdivision . . . may establish and maintain an insurance reserve fund for insurance purposes, and all political subdivisions . . . may include in the annual tax levy of the political subdivision such amounts as are determined by the governing body to be necessary for the purposes and uses of the insurance reserve fund. . . . If a political subdivision has no annual tax levy, the political subdivision may appropriate from any unexpended balance in its general fund such amounts as the governing body of the political subdivision shall deem necessary for the purposes and uses of the insurance reserve fund.
2. Except in the case of a school district, the fund established pursuant to this section shall be kept separate and apart from all other funds and shall be used only for the payment of claims against the political subdivision which have been settled or compromised, judgments rendered against the political subdivision for injuries arising out of risks established by this chapter, or costs incurred in the defense of claims. Payments by a school district for the same purposes shall be made out of the district's general fund as established in section 57-15-14.2.

N.D.C.C. § 32-12.1-08. Consequently, these funds obtained from an annual tax levy or appropriation for the purpose of an insurance reserve fund may be used by the political subdivision solely for insurance or self-insurance purposes. Such purposes could be met

by purchasing insurance from a private insurance company, depositing it into an individual insurance reserve fund, or contributing it to a government self-insurance pool. See, 1985 N.D. Op. Att'y Gen. 96, a copy of which is attached.

Government self-insurance pools are regulated by N.D.C.C. ch. 26.1-23.1. N.D.C.C. § 23.1-23.1-03 requires the pool to be governed by a board of directors and authorizes the pool to be an incorporated body.

Once the political subdivision has made an authorized payment of the levied or appropriated funds to a private insurance company or to a government self-insurance pool pursuant to N.D.C.C. §§ 32-12.1-07 and 32-12.1-08, it has fulfilled its statutory duties. The money is then in the hands of the private insurance company or the government self-insurance pool and the use of that money is regulated by the statutes regulating such entities and by their articles of incorporation if they are incorporated. Of course a political subdivision may choose to maintain its own self-insurance reserve fund, in which case it maintains control of the funds and can use them only as specified under subdivision 2 of N.D.C.C. § 32-12.1-08.

The second segment of your last question is whether it is lawful for government self-insurance pools to contribute to political campaigns.

To my knowledge, the only government self-insurance pool operating within the state is the North Dakota Insurance Reserve Fund (hereinafter "NDIRF"). NDIRF was incorporated as a nonprofit corporation in 1986 and operates as a government self-insurance pool. As such, it receives its powers under N.D.C.C. chs. 10-24 and 26.1-23.1. Whether NDIRF, or any other government self-insurance pool constituted as a corporation, may contribute to a "political campaign" is controlled by N.D.C.C. ch. 16.1-08.

N.D.C.C. § 16.1-08-02(1) states:

1. No corporation, cooperative corporation, or association shall make a direct contribution:
 - a. To aid any political party, political committee, or organization.
 - b. To aid any corporation or association organized or maintained for political purposes.
 - c. To aid any candidate for political office or for nomination to such office.
 - d. For any political purpose or the reimbursement or indemnification of any person for money or property so used.
 - e. For the influencing of any measure before the legislative assembly, except in accordance with chapter 54-05.1.

(Subsection 2 of N.D.C.C. § 16.1-08-02 allows corporations to establish separate and segregated funds specifically for political purposes. Because any such fund must be funded by moneys specifically contributed for that purpose, this opinion does not address whether that option would be available to NDIRF or any other government self-insurance pool.) As stated earlier in my response to your first question, N.D.C.C. § 16.1-08-04 provides certain exemptions to the prohibitions contained in N.D.C.C. § 16.1-08-02(1). This statute states:

Nothing in this chapter shall be construed to prohibit the exercise by corporations, cooperative corporations, and associations of the right to make expenditures and contributions for the purpose of promoting passage or defeat of initiated or referred measures, or for promoting any general political philosophy or belief deemed in the best interest of the employees, stockholders, patrons, or members of the corporation, cooperative corporation, or association other than a 'political purpose' as defined by this chapter.

(Emphasis added.)

"Political purpose" is defined in N.D.C.C. § 16.1-08-01(10) as "any activity undertaken in support of or in opposition to the election or nomination of a candidate whether the activity is undertaken by a candidate, a political committee, a political party, or any person." Reading these two statutes together, it is my opinion that neither NDIRF nor any other government self-insurance pool may contribute directly to any political campaign.

The last segment of your question is whether it is lawful for government self-insurance pools to support or oppose initiated or referred measures.

Inasmuch as NDIRF is a nonprofit corporation receiving its powers under N.D.C.C. chs. 10-24 and 26.1-23.1, it may avail itself of the provisions of N.D.C.C. § 16.1-08-04 which allow a corporation the "right to make expenditures and contributions for the purpose of promoting passage or defeat of initiated or referred measures . . ." Consequently, it is my opinion that NDIRF or any other government self-insurance pool constituted as a corporation may contribute funds to support or oppose initiated or referred measures.

Sincerely,

Nicholas J. Spaeth

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