

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 99-F-14

Date issued: September 8, 1999

Requested by: Edwin J. Nagel, Jr., State Auditor's Office

- QUESTION PRESENTED -

Whether a county may loan county general funds or county road funds to an organized township for the purpose of constructing or repairing township roads.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a county may loan county general funds or county road funds to an organized township for the purpose of constructing or repairing township roads if the loan is made pursuant to a joint powers agreement.

- ANALYSIS -

The purposes for which a county may make a loan of county funds are restricted. Article X, Section 18 of the North Dakota Constitution provides:

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.

This section, generally referred to as the anti-gift provision, prohibits a county from loaning or giving its credit to or in aid of any individual, association or corporation unless it is for the reasonable support of the poor or as part of a permitted industry, enterprise or business. A township is not an individual, association, or corporation, but it is instead a political

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subdivision of the state. Therefore, the anti-gift provision does not prohibit a loan from a county to a township. See 1983 N.D. Op. Att'y Gen. 53 (Article X, Section 18 does not prohibit a loan from a county to a rural fire district); letter from Attorney General Nicholas J. Spaeth to Eugene Belisle (April 7, 1992) (Article X, Section 18 does not prohibit a loan or grant from a city to a school district).

There are several statutory provisions permitting counties and townships to coordinate certain roadwork and programs, and counties are also in charge of road work in unorganized townships. See, for example, N.D.C.C. §§ 11-27-09.1, 24-05-20(2), 24-06-14, 24-06-19, 24-08-02.1, 57-15-19.4, 57-15-20.2(3), 57-15-21, and 57-15-22.1. Further, a township may contract with a county for repair of the township's roads. N.D.C.C. § 24-06-09. However, it is my understanding that your question does not involve a situation where there is specific statutory authority or a state or federal program for the county to loan funds to the township for any purpose or for road purposes specifically.

Although a county loan to a township does not violate Article X, Section 18 of the North Dakota Constitution, the county and township still must have specific statutory authority to make or receive loans or the statute must contain language from which the authority to make or receive loans may be necessarily implied. 1993 N.D. Op. Att'y Gen. L-129 (April 12 letter to Walter M. Lipp). See also Walstad v. Dawson, 252 N.W. 64, 66-67 (N.D. 1934) (county department only "has such powers as are expressly conferred by statute or are necessarily implied in order to effectuate the purposes for which it was created"). A thorough search of the Century Code has revealed that there is no statute granting specific authority to a county to make a loan to a township for road purposes, and there is no statute from which such authority may be necessarily implied.¹ Likewise, there is no general authority for a township to borrow money from a county for these purposes through a loan.²

¹ N.D.C.C. § 21-06-09 permits counties and townships to accept loans or grants from the federal government relating to certain preliminary costs incurred for a public works project.

² A township does have the authority to borrow money through the issuance of general obligation bonds for the construction of roads and bridges. N.D.C.C. § 21-03-06(5)(b). However, such borrowing is limited to one and one-half percent of the township's taxable property value. Id. Further, such borrowing requires the approval of sixty percent of the qualified voters of the township voting in the election. N.D.C.C. § 21-03-07.

However, it may be possible that the general authority granted to counties and townships to enter into joint powers agreements may provide the necessary authority for a county to loan funds to a township. Joint powers agreements are created under N.D.C.C. ch. 54-40.3. A county or township, "upon approval of its respective governing body, may enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them." N.D.C.C. § 54-40.3-01(1). Among other things, a joint powers agreement may provide for

The manner in which the parties to the agreement will finance the cooperative or joint undertaking and establish and maintain a budget for that undertaking. The parties to the agreement may expend funds pursuant to the agreement, use unexpended balances of their respective current funds, enter in a lease-option to buy and contract for deed agreements between themselves and with private parties, accumulate funds from year to year for the provision of services and facilities, and otherwise share or contribute property in accordance with the agreement in cooperatively or jointly exercising or carrying out the power or function. The agreement may include the provision of personnel, equipment, or property of one or more of the parties to the agreement that may be used instead of other financial support.

N.D.C.C. § 54-40.3-01(1)(d). This paragraph implies that the parties to a joint powers agreement may include in that agreement the use of a loan between one party to the other as an element of financing the joint undertaking.³

³ But c.f. letter from Attorney General Nicholas J. Spaeth to Eugene Belisle (Apr. 7, 1992) construing somewhat similar language formerly found in N.D.C.C. § 54-40-08(1) to the effect that the authority of a political subdivision to loan money to another political subdivision could not be implied from then existing § 54-40-08(1). However, present section 54-40.3-01(1) contains some broader language not found in former section 54-40-08(1), i.e., that a joint powers agreement may provide for the "manner in which the parties to the agreement will finance the cooperative or joint undertaking and establish and maintain a budget for that undertaking." N.D.C.C. § 54-40.3-01(1).

Several laws provide that both counties and townships may work to improve roads within their respective jurisdictions. See N.D.C.C. ch. 24-05, County Roads, and ch. 24-06, Local Road Improvements. One statute mentioned above specifically permits a township to contract with a county for road purposes:

The board of supervisors of any township may enter into a contract with the board of county commissioners of the county, the board of supervisors of another township, or the directors of a soil conservation district for the construction, improvement, or repairing of township roads and bridges without the necessity of advertising for bids.⁴

N.D.C.C. § 24-06-09. This statute authorizes a township to enter a contract with a county for the county to perform road work on township roads, and it may be reasonably implied that the township is intended to pay the county for the cost of such construction. N.D.C.C. § 54-40.3-01(1) would permit the county and township to jointly administer this authority for the improvement of township roads.

While N.D.C.C. § 24-06-09 permits a township to contract with a county for the county to undertake the construction, improvement, or repair of township roads and bridges, a joint powers agreement would permit the county and the township to exercise this power in a cooperative or joint manner. N.D.C.C. § 54-40.3-01(1). It could be reasonably expected that the contract contemplated by N.D.C.C. § 24-06-09 would entail the township paying the county for the cost that the county incurs in the improvement, maintenance, or construction of township roads and bridges. That section does not state what the terms of the township's repayment would be, which implies that the terms may include payment over time from the township's budget. By pursuing a joint powers agreement, a township and a county may agree that the township will pay the county over time for road improvements within the township, but instead of the county providing for the township's road improvements to be performed as part of the county's road improvement efforts, the county will simply forward the money necessary to the township and the township will make the arrangements for the improvements itself.

Further, it could be argued that the county's authority to maintain and operate roads included in its county road system under N.D.C.C. § 24-05-17 and the board of township supervisors' authority over the

⁴ It is expected that the entity the township contracts with would obtain bids for the work to be performed.

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roads, highways, and bridges in the townships under N.D.C.C. § 24-06-01 would be sufficient to support a joint powers agreement under N.D.C.C. § 54-40.3-01(1). Such an agreement will permit a loan of funds from the county to the township for township road purposes. This argument is beneficial because it foregoes the legal fiction of a contract between the county and township being first made pursuant to N.D.C.C. § 24-06-09 where the county agrees to perform road work within the township but having to assign that work to the township board of supervisors under a joint powers agreement.

Therefore, it is my opinion that a county may loan county general funds or county road funds to an organized township for the purpose of constructing or repairing township roads if the loan is made pursuant to a joint powers agreement.

- 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 question presented is decided by the courts.

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