

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-13

Date issued: June 28, 2000

Requested by: Senator Dwight Cook

- QUESTIONS PRESENTED -

I.

Whether a county library board which has had a reading room since 1961 may close its reading room and contract for services with the city or other library under N.D.C.C. § 40-38-04(5) without an affirmative vote of the county residents.

II.

Whether a county governing body may replace county library board members with themselves and then act as the county library board and contract for services with a city or other county library under N.D.C.C. § 40-38-03 without an affirmative vote of county residents.

III.

If the answer to either question 1 or 2 is yes, what methods can the county library board use to dispose of the county library collection?

IV.

If the city and county residents vote to have a single joint library board to govern the library service countywide under N.D.C.C. § 40-38-11(3), is the equal number of appointees from each party determined by the taxable valuation of each party or by the population of each party to the agreement?

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a county library board which has had a reading room since 1961 may close its reading room and contract for services with the city or other library under N.D.C.C. § 40-38-04(5) without an affirmative vote of the county residents.

II.

It is my opinion that a county governing body may not replace county library board members with themselves and then act as the county library board and contract for services with a city or other county library.

III.

It is my opinion that a county library board which closes its reading room and contracts for services with a city or other library under N.D.C.C. § 40-38-04(5) may dispose of its library collection by selling it for fair market value.

IV.

It is my opinion that if the city and county residents vote to have a single joint library board to govern the library service countywide under N.D.C.C. § 40-38-11(3), the number of appointees each party appoints to the joint library board is determined not by the taxable valuation of each party, nor by the population of each party, but instead each party appoints the same number of appointees as the other party appoints regardless of taxable valuation or population.

- ANALYSES -

I.

N.D.C.C. ch. 40-38 relates to public libraries. There are four provisions in this chapter that relate to cooperation or agreements between library boards or governing bodies of political subdivisions. N.D.C.C. § 40-38-01 provides, in part:

The governing body of any city or county upon petition of not less than fifty-one percent of the qualified electors . . . or upon a majority vote of the qualified electors thereof voting on the question shall establish and maintain public library service within its geographic limits by means of a public library and reading room or other public library service, either singly or in cooperation with the state library, or with one or more cities or counties, or by participation in an approved state plan for rendering public library service under the Library Services and Construction Act [20 U.S.C. 351-358], and acts amendatory thereof.

(Emphasis added.) The second provision is N.D.C.C. § 40-38-03, which provides, in part, that "[t]he governing board of a municipality or county establishing public library service may, in lieu of appointing a library board, contract directly with a library board established by another governing body of a municipality or county for the purpose of extending public library service." The third provision is N.D.C.C. § 40-38-04, which provides, in part, that the board of directors of a public library has the authority "[t]o contract to furnish library service and to receive library service from other counties, school districts, and cities of the state of North Dakota and adjoining states, and the state library."

The fourth provision is N.D.C.C. § 40-38-11, which authorizes public library services to be jointly provided "through a written agreement between the governing bodies of any city or county or both to establish and maintain joint library services with one or more cities or counties or both." Entering into an agreement for the provision of joint library services pursuant to N.D.C.C. § 40-38-11 requires approval by the electors of the involved political subdivisions. N.D.C.C. § 40-38-11(10).

In considering whether a county library board and a city library board may merge their collections into one facility without an affirmative vote of the county and city residents, our office considered the relationship between these four provisions:

While N.D.C.C. § 40-38-01 states that a city or county library may cooperate with one or more cities or counties when providing public library service, other statutes specifically address furnishing or receiving public library services by cities and counties. (See N.D.C.C. §§ 40-38-03 (instead of appointing a library board, a governing body may contract directly with a library board established by another governing body) and 40-38-04(5) (a library board may contract to furnish library service and to receive library service from other counties, school districts, and cities and the state library)).

However, joint library services by cities and counties are addressed by N.D.C.C. § 40-38-11. Under this section, provision of joint library services first must be approved by a vote of the electors of each individual city or county seeking to provide joint library services after July 1, 1981. N.D.C.C. § 40-38-11(10); see also Letter from Attorney General Nicholas J. Spaeth to Donna M. Trotter (Oct. 16, 1991). It is not immediately clear whether the cooperation between one or more cities or counties contemplated by N.D.C.C. § 40-38-01 and the ability to contract to furnish or receive library service under

N.D.C.C. § 40-38-04(5) allows a county library board and a city library board to merge their collections into one facility without providing for joint library services by holding an election under N.D.C.C. § 40-38-11 and creating a single joint library board.

1998 N.D. Op. Att'y Gen. 145, 146-47 (Dec. 17 to Allen Kopyy). Similarly, it is not immediately clear whether the cooperation between one or more cities or counties contemplated by N.D.C.C. § 40-38-01 and the ability to contract to furnish or receive library service under N.D.C.C. § 40-38-04(5) allows a county library board to close its reading room and contract for services with the city or other library without an affirmative vote of the county residents. The December 17, 1998, opinion to Allen Kopyy concluded that a county library board and a city library board may not merge their collections into one facility while maintaining separate library boards without an affirmative vote of county and city residents. Id. at 149. The Attorney General's office has also concluded that the governing bodies of a county and city may not begin consolidating county and city library services without first obtaining approval of the electors of both the county and city under N.D.C.C. § 40-38-11. 1993 N.D. Op. Att'y Gen. 54, 56 (Sept. 9 to Allen Kopyy). Thus, consolidating county and city library services, and merging county and city library board collections into one facility, both, in effect, constitute establishing joint library services under N.D.C.C. § 40-38-11 and therefore require the approval of the electors in each of the participating political subdivisions.

The issue here is whether a county library board's closing of its reading room and contracting for services with the city or other library for provision of library services constitutes, in effect, the establishment of joint library services under N.D.C.C. § 40-38-11, thereby requiring the approval of the electors of the participating political subdivisions. N.D.C.C. § 40-38-01 authorizes public library service to be provided "by means of a public library and reading room or other public library service, either singly or in cooperation with . . . one or more cities or counties. . . ." N.D.C.C. § 40-38-01 (emphasis added). Thus, the public library service provided may be something different than a public library and reading room. "The [library] funds are not earmarked for one particular form of library service The library fund may be used for other public library services as determined by the board of directors of the county library pursuant to N.D.C.C. § 40-38-04(3)." Letter from Attorney General Nicholas Spaeth to Jeanne McLean (Aug. 18, 1987).

If a county library board simply contracts for services with a city or other library under N.D.C.C. § 40-38-04(5), the county and city would not be jointly providing library services or merging their libraries which requires a vote under N.D.C.C. ch. 40-38-11. Instead, the city or other library would simply be providing library services to the

county for a fee. Thus, it is my opinion that a county library board may close its reading room and contract for services with the city or other library under N.D.C.C. § 40-38-04(5) without an affirmative vote of the county residents under N.D.C.C. § 40-38-11.

II.

N.D.C.C. § 40-38-03 states, "[t]he governing board of a municipality or county establishing public library service may, in lieu of appointing a library board, contract directly with a library board established by another governing body of a municipality or county for the purpose of extending public library service." "This provision is applicable only to those cities and counties which do not already have appointed library boards." 1993 N.D. Op. Att'y Gen. 54 (Sept. 9 to Allen Koppy). If a county already has an appointed library board, N.D.C.C. § 40-38-04(5) enables a county library board "[t]o contract to furnish library service and to receive library service from other counties, school districts, and cities of the state of North Dakota and adjoining states, and the state library."

State law authorizes a board of county commissioners to appoint five directors to the library board. See N.D.C.C. § 40-38-03. The law does not specify whether a county governing body may appoint its own members to the county library board. In an Attorney General's opinion determining that a board of county commissioners may not appoint its own members as district overseers of highways, we stated:

The general rule regarding self-appointment is as follows:

Officers who have appointing power are usually disqualified for appointment to office to which they may appoint. Such exercise of the appointive power is against public policy, and is void on its face Statutes may provide, however, that officers having appointive power may appoint one of their number to an office

3 Eugene McQuillin, The Law of Municipal Corporations, § 12.75 (3rd ed. 1990) (footnotes omitted).

1998 N.D. Op. Att'y Gen. L-107, L-109 (Aug. 24 to Cynthia Feland). State law was amended after the issuance of the Feland opinion to specifically authorize a board of county commissioners to appoint one or more of its members as district overseers of highways. See N.D.C.C. § 24-06-14 and 1999 N.D. Sess. Laws ch. 102, § 2. State law does not authorize a board of county commissioners to appoint its members to the county library board. Compare N.D.C.C. § 11-11-17 (permitting a board of county commissioners to designate one or more of its members to oversee county roads). Thus, it is my opinion that

a county governing body may not appoint its members to the county library board.

III.

Counties, including county library boards, have only those powers expressly conferred upon them by the Legislature, or those necessarily implied from the powers expressly granted. See Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924); County of Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985). A county library board has "the supervision, care, and custody of the library property. . . ." N.D.C.C. § 40-38-04(4).

Article X, Section 18 of the North Dakota Constitution provides that a county may not make donations to any individual, association, or corporation except for reasonable support of the poor.¹ An "individual, association, or corporation" does not include a political subdivision, see 1999 N.D. Op. Att'y Gen. 66 (Sept. 8 to Edwin Nagel), Letter from Attorney General Nicholas Spaeth to Eugene Belisle (Apr. 7, 1992), 1983 N.D. Op. Att'y Gen. 53 (Apr. 22 to Tom Slorby); however, a library board still would need statutory authority to provide its books to another political subdivision at less than fair market value, see 1999 N.D. Op. Att'y Gen. 66 (Sept. 8 to Edwin Nagel), 1993 N.D. Op. Att'y Gen. L-129 (Apr. 12 to Walter Lipp). Thus, the library boards of a county and city could merge their book collections by the joint provision of library services under N.D.C.C. § 40-38-11 after the matter is voted on and approved by the electors in the county and city. N.D.C.C. § 40-38-11(10).

However, in this case, the issue is how may the books be disposed of without the provision of joint library services authorized by the electors under N.D.C.C. § 40-38-11. A previous North Dakota Attorney General's opinion provided:

The North Dakota Supreme Court has held that a transaction involving the sale of state-owned property for less than what could be obtained for the property at a public sale violates Article X, Section 18 of the North Dakota Constitution. See Herr v. Rudolf, 25 N.W.2d 916 (N.D. 1947). The same would be true concerning a sale for less than fair market value by a school district.

2000 N.D. Op. Att'y Gen. L-13, L-14 (Feb. 1 to Aaron Krauter). Similarly, it is necessary for the county library board to dispose of its library collection for fair market value so that such disposal

¹ A state law authorizing such support is also necessary. See N.D. Const. art. VII, § 2; Letter from Attorney General Nicholas Spaeth to Charles Isakson (Sept. 29, 1992).

does not constitute 1) a donation in violation of Article X, Section 18 of the North Dakota Constitution or 2) an action for which the county library board has no statutory authority.

IV.

If two or more cities or counties approve by election the establishment of joint library services,

[t]he parties to the agreement shall appoint a single joint library board to govern public library services covered by the agreement. The method of representation on the joint library board and the establishment of the initial board with staggered terms shall be determined in the agreement. Provided, the joint library board shall consist of an equal number of appointees from each party to the agreement and, in any case, shall consist of not less than five members nor more than eleven members.

N.D.C.C. § 40-38-11(3) (emphasis added). This law provides that each party to the agreement for the establishment and maintenance of joint library services must appoint an equal number of appointees to the joint library board. The number of appointees each party appoints to the joint library board is not determined by the taxable valuation or the population of the parties to the agreement. The law simply provides that the county and the city must each appoint an equal number of appointees to the joint library board. For example, if the parties to the agreement are a city and a county, if the city appoints three members to the joint library board, the county would also appoint three members to the joint library board.

- 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.

Heidi Heitkamp
Attorney General

Assisted by: Lea Ann Schneider
 Assistant Attorney General