LETTER OPINION
2002-L-61

October 25, 2002

The Honorable Dwight Wrangham
House of Representatives District 8
301 52nd St SE
Bismarck, ND 58501-8604

Dear Representative Wrangham:

Thank you for your letter requesting my opinion on several issues relating to the McLean County Courthouse. You first ask whether the Board of County Commissioners (Board) properly used public funds in publishing an eight page newspaper insert containing information regarding a pending vote on whether to approve the construction of a new courthouse. The vote was required by N.D.C.C. § 11-11-18 because the Board proposed to make an "extraordinary outlay of money" to construct the new courthouse. See 2001 N.D. Op. Att'y Gen. L-48 and 2001 N.D. Op. Att'y Gen. L-22 (copies enclosed) for a discussion of the factual and legal issues surrounding the requirement of the vote.

"In North Dakota, counties are creatures of the constitution and may speak and act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to constitutional authority." County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 329 (N.D. 1985). There is no statute that specifically allows a county to issue a pre-election statement regarding issues on the ballot. By the same token, the expenditure of public funds did not technically violate the prohibition found in N.D.C.C. § 16.1-10-02(1) against using county property or services for a "political purpose." Subdivision 16.1-10-02(2)(a), N.D.C.C., defines "political purpose" to mean "any activity undertaken in support of or in opposition to the election or nomination of a candidate to public office . . . but does not include activities undertaken in the performance of a duty of state or political subdivision office."

While this office has suggested in prior opinions that certain state-wide officeholders may provide information to voters regarding specified election issues, those opinions do not apply to situations such as the one at issue here, where elected officials of a political

subdivision prepare and distribute a newspaper insert regarding a ballot issue at taxpayer expense.[1]

The North Dakota Supreme Court has not passed on this issue, but the "weight of authority denies public officials the power to spend public moneys to persuade the voters to accept a position . . . preferred by the public servants." 6 Antieau on Local Government Law § 86.11 (2d ed. 2002). Courts in other jurisdictions have held that political subdivisions may not expend public funds for the purpose of influencing the result of an election issue. Porter v. Tiffany; 502 P.2d 1385 (Or. App. Ct. 1972) (bond issue and initiated measure); Citizens to Protect Public Funds v. Board of Education, 98 A.2d 673, 677-78 (N.J. 1953) (school bond issue); Elsenau v. Chicago, 165 N.E. 129 (Ill. 1929) (municipal bond issue); Mines v. Del Valle, 201 Cal. 273, 257 Pac. 530 (1927) (public utility bond issue). See also 1988 S.D. Op. Att'y Gen. 225 (concluding political subdivisions may inform voters regarding an election measure but may not advocate a position on the measure).

Citizens is instructive regarding the permissible expenditures by public bodies relating to election issues. In Citizens a school bond referendum was at issue and a local school board authorized funds for printing an 18-page booklet. The booklet contained not only facts regarding school demographics, architectural sketches, the costs and tax impact, but it urged a yes vote and listed negative consequences of a no vote.

Justice William Brennan, (later United States Supreme Court Justice) noted that a fair implication of the New Jersey law allowed the board to spend some funds in an informational role incident to the board's duty to build and maintain schools. Id. at 676. But, Justice Brennan stated,

> [t]he public funds entrusted to [a political subdivision] belong equally to the proponents and opponents of [a] proposition, and the use of the funds to finance not only the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure then is not within the implied power and is not lawful in the absence of express authority from the Legislature.

[1] 1996 N.D. Op. Att'y Gen. L-107 dealt with the question of the use of a city's economic development fund to sponsor advertisements promoting a state-wide initiated measure that affected the city. To the extent that opinion states that there is a direct correlation between lobbying activities, which are expressly authorized by statute for representatives of political subdivisions, and expenditures for ballot measures, which are not specifically authorized by statute, that opinion is overruled. Nonetheless, the question presented in that opinion involved expenditures from an economic development fund by a home rule city which is not directly relevant to the question involved here, since McLean County is not a home rule county and the question does not concern the propriety of expenditures from an economic development fund.

Citizens, 98 A.2d at 677-78. Justice Brennan concluded that the gist of the booklet was to "advocate one side only . . . without affording the dissenters the opportunity by means of that financed medium to present their side." Id. at 677. "It is the expenditure of public funds in support of one side only in a manner which gives the dissenters no opportunity to present their side which is beyond the pale." Id. at 677-78. Brennan observed that a public body is not restrained from seeking approval of its judgment but the dissenter's views must be accommodated. Id.

Likewise, in Stanson v. Mott, 551 P.2d 1, 17 Cal. 3d 206 (1976), the California Supreme Court concluded a state official lacked statutory authority to expend public funds to support state bond issues for enhancement of state and local recreational facilities. The court in Stanson explained that "in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign." Id. at 209-10.

Stanson also drew a distinction between lobbying regarding legislative proposals to implement policies of a public entity and election campaigning. The court explained that legislative lobbying by a public entity was authorized and is inimical to the legislative process, whereas use of public funds to influence the resolution of issues to be decided by a public vote is a "threat to the integrity of the electoral process." Id. at 218. Stanson noted that state law permitted the dissemination of information regarding the state's long range recreational needs and plans to meet such needs and that the agency had implied authority to provide the public with a fair representation of relevant information. Id. at 220-21.

Balance and fair play are the theme of the New Jersey and California cases the court observed in Palm Beach County v. Hudspeth, 540 So.2d 147 (Fla. Dist. Ct. App. 1989). In passing on the county's expenditure of funds to promote passage of a local health care act, the court advised that "[w]hile the court not only may but should allocate tax dollars to educate the electorate on the purpose and essential ramifications of referendum items, it must do so fairly and impartially." Id. at 154. The Florida court explained that the "appropriate function of government in connection with an issue placed before the electorate is to enlighten, NOT proselytize." Id. at 154 (emphasis in original).

The newspaper insert regarding the McLean County Courthouse, while professing to provide voters information about whether to approve construction of a new courthouse, cast the alternative, renovation of the existing courthouse, in a negative light. The insert stated that renovation would not meet the needs of the county or the disabled and would "do little to improve services or operation of county government." It advised that the county "would likely lose the opportunity to take advantage of current low interest rates on bonds." The insert stated the cost and tax impact of a new building but provided no comparable information regarding renovation. The insert emphasized the

uncertain nature of a cost estimate for the renovation and the expense of relocation during remodeling. It also suggested equipment and employees would be adversely affected by dust resulting from renovation work. The advertisement suggests there is a "concerted effort to reduce the number of counties in the state," and goes on to conclude that, "[i]n the future those counties which have positioned themselves with modern technology-based buildings and operations will be at the head of the list in providing a base for county consolidation."

This office will not attempt to deliver an opinion that a minor factual variation might render incorrect. 2002 N.D. Op. Att'y Gen. L-07. In the question you present, however, there are no factual variations to consider, as the newspaper insert you provided contains all the facts that are necessary for a determination of the question.

Although a fact-finder conceivably could reach a contrary conclusion, it is apparent to me that no fair minded reading of the newspaper insert could lead to a conclusion other than that the overall intent and purpose of the newspaper insert was to promote passage of the bond issue, and not to provide a fair and balanced presentation of the issues before the voters. In my opinion the newspaper insert went beyond a fair presentation of facts to advocacy by the county for passage of the bond issue for a new courthouse. The expenditure of public funds for the newspaper insert in such a manner is inappropriate and unlawful.

You also ask whether the Board can renovate the roof of the court house before a November vote to renovate the courthouse without first consulting with the Historical Society.

As I pointed out in 2001 N.D. Op. Att'y Gen. L-48, the State Historical Board has broad power under N.D.C.C. § 55-02-07 to regulate the disposition and maintenance of historic sites. McLean County is required under section 55-02-07 to follow the State Historical Board's "direction in protecting the courthouse." Id. A member of my staff checked with the Historical Society Architectural Project Manager regarding the status of courthouse maintenance. He, together with the director of the Society, has been working with the Board since June regarding maintenance and preservation plans. He explained that the roof work is a matter of preservation. Thus, the Board is in compliance with 2001 N.D. Op. Att'y Gen. L-48.

Sincerely,

Wayne Stenehjem
Attorney General

sam/tam/vkk
Enclosures