

**LETTER OPINION
2003-L-25**

April 11, 2003

The Honorable Merle Boucher
State Representative
606 Highland St
Rolette, ND 58366-0007

Dear Representative Boucher:

Thank you for requesting my opinion on several issues relating to Cass County's proposed "courthouse demolition/improvement project." I assume you are referring to the demolition of the Cass County jail and sheriff's residence, and the proposal to build a new court and law enforcement facility on that site.

Your first question is whether the proposed project, which you indicate has an estimated cost of between \$8 and \$10 million, would constitute an extraordinary expenditure requiring a vote of the Cass County residents. Two statutes are relevant to this and the other questions you ask: N.D.C.C. §§ 11-11-16 and 11-11-18. Section 11-11-16, N.D.C.C., provides as follows:

The board of county commissioners may provide for the purchase, erection, repair, and maintenance of the courthouse, hospitals, jails, and other necessary buildings within and for the county. It may purchase the sites for such county buildings if necessary and may make contracts on behalf of the county for the building, repairing, and maintaining thereof if the expenditures therefor are not greater than can be paid out of the revenue of the county for the current year. The board shall have the entire supervision of the construction of such buildings.

Section 11-11-18, N.D.C.C., provides as follows:

The board of county commissioners shall submit to the electors of the county at any regular or special election any proposal for an extraordinary outlay of money by the county when the proposed expenditure is greater in amount than can be provided for by the annual tax levies. If the board considers the courthouse, jail, or other public buildings of the county

inadequate for the needs of the county or deems it necessary to build a county hospital, and if it is thought that it is not for the best interests of the county to issue bonds to aid in the construction of such buildings or that the construction of such buildings by any other procedure is not for the best interests of the county, it shall submit to the electors of the county, at any regular or special election, the proposal for the construction of a courthouse, jail, or other public building by establishing a building fund to aid in the construction thereof. The requirements of this section shall not apply to lease-purchase agreements authorized by section 24-05-04.

In N.D.A.G. 2001-L-22, this office stated that “if the total cost of the proposed courthouse is greater than the county’s revenues for the current year, N.D.C.C. § 11-11-16 prohibits the project unless the matter is approved by the voters under N.D.C.C. § 11-11-18.” However, because McLean County, unlike Cass County, does not have home rule, that opinion did not consider the applicability of N.D.C.C. §§ 11-11-16 and 11-11-18 to a county with home rule authority pursuant to N.D.C.C. chapter 11-09.1.

A home rule political subdivision may exercise powers not allowed under state law if: (1) the Legislature granted it that power; (2) the political subdivision included that power in its home rule charter; (3) the political subdivision properly implemented the power through an ordinance; and (4) the power concerns only local, rather than statewide, matters.”

N.D.A.G. 98-L-117 (citations omitted).

Home rule counties can acquire the specific powers listed in N.D.C.C. § 11-09.1-05, including the broad power to control their “finances and fiscal affairs.” N.D.C.C. § 11-09.1-05(2). Cass County has included the power over its finances and fiscal affairs in article 2, section 2 of its home rule charter. Thus, Cass County meets the first two criteria above.

I understand that, at this point in time, Cass County is unsure to what extent the city of Fargo or the state will be involved in the building. Therefore, it is unlikely that Cass County currently has ordinances dealing with the financing of the building project. If it did, and the ordinances were specific enough to indicate that Cass County does not intend to comply with N.D.C.C. §§ 11-11-16 and 11-11-18, then the third criteria above would be met.

The final issue is whether the matter is of statewide concern. “[A] [political subdivision’s] implementation of home rule may not ‘supersede or prevail over conflicting general law dealing with affairs purely of statewide concern.’” N.D.A.G. 93-F-23. Notably, only the “electors of the county” are eligible to vote on a proposed expenditure requiring a vote under N.D.C.C. § 11-11-18. Further, county property owners would be responsible for the taxes funding a proposed building fund under N.D.C.C. § 11-11-18. Finally, the building

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itself would be a county building, rather than a building benefiting the entire North Dakota population. As such, the question on the expenditure of funds for a county building appears to be one of local, rather than statewide, concern. Accordingly, it is my opinion that if Cass County has appropriate implementing ordinances, N.D.C.C. §§ 11-11-16 and 11-11-18 are inapplicable to Cass County's proposed construction project.

If Cass County's home rule ordinances do not sufficiently address the issue, then the county will be subject to N.D.C.C. §§ 11-11-16 and 11-11-18. This office has previously stated that if the county does not have enough reserve funds and tax revenues for the current year to pay for the courthouse construction project, N.D.C.C. § 11-11-16 prohibits the county from pursuing the project unless an election is held under N.D.C.C. § 11-11-18. N.D.A.G. 2001-L-22. That opinion later stated that "N.D.C.C. § 11-11-18 specifically requires a vote if the proposed expenditure is greater than the annual tax levies." N.D.A.G. 2001-L-22.

While the two statements may appear to conflict, the underlying facts in that opinion indicated that the proposed project not only exceeded any available reserve funds and tax revenues, but was almost four times the total annual tax levy of the county. Because of those facts, the statements were consistent within the framework of that opinion. This opinion clarifies the amount that triggers the voting requirement in N.D.C.C. § 11-11-18. That is, a vote is necessary unless "the proposed expenditure can be paid for out of money available from the county tax levies for the current year together with any other available funds on hand" and if it "has been properly budgeted for." N.D.A.G. Letter to Rothe (Jan. 31, 1980). That conclusion is consistent with Eddy v. Krekow, 209 N.W. 225, 229 (N.D. 1926), which held that a county's project is not subject to voter approval if "the expense of the same is budgeted, and is, together with the other expenses of the county, within the limit of the current annual revenue."

Whether the total cost of Cass County's project exceeds Cass County's revenues and funds on hand for the year the project is begun is a factual determination which this office cannot make. The issue of whether the demolition and subsequent construction are one project or are separate projects is also a question of fact. This office has your proposed estimate of the cost of the project, but no firm numbers. Further, this office does not know Cass County's revenues or funds on hand for the year the project was begun. As such, this office cannot render an opinion on that part of your question. However, as stated above, if the expenditure for the project exceeds Cass County's revenues and available funds for the year the project is begun, Cass County must obtain the consent of the voters prior to proceeding if its home rule ordinances do not take it out of the requirements of N.D.C.C. §§ 11-11-16 and 11-11-18. N.D.A.G. 2001-L-22.

Your second question asks whether the manner in which Cass County finances the project, whether it be by "bonding or borrowing of any kind," affects the applicability of N.D.C.C. §§ 11-11-16 and 11-11-18. In N.D.A.G. 2001-L-48, this office considered

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whether financing a project through bonds or “any other procedure” affects the requirement that an extraordinary expenditure be submitted to a vote. The opinion concluded that “monies the county borrows to aid in the construction of a courthouse, regardless of their origin, do not affect the requirement of submitting the question to a vote.” N.D.A.G. 2001-L-48. Accordingly, it is my opinion that the manner in which Cass County finances the project is irrelevant. Cass County is required to ask the voters to approve the expenditure if the cost of the proposed project would constitute an extraordinary expenditure. However, as indicated earlier in this opinion, it may be possible for a home rule county to supersede the voting requirement.

Your final question is whether Cass County can commence the site preparation portions of the project, including the demolition of an existing structure, prior to a vote. Section 11-11-16, N.D.C.C., states that a county may make a contract for the construction of a building “if the expenditures therefore are not greater than can be paid out of the revenue of the county for the current year.” Thus, if the expenditures exceed the amount, the county must submit the question to the voters prior to even entering into the contract, much less beginning the project. Accordingly, it is my opinion that if the project constitutes an extraordinary expenditure, Cass County cannot commence the project prior to submitting the proposed expenditure to a vote. Whether the demolition is a separate project from the proposed construction is a question of fact on which this office cannot opine.

Sincerely,

Wayne Stenehjem
Attorney General

sam/vkk