

**LETTER OPINION
2004-L-57**

September 8, 2004

Mr. Galen J. Mack
Pierce County State's Attorney
PO Box 196
Rugby, ND 58368-0196

Dear Mr. Mack:

Thank you for your letter asking whether an entity created under a joint powers agreement between Pierce County and the home rule city of Rugby may borrow funds from the United States Department of Agriculture (USDA) and acquire USDA guaranteed loans from local banks to finance a portion of the construction costs and initial operating costs of a proposed correctional center. You also ask whether such financing and construction arrangements would require Pierce County to have an election under N.D.C.C. §§ 11-11-16 and 11-11-18.

It is my opinion that the entity created under the joint powers agreement between Pierce County and the home rule city of Rugby may borrow funds from the USDA and acquire USDA guaranteed loans from local banks to finance a portion of the construction costs and initial operating costs of a new correctional center. It is my further opinion that such financing and construction arrangements would not require Pierce County to have an election under N.D.C.C. §§ 11-11-16 and 11-11-18 if the county is jointly or cooperatively exercising the borrowing authority of the home rule city.

ANALYSIS

Pierce County and the home rule city of Rugby have entered into a joint powers agreement for the construction of a correctional facility at Rugby, North Dakota.¹ The city

¹ State law provides that, for the confinement of lawfully committed persons, if a county or city agree to cooperate with each other, they shall establish and maintain "pursuant to chapter 54-40 and this chapter [12-44.1], a correctional facility in conjunction with other counties and cities." N.D.C.C. § 12-44.1-02. Chapter 54-40, N.D.C.C., relates to the joint exercise of governmental powers. It is my opinion that the language in N.D.C.C. § 12-44.1-02 does not prohibit cities and counties from using the joint powers agreement authority under N.D.C.C. ch. 54-40.3; the authority of a county to enter into a joint powers agreement to jointly or cooperatively exercise powers with another political subdivision under N.D.C.C. ch. 54-40.3 is in addition to any other authority it may have.

of Rugby is a home rule city whose home rule charter includes the powers listed in N.D.C.C. § 40-05.1-06.

Regarding joint powers agreements, state law provides:

1. Any county, city . . . or other political subdivision of this state, 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. . . . A joint powers agreement may provide for:
 - a. The purpose of the agreement or the power or function to be exercised or carried out.
.....
 - c. The precise organization, composition, and nature of any separate administrative or legal entity, including an administrator or a joint board, committee, or joint service council or network, responsible for administering the cooperative or joint undertaking. . . . However, no essential legislative powers, taxing authority, or eminent domain power may be delegated by an agreement to a separate administrative or legal entity.
 - d. 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 into 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. . . .
.....
 - g. The process to apply for federal or state aid, or funds from other public and private sources, to the parties for furthering the purposes of the agreement.

....

- i. Any other necessary and proper matters agreed upon by the parties to the agreement.

....

N.D.C.C. § 54-40.3-01(1) (emphasis added). Regarding N.D.C.C. ch. 54-40.3, “the intent of the drafters and the Legislature was to allow entities to contract to do those things which only one entity had the authority to do.” N.D.A.G. 93-L-190; accord N.D.A.G. 94-L-258, and N.D.A.G. 98-L-192. The joint powers agreement between Pierce County and the home rule city of Rugby states:

WHEREAS, Chapter 54-40.3 N.D.C.C. authorizes any county to enter into an agreement with any other political subdivision of North Dakota upon approval of its respective governing body for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them;

WHEREAS, Pierce County and Rugby desire to continue in the planning, financing, formation, construction and operation of a correctional and treatment facility to be known as North Central Correctional and Rehabilitation Center (hereafter referred to as “NCCRC”) for the incarceration and chemical dependency treatment of persons sentenced to incarceration or treatment by local, state and federal courts;

....

WHEREAS, financial assistance through a cooperative effort between Pierce County and Rugby is necessary to develop, construct and operate NCCRC;

NOW, THEREFORE, the parties agree as follows:

....

3. Organization: NCCRC shall be governed by a board of directors (hereafter referred to as “Board”).

....

4. Finances: Rugby and Pierce County shall work together and with the Board to finance the development, construction and operation of NCCRC. Pierce County and Rugby shall share equally in the expenses necessary to proceed with the development, construction and operation of NCCRC. . . .

The Board is authorized to prepare and execute any contracts . . . in which Rugby or Pierce County would be allowed to enter either together or individually as authorized by law or by Rugby's Home Rule Charter to plan, finance, construct and operate NCCRC. To the extent authorized by the laws of the State of North Dakota, the parties authorize NCRRC (sic) and its board to finance the planning, construction and operation of NCCRC by applying for and obtaining funds from public and private sources (e.g., Rugby Job Authority, U.S.D.A., bank loan(s), etc.), grants, donations, and federal and state aid, and to apply for and issue lawful bonds (e.g., revenue or otherwise) or notes for the design, construction and other costs of NCRRC (sic).

. . . .

The Board is authorized to acquire, hold, and dispose of real property, personal property, and fixtures, and to encumber the such property (e.g., mortgage, etc.), in the same manner that Rugby or Pierce County or either of them are otherwise entitled under the laws of the State of North Dakota.

. . . .

The board is also authorized to form such non-profit corporation or entity as may be appropriate or necessary to design, construct or operate NCCRC or to secure funding for NCCRC.

Joint Powers Agreement between Pierce County and Rugby dated August 20, 2004 (hereafter, "Joint Powers Agreement"). Under the Joint Powers Agreement, the board of directors is given the authority that the city of Rugby has in its home rule charter and is authorized to execute contracts for the purpose of financing the NCCRC. Rugby's home rule charter includes broad authority over its finances and fiscal affairs² and the authority to engage in any permitted enterprise. Given the broad authority in N.D.C.C. ch. 54-40.3 and the language in the Joint Powers Agreement, it is my opinion that the entity created under the Joint Powers Agreement may borrow funds from the USDA and acquire USDA guaranteed loans from local banks to finance a portion of the construction costs and initial operating costs of the correctional facility.

You also ask whether such financing and construction arrangements would require Pierce County to have an election to approve the project. Sections 11-11-16 and 11-11-18, N.D.C.C., require the county to have an election to authorize expenditures that are greater

² See City of Rugby Home Rule Charter, art. III, § 2 (the city shall have the power to "control its finances and fiscal affairs; . . . to contract debts, borrow money, issue bonds, warrants and other evidences of indebtedness . . .") Also, the city of Rugby would have to implement this power through an ordinance. See N.D.C.C. § 40-05.1-06.

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in amount than can be provided for by the annual tax levies or that are greater than can be paid out of the revenue of the county for the current year. See generally, N.D.A.G. 2001-L-22. Under the Joint Powers Agreement, the board of directors or a non-profit organization formed by the board would be exercising the powers of the home rule city when it enters into agreements with the USDA. The board of directors is lawfully created under N.D.C.C. ch. 54-40.3 to enter into contracts for the financing and general oversight of the building and operation of the correctional center. Such power is lawfully provided to the board of directors or a separate legal entity under N.D.C.C. ch. 54-40.3 and the Joint Powers Agreement. Thus, it is my opinion that the county is not required to have an election under N.D.C.C. §§ 11-11-16 and 11-11-18 if it is jointly or cooperatively exercising the borrowing authority of the home rule city.

Sincerely,

Wayne Stenehjem
Attorney General

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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. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).