

**LETTER OPINION
2005-L-38**

October 26, 2005

Mr. Jeffrey K. Leadbetter
Ransom County State's Attorney
PO Box 511
Lisbon, ND 58054-0511

Dear Mr. Leadbetter:

Thank you for your letter asking whether the Lisbon Area Development Authority, recognized by the county as a nonprofit county hospital association, may receive proceeds of the tax levy under N.D.C.C. § 23-18-04 for the purchase of hospital equipment to be leased by the Lisbon Area Development Authority to a local hospital owned by a sectarian organization. It is my opinion that the proceeds of a tax levy under N.D.C.C. § 23-18-04 may not be granted to the Lisbon Area Development Authority for the purchase of hospital equipment to be leased to a local hospital owned by a sectarian organization.

ANALYSIS

You indicate that Ransom County is currently levying five mills under N.D.C.C. ch. 23-18 and the proceeds of the tax levy are being held by the county under section 23-18-04. You also indicate that the county has recognized the Lisbon Area Development Authority as a county hospital association.¹ You further state that the Lisbon Area Development Authority has approached the county commission with a proposal to receive the proceeds of the tax levy for the purpose of purchasing hospital equipment which in turn would be leased to the local hospital which is currently owned by a sectarian organization. Title to the equipment would remain with the Lisbon Area Development Authority, but the equipment itself would be used by the local sectarian hospital.

¹ According to the records of the North Dakota Secretary of State, the Lisbon Area Development Authority has been chartered as a nonprofit corporation with the stated purpose of, inter alia, securing "community facilities and other related facilities, services and conditions, economic and otherwise, conducive [sic] to the progress and general welfare of the community." Lisbon Area Development Authority Articles of Incorporation Article III(d). The Authority is listed in the records as exempt from the federal tax code under 26 U.S.C. § 501(c)(4).

“Local governmental entities have only those powers expressly granted to them by the Legislature, or those necessarily implied from the power expressly granted.”² Section 23-18-01, N.D.C.C., allows for the establishment of a county or community hospital association in any county in the state and provides that the association may apply to the county for a grant to aid in the erection of a “nonsectarian county hospital.”³ The county may then submit to the electors the question of levying a tax in aid of the county or community hospital.⁴ If the ballot measure passes by sixty percent of the ballots cast, the board of county commissioners “shall make an annual levy for a period of not more than fifteen years at the mill rate approved at the election”⁵ The proceeds of the tax must be placed in a separate fund by the county treasurer and “must be used exclusively for the construction and equipment of a nonsectarian county or community hospital . . . and must be kept separate and apart from the other moneys of the county.”⁶

Section 23-18-04, N.D.C.C., has been interpreted in several opinions issued by this office over the years.⁷ “In each of those opinions [the Attorney General concluded] that the fund authorized by N.D.C.C. ch. 23-18 was ‘in the nature of a sinking fund and therefore available only for the retirement of a debt.’ . . . [E]ach of these letters correctly state the law with regard to the use of tax revenues raised pursuant to N.D.C.C. chs. 23-18 and 23-18.1.”⁸ Therefore, the tax revenue cannot be used for operating expenses or loan indebtedness for an existing hospital.⁹ As construed by this office, the use of the proceeds of the tax levy is limited, basically, to retiring a debt incurred in the initial construction and equipping of a nonsectarian county or community hospital.¹⁰

In addition, N.D.C.C. § 23-18-04 provides that the proceeds of the tax levy must be “used exclusively” for the construction and equipping of a nonsectarian county or community hospital. The statute is not concerned with legal title to the equipment. Consequently, the fact that the non-profit county hospital association would hold legal title to the equipment

² N.D.A.G. 95-L-99 (citing Parker Hotel Co. v. City of Grand Forks, 177 N.W.2d 764, 768 (N.D. 1970)); Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924).

³ Id.

⁴ Id. See also N.D.C.C. § 23-18-02.

⁵ N.D.C.C. § 23-18-03.

⁶ N.D.C.C. § 23-18-04 (emphasis added).

⁷ See N.D.A.G. Letter to Rohrich (Sept. 30, 1985) (term “construction and equipment” within the meaning of N.D.C.C. § 23-18-04 only contemplates the initial construction and equipment costs of a community hospital and not subsequent maintenance or repair costs); N.D.A.G. Letter to Rohrich (Aug. 20, 1984) (fund authorized in N.D.C.C. § 23-18-04 is in the nature of a sinking fund available only for retiring a debt, such as from issuance of bonds or borrowing from a bank; the mill levy must cease when obligation paid in full).

⁸ N.D.A.G. Letter to Wold (Apr. 16, 1990).

⁹ Id.

¹⁰ Id.

purchased with the proceeds of the tax levy would not really be material in determining the propriety of the proposed arrangement. Rather, what is more important is the ultimate use made of the tax levy proceeds. As described in your letter, the proceeds would be used to purchase hospital equipment which would be leased to and used by the local hospital. This would constitute use by a sectarian organization. Such an arrangement would be in apparent violation of N.D.C.C. § 23-18-04 because the proceeds would be used for equipping an existing sectarian hospital.

Also, the fact that the tax levy proceeds would be granted to an entity recognized by the county as a nonprofit community hospital association which would purchase and then lease the equipment to the sectarian hospital would not save the arrangement. “[T]he law does not permit by indirection what cannot be accomplished directly.”¹¹ Since it is beyond dispute that a county could not directly provide the proceeds of the tax levy to a local sectarian hospital, neither may it do so indirectly by means of channeling the tax levy proceeds through an entity recognized by the county as a nonprofit county hospital association, particularly where, as here, the sectarian local hospital would actually be using the equipment financed by the tax levy.

Consequently, it is my opinion that the proceeds of a tax levy under N.D.C.C. § 23-18-04 may not be granted to an entity recognized by the county as a nonprofit county hospital association for the purchase of hospital equipment to be leased to a local hospital owned by a sectarian organization.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

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).

¹¹ Langenes v. Bullinger, 328 N.W.2d 241, 246 (N.D. 1982); N.D.A.G. 2003-L-47.