

**LETTER OPINION
2006-L-01**

January 3, 2006

Mr. John P. Van Grinsven
Ward County State's Attorney
PO Box 5005
Minot, ND 58702-5005

Dear Mr. Van Grinsven:

Thank you for your letter asking several questions regarding whether the Ward County Commission may donate money to assist in the purchase and installation of new seating in the All Seasons Arena (ASA), a facility located on grounds owned by the State Fair Association in Minot, North Dakota. If so, you ask how the donation may be accomplished. For the reasons explained below, it is my opinion that the county may make the donation for the purpose of improved seating, provided that there is a joint powers agreement between the involved governmental entities.

ANALYSIS

The Ward County Commission was asked to donate \$97,780 to be applied to the purchase and installation of new seating in the ASA. Further, it was requested that this donation be made to the Arena Commission, an entity created in 1974 by a written joint powers agreement among Ward County, the city of Minot, and the State Fair Association. The stated purpose of the Arena Commission was to supervise, manage, and operate the ASA. Under a second written agreement, labeled "Management Agreement," dated October 1, 1976, the Arena Commission granted to the North Dakota State Fair Association, and the State Fair accepted, the "management responsibility for the All Season's Arena." Under the amendment, the Arena Board continues to serve "in an advisory capacity to the State Fair Association and it's [sic] management."

This request for a donation was not made in time to be incorporated into the 2006 budget of Ward County. Thus, there is not at this time a designated source for these funds in the 2006 budget. Ward County expects that money for this donation will be obtained from funds appropriated to certain county departments and from the general fund.¹

¹ Ward County should determine, before transferring any funds, that there are no restrictions on the use of the funds which would prevent the county from using the funds for the proposed project. As noted by a well-respected treatise on municipal corporations "[i]t is well settled that money raised for a special municipal purpose, under express

You first ask whether making this donation would unlawfully exceed the maximum mill levy that may be imposed for the State Fair Association.

Ward County currently levies two mills for the State Fair Association pursuant to N.D.C.C. ch. 4-02, which authorizes counties to establish and fund fair associations, and N.D.C.C. ch. 57-15, which establishes mill levy limitations for, among other things, county fair associations. You ask if the county is restricted to transferring only those funds collected through the mill levies and whether an amount beyond those mills may be transferred to or on behalf of the State Fair Association.

A similar issue was addressed in N.D.A.G. 94-F-01. That opinion involved a city's transfer of general fund moneys to a job development authority (JDA) that was also receiving money from a mill levy. The issue was whether the specific provisions that authorized and limited taxes for a city job development authority impliedly limited the total annual funding to that amount which would be raised by the mill levy. This office concluded that a city could transfer legally available general fund moneys to a job development authority in excess of the amount that would be collected through the levy of a job development authority tax, subject only to general fund spending limitations.²

This office reached a similar conclusion in N.D.A.G. Letter to Thompson.³ In that opinion, a county questioned whether its transfers of money to a JDA were limited to the moneys collected from the taxes imposed in favor of the JDA. Again, this office concluded that a county may transfer general county funds to the JDA, in addition to moneys collected from the mill levies imposed in favor of the JDA.⁴

These two opinions were based upon the holding in Peterson v. McKenzie County Pub. Sch. Dist. No. 1.⁵ In Peterson, a transfer of funds from a school district's general fund had been made to its building fund. A group of school district residents challenged the transfer, arguing that the money in the building fund could only be obtained through the mill levy established for that purpose. They also argued that a listing of general purposes for which general fund moneys may be expended is exclusive. The court, however, held that the statutes authorizing the levy of a school building tax did not preclude the transfer

limitations to a particular use, cannot lawfully be used for another purpose, and if used, the special fund must be reimbursed." 15 Eugene McQuillin, The Law of Municipal Corporations § 39.64 (3d ed. 2005).

² N.D.A.G. 94-F-01.

³ April 15, 1992.

⁴ N.D.A.G. Letter to Thompson (Apr. 15, 1992) ("in the absence of a statute prohibiting or otherwise limiting the use of general fund moneys for a particular county purpose, the question of whether the Board may use general fund moneys for that purpose would be a policy matter to be addressed by the Board").

⁵ 467 N.W.2d 456 (N.D. 1991).

of money from a school district's general fund. It also held that a listing of general purposes for which the general fund moneys may be expended does not necessarily preclude using those funds for other legitimate purposes. The court was not persuaded that such things as the maintenance, construction, or erection of buildings could not be included as general expenses.

Therefore, it is my opinion that Ward County may transfer the amount requested from lawfully available general funds to the State Fair Association in excess of the amount that would be collected through the mill levy authorized for the State Fair, subject only to general fund spending limitations.

You also asked whether the contemplated donation violates the terms of the 1974 Tri-Party Agreement, which is a joint powers agreement entered into under N.D.C.C. ch. 54-40 among Ward County, the city of Minot, and the State of North Dakota through the State Fair Association. The Office of Attorney General generally does not interpret contracts.⁶ Therefore I respectfully decline to provide an opinion interpreting the Tri-Party Agreement.

Finally, you ask whether Ward County may donate money to assist in the purchase and installation of new seating for the ASA and, if so, how the donation may be accomplished.⁷

⁶ cf. N.D.A.G. 97-L-172 (the office of Attorney General usually does not interpret local ordinances or home rule charter language).

⁷ I note that Ward County contends that it is part owner of the ASA, although admittedly not part owner of the land on which the ASA is located. The land is undisputably owned by the State Fair Association, according to a deed transferring the ownership of the land to the Association dated April 7, 1966, and recorded in Ward County Recorder's office. An earlier opinion of this office, discussing Minot's participation in constructing the ASA, noted that under the construction plan, the building would be constructed and owned by the State Fair Association and a long term lease would be entered into with the county and city for their use of the building when it was not needed by the Association. N.D.A.G. Letter to Thomas (July 5, 1973). Ward County apparently bases its belief of ownership upon the wording of the Tri-Party Agreement, where each of the three parties to the agreement state that their purpose is "acquiring, constructing and maintaining a public building for the joint use of these parties in a combined effort to fulfill public needs. . . ." Tri-Party Agreement, dated April 9, 1974, pp. 1-1, ¶ 1. The city of Minot, contrary to Ward County, does not claim, pursuant to the Tri-Party Agreement or any other document, an ownership interest in the building; rather, the city has recently and expressly identified the State Fair Association as the owner of the ASA. City-State Fair Agreement, dated Feb. 5, 1998, between State of North Dakota, acting by and through the State Fair Association and the city of Minot. Real property is defined as including that which is affixed to it, and is immovable. N.D.C.C. §§ 47-01-03, 47-01-05. Based upon the documentation received in this office to address the requests by Ward County, it is my opinion that Ward County is not part owner of ASA. However, for reasons discussed in this opinion, ownership by

The North Dakota Constitution prohibits a political subdivision from loaning or giving its credit or making donations to or in aid of any individual, association, or corporation unless it is for the reasonable support of the poor, or as part of a permitted industry, enterprise, or business.⁸ This constitutional provision limits donations to private entities but does not prohibit donations from a political subdivision to another political subdivision or to a state agency.⁹ It does not prohibit shifts in revenue among public bodies.¹⁰

Although a donation by one political subdivision to another or to the State is not prohibited by article X, section 18 of the North Dakota Constitution, the political subdivision must have statutory authority to donate money. A political subdivision possesses only those powers expressly granted to it by the Legislature or those necessarily implied from the powers expressly granted.¹¹

The Legislature has provided such authority in N.D.C.C. ch. 54-40.3, regarding joint powers agreements. That law authorizes a political subdivision to enter into a joint powers agreement with the state or other political subdivision “for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them.”¹² Only one of the parties to the agreement needs to have the statutory authority to take the action that is the subject of the joint powers agreement.¹³

A joint powers agreement may address, among other things, “[t]he manner in which the parties to the agreement will finance the cooperative or joint undertaking”¹⁴ “The parties . . . may expend funds . . . use unexpended balances of their respective current funds, . . . and otherwise share or contribute property in accordance with the agreement”¹⁵

Ward County is not relevant to the county’s ability to make the donation for the new seating.

⁸ N.D. Const. art. X, § 18.

⁹ Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964); N.D.A.G. 2005-L-35; N.D.A.G. 2005-L-30; N.D.A.G. 2002-F-03; N.D.A.G. 1995-L-115; N.D.A.G. 1994-F-02.

¹⁰ N.D.A.G. 2005-L-30, citing Berry v. State, 908 S.W.2d 682, 685 (Mo. 1995).

¹¹ Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991) (cities); Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924) (counties); see generally N.D. Const. art. VII, § 2; N.D.A.G. 2002-F-03.

¹² N.D.C.C. § 54-40.3-01(1).

¹³ N.D.A.G. 2005-L-35; N.D.A.G. 2002-F-03; N.D.A.G. 1998-L-192, N.D.A.G. 1995-L-115, N.D.A.G. 1994-F-02, N.D.A.G. 1994-L-258, N.D.A.G. 1993-L-190, N.D.A.G. 1993-F-23.

¹⁴ N.D.C.C. § 54-40.3-01(1)(d).

¹⁵ Id.

The State Fair Association has been granted all powers that corporations have.¹⁶ Corporate powers include the authority to acquire, own, improve, or otherwise deal in and with real and personal property.¹⁷ Therefore, I would recommend Ward County enter into a new joint powers agreement with the State Fair Association under N.D.C.C. ch. 54-40.3 for the purpose of purchasing and installing the new seating in the ASA. The agreement could authorize the Arena Commission to exercise the State Fair Association's authority to improve the ASA by purchasing and installing new seating, along with any other provisions deemed necessary, including those with respect to how the purchase is to be shared.¹⁸

It is my opinion that Ward County may donate public funds to assist in purchasing and installing new seating in the ASA through a joint powers agreement under N.D.C.C. ch. 54-40.3.

Sincerely,

Wayne Stenehjem
Attorney General

jak/cwg/vkk
Enclosure

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.¹⁹

¹⁶ N.D.C.C. § 4-02.1-16.

¹⁷ N.D.C.C. § 10-19.1-26(4).

¹⁸ See, e.g., N.D.A.G. 2004-L-57, where, through a joint powers agreement, the parties designated a board of directors to exercise the powers of two political subdivisions to prepare and enter into contracts to finance, construct, and operate a joint correctional center (copy enclosed).

¹⁹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).