

**LETTER OPINION
2006-L-07**

February 16, 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 whether a city and county may fund an agreement to provide joint library services by levying separate taxes with mill levies that are not equal in amount. You also asked whether a home rule county or city could increase the amount of its levy without a vote of the electors as required by N.D.C.C. § 40-38-02(4). For the reasons stated below, it is my opinion that a city and county may fund an agreement to provide joint library services by levying separate taxes with mill levies that are not equal in amount. It is my further opinion that a home rule county or city may, if it has in its charter the powers in N.D.C.C. § 11-09.1-05(2) and N.D.C.C. § 40-05.1-06(2), adopt an ordinance increasing the mill levy above any mill levy limitation set forth in statute, without voter approval.

ANALYSIS

A city or a county may provide public library services under N.D.C.C. ch. 40-38. Section 40-38-01, N.D.C.C., provides for the establishment of city or county library services by their respective governing body through a process initiated either by resolution or petition. If library services have been authorized, the authorizing governing body of a city or a county shall establish a library board and a library fund.¹ Each respective library fund is supported by an annual tax not to exceed four mills² unless a higher amount is approved by 60 percent of the voters voting in the election.³ If a tax for county library services is levied, a city already levying a tax for library services is exempted from the county tax levy to the extent that the city levies taxes for a library fund during the year for which the tax levy is made.⁴ This exemption protects property located in a city from being assessed for library services by two political entities.

¹ N.D.C.C. §§ 40-38-02 and 40-38-03.

² N.D.C.C. § 40-38-02(1).

³ N.D.C.C. § 40-38-02(4).

⁴ N.D.C.C. § 40-38-02(3).

If a city and a county have established separate library services under N.D.C.C. § 40-38-01, the governing bodies of the city and the county may enter into a written agreement to maintain joint library services.⁵ The establishment of joint library services must be approved by the electors of the city and the county.⁶

The city and the county must appoint a joint library board to administer the agreement, and the joint board must create a joint fund to meet the cost of the library services.⁷ The joint library board does not have statutory authority under N.D.C.C. ch. 40-38 to levy a property tax to finance the joint fund. The joint fund receives financing from the city and county as parties to the agreement through tax assessments authorized under N.D.C.C. § 40-38-02(1). These tax assessments are only limited by the provisions of N.D.C.C. §§ 57-15-06.7(15) and 57-15-10(5).⁸ The proportionate share of the contributions made by the city and the county is determined by the terms of the agreement.⁹ This may require the assessment of taxes by the city and the county that result in mill levies that are unequal in amount under the terms of the agreement.

An agreement between a city and a county to provide joint library services creates what essentially is a joint venture, which is funded by contributions made by the parties to the agreement. An agreement does not create a third, or separate, taxing district. The joint board has no taxing authority and each party levies a tax within its own taxing district. To the extent that N.D.A.G. 98-F-29 concludes that an agreement between a city and a county to provide joint library services “results in a single taxing district which may not impose a mill levy on property within the city limits that is different from the mill levy imposed on property outside the city limits,” it is overruled.

You also asked whether a home rule county or city could increase the amount of its levy without a vote of the electors as required by N.D.C.C. § 40-38-02(4). That provision allows a governing body to increase the mill levy above the mill levy limitation in that section if approved by 60 percent of the qualified electors voting in the election.

Home rule counties and cities may exercise the powers contained in N.D.C.C. § 11-09.1-05 and N.D.C.C. § 40-05.1-06, respectively, if those powers are included in their charters and implemented through an ordinance. Those sections authorize counties and cities to control their finances, levy and collect property taxes, and

⁵ N.D.C.C. § 40-38-11(1) and N.D. Const. art. VII, § 10.

⁶ N.D.C.C. § 40-38-11(10).

⁷ N.D.C.C. § 40-38-11(3) and (5).

⁸ N.D.C.C. § 40-38-02(1).

⁹ N.D.C.C. § 40-38-11(5).

establish debt and mill levy limitations.¹⁰ Ordinances adopted to implement charters may supersede state law within the implementing county or city's jurisdiction.¹¹

The home rule powers to levy and collect property taxes and special assessments and to establish debt and mill levy limitations give home rule entities the authority to determine the method by which the entities' functions and services are financed.¹² If a county or city's home rule charter contains these provisions, the county or city may, by appropriate ordinance, supersede mill levy limitations otherwise established by law.¹³ Thus, a home rule county or city may, if they have in their charters the powers in N.D.C.C. § 11-09.1-05(2) and N.D.C.C. § 40-05.1-06(2) respectively, adopt an ordinance increasing the mill levy above the mill levy limitation in N.D.C.C. § 57-15-06.7(15) and N.D.C.C. § 57-15-10(5).

A home rule charter or ordinance may also address any requirement for voter or property owner approval.¹⁴ Home rule entities with the power to control their finances, levy and collect property taxes, and establish debt and mill levy limitations may enact ordinances superseding a statute requiring a vote of a certain percent of the electors.¹⁵ The ordinance itself could establish the mill levy amount or it could provide for voter approval. If the ordinance did provide for voter approval, the voting requirements could differ from those set forth in N.D.C.C. § 40-38-02(4).

There are some limitations, however, of which home rule entities should be aware. Home rule entities must comply with any limitations in their charters regarding the entities' control of their finances or on their power to levy a tax.¹⁶ And, N.D.C.C. § 11-09.1-05(2) and N.D.C.C. § 40-05.1-06(2) contain limitations with regard to property taxes applicable to home rule entities. All property must be assessed in a uniform manner within the taxing district¹⁷ and a home rule county may not supersede a state law that determines what property or acts are subject to or exempt from ad valorem or sales and use taxes.¹⁸

¹⁰ N.D.C.C. § 11-09.1-05(2) (counties) and N.D.C.C. § 40-05.1-06(2) (cities).

¹¹ N.D.C.C. § 11-09.1-04 (counties) and N.D.C.C. §§ 40-05.1-05 and 40-05.1-06 (cities).

¹² See N.D.A.G. 95-L-48.

¹³ See N.D.A.G. 96-L-142; N.D.A.G. 76-17 (Letter to Winkjer (July 19, 1976)).

¹⁴ See N.D.A.G. 95-L-48.

¹⁵ Id.

¹⁶ N.D.A.G. 97-L-172 (charter limited city's taxing authority to the amount authorized by state statutes and the constitution); N.D.A.G. 96-L-142.

¹⁷ N.D.C.C. § 11-09.1-05(2); N.D.C.C. § 40-05.1-06(2).

¹⁸ N.D.C.C. § 11-09.1-05(2).

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In conclusion, it is my opinion that a home rule county or city may, if it has in its charter the powers in N.D.C.C. § 11-09.1-05(2) and N.D.C.C. § 40-05.1-06(2), adopt an ordinance increasing the mill levy above any mill levy limitation set forth in statute and provide for the manner in which the mill levy may be authorized, including eliminating the voter approval requirement.

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.¹⁹

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