LETTER OPINION
2008-L-08

May 22, 2008

The Honorable Dwight Wrangham
State Representative
301 52nd Street SE
Bismarck, ND 58501-8604

The Honorable Mark Dosch
State Representative
509 Cottonwood Loop
Bismarck, ND 58504-7411

The Honorable Lisa Meier
State Representative
1713 South 3rd Street
Bismarck, ND 58504-7114

Dear Representatives Wrangham, Dosch, and Meier:

Thank you for your letter asking questions about the construction of an aquatic and wellness center ("aquatic center") by the Bismarck Parks and Recreation District ("Park District") and the North Dakota State Board of Higher Education on the Bismarck State College campus. It is my opinion that where, as here, a park district enters into a development agreement with a non-profit corporation for funding and constructing a fee-based facility under N.D.C.C. ch. 48-02.1, the park district is exempt from the competitive bidding requirements in N.D.C.C. ch. 48-01.2. It is my further opinion that the Board of Higher Education ("Board") has the authority to enter into a joint powers agreement with a park district that includes a provision allowing for the long-term, shared use of state land under the Board's control.

According to the information you and the Park District provided to this office, the Park District, after investigating the need for an indoor aquatics center, decided to move forward with the project earlier this year. For two successive weeks in January and February 2008, the Park District advertised a Request for Information ("RFI") in the Bismarck Tribune, seeking proposals from anyone "willing to offer alternatives for

financing, funding and construction of an indoor aquatics/wellness center." The only proposal received was from Streamline, a non-profit corporation formed by individuals to promote indoor swimming. Following a March 2008 hearing, the Park District accepted Streamline's proposal and approved a project with the following structure: (1) Bismarck State College ("BSC"), through the Board, will furnish the land upon which the aquatic center will be built; (2) the Park District will issue $1.9 million of debt, which will be used, in part, to provide improvements to the land upon which the aquatic center will be built; and (3) Streamline will finance and construct the center, the approximate cost of which is $8 million, and will lease it to the Park District.

On April 15, the Park District and the Board entered into a joint powers agreement ("JPA") in which they formally agreed to work together to construct the facility. The JPA gives the Park District the power, on behalf of the Board, to enter into a lease or other agreement with other entities to finance and construct improvements. Pursuant to the JPA, the Park District is currently negotiating the terms of the development agreement with Streamline. My understanding is that, although negotiations are ongoing, one of the terms is that the Park District will lease to Streamline the land on which the aquatic center will be built. Another term is that Streamline will keep ownership of the aquatic center when the Park District's lease ends, but "may transfer ownership" of the aquatic center to the Park District or BSC. In addition, the parties have proposed that the Park District's initial lease of the aquatic center will be for twenty-five years, and the Park District will have first right for rent renewal for up to twenty-five additional years. The Park District's annual rent is estimated to be $640,000 to $700,000, but, after Streamline pays off its original construction obligations and any bonds or loans, the rent will be reduced so that Streamline is only compensated for actual costs of ownership.

ANALYSIS

A. Is the Aquatic Center Project a "Public Improvement" Subject to the Competitive Bidding Laws?

Under N.D.C.C. ch. 48-01.2, a governing body, which includes political subdivisions,[1] is required to use competitive bidding to let a contract to construct an improvement that is

[1] N.D.C.C. § 48-01.2-01(16) (defining governing body as "the governing officer or board of a state entity or a political subdivision").

estimated to cost more than $100,000.[2] A "public improvement" is a project constructed on public land "undertaken by a governing body" and "paid for with public funds."[3]

The Park District does not dispute that it did not comply with the competitive bidding requirements in N.D.C.C. ch. 48-01.2 but argues that it was not required to comply with them because the aquatic center is not a public improvement.[4] The Park District asserts that the aquatic center is not a public improvement because it is not being "undertaken by a governing body."[5]

As ordinarily understood, "undertake" means to "take upon oneself" or "commit oneself."[6] At least one jurisdiction has examined a governing body's involvement in a project and determined that if the involvement is "significant," then the project is "undertaken by a governing body."[7] In In re Wren, the Minnesota Court of Appeals determined that the city of Richfield was significantly involved in a redevelopment project undertaken by a private entity because the city "communicated regularly with property owners in the redevelopment area, solicited and contracted Gateway [the private entity] to acquire property in the redevelopment area, agreed to exercise its power of eminent domain if Gateway could not obtain property, and exercised its power of eminent domain to acquire commercial property within the redevelopment property."[8] Here, the Park District initiated the project by soliciting proposals for the project, the Park District is entering into a development agreement with Streamline for funding and constructing the project, and the Park District is issuing $1.9 million of debt, which will

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[2] N.D.C.C. § 48-01.2-04(1); see Braaten v. Olson, 148 N.W. 829, 831 (N.D. 1914) ("in the absence of a constitutional or statutory mandate, competitive bids are not necessary").

[3] N.D.C.C. § 48-01.2-01(20) (defining public improvement as "any improvement undertaken by a governing body for the good of the public and which is paid for with public funds and constructed on public land . . . and includes an improvement on public or nonpublic land if any portion of the construction phase of the project is paid for with public funds. . . .").

[4] Because the Park District does not dispute that it did not comply with the competitive bidding requirements of N.D.C.C. ch. 48-01.2, it is unnecessary to address your questions relating to the sufficiency of the RFI and other procedures used by the Park District when entering into its agreement with Streamline.

[5] See N.D.C.C. § 48-01.2-01(20).

[6] American Heritage College Dictionary, 1472 (3d ed. 1993); In re Wren, 685 N.W.2d 721, 724 (Minn. App. 2004); see N.D.C.C. § 1-02-02 ("[w]ords used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears").

[7] See In re Wren, 685 N.W.2d at 724-25 (Minn. App. 2004).

[8] In re Wren, 685 N.W.2d 721, 725 (Minn. App. 2004).

be used, in part, to provide improvements to the land upon which the aquatic center will be built. Thus, the Park District's involvement is extensive and could be considered "significant." It is my opinion, therefore, that a North Dakota court might determine that the aquatic center's construction is being "undertaken by a governing body" based upon the Park District's significant involvement in the project.

The second requirement is that the project must be funded with public funds. The Park District seems to argue that the project is not being "paid for with public funds" because it is being funded by Streamline, presumably through the issuance of so-called MIDA bonds by Burleigh County under N.D.C.C. ch. 40-57.[9] The North Dakota Supreme Court has not addressed whether a project is "paid for with public funds" where a governmental entity repays debt service on bonds issued for a project indirectly by means of annual rental payments under a lease arrangement. One West Virginia court has said that "public funds are at issue when the state is obligated to make rental payments pursuant to a lease agreement," and implied that competitive bidding laws should be invoked when public funds are "used either directly for the costs of construction or indirectly by means of a lease arrangement which contemplates payments essentially covering the amount of the construction."[10] In addition, that court held that governmental entities "cannot escape" the public bidding statute by involving a third party for construction responsibilities or for obtaining funding.[11] On the other hand, one noted author stated that "[o]rdinarily, a statute requiring competitive bidding on public improvements is applicable only to contracts whereby the city itself assumes an obligation or indebtedness."[12] It is my understanding that the rental payments by the Park District would be subject to annual appropriation. This would indicate that the Park District is not assuming an "obligation or indebtedness" since it could determine in any subsequent year not to appropriate sufficient money to make the annual rental

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[9] See N.D.C.C. § 48-01.2-01(20).

[10] Affiliated Constr. Trades Found. v. Univ. of W. Va. Bd. of Trustees, 557 S.E.2d 863, 878-79 (W.Va. 2001) (emphasis added); see also State ex inf. Webster, ex rel. Mo. Dep't of Labor and Indus. Relations, Div. of Labor Standards v. City of Camdenton, 779 S.W.2d 312 (Mo. App. S.D. 1989) (holding firehouse/police station had been paid in part with public funds in the form of the city's advance lease payment to the private entity owning the structure).

[11] Affiliated Constr. Trades Found., 557 S.E.2d at 879; see also N.D.A.G. 2002-L-33 (discussing factors courts look to in determining whether projects are truly public).

[12] 13 Eugene McQuillin, The Law of Municipal Corporations § 37.106 (3d ed. 1997). See also Hart v. Holtzman, 626 N.Y.S.2d 145 (N.Y. App. Div. 1995) (significant partial or even complete governmental funding of low income housing project is insufficient to convert privately owned project into public works for purpose of prevailing wage law where developer retained ownership and construction risk).

payment.[13] Considering all of this, and even keeping in mind the strict construction generally given to competitive bidding statutes,[14] it is questionable whether a project is "paid for with public funds" within the meaning of N.D.C.C. § 48-01.2-01(20) if a governmental entity is indirectly paying for it with public funds by making annual rental payments subject to a non-appropriation clause under a lease arrangement.

Here, it appears that the parties intend the Park District's annual rental payments of $640,000 to $700,000 to essentially cover the cost of debt service on bonds to be issued for constructing the aquatic center.[15] Thus, the aquatic center is, arguably, being indirectly repaid with public funds by means of a lease arrangement with the Park District. In addition, it appears that parts of the project – land improvements – are being directly paid for with public funds. However, I cannot determine whether the aquatic center is being paid for with public funds without knowing the details of the development agreement and other documents, which have not yet been finally determined.[16] It is also not yet entirely clear which type of debt financing Streamline will utilize to pay for construction of the aquatic center since Burleigh County has not yet approved the MIDA bond issuance. Therefore, I cannot give an opinion as to whether the aquatic center is a public improvement subject to the competitive bidding requirements of N.D.C.C. ch. 48-01.2.

B. Is the Aquatic Center Exempt from the Competitive Bidding Laws?

Even if the aquatic center is a public improvement within the meaning of N.D.C.C. ch. 48-01.2, and assuming the Park District enters into a development agreement with

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[13] See Red River Human Serv. Found. v. Dep't of Human Serv., 477 N.W.2d 225 (N.D. 1991) (non-appropriation clause in lease permitted state agency to cancel lease since Legislature failed to appropriate sufficient funds in biennium to pay rent for office space).

[14] See Haugen v. City of Berthold, 267 N.W.2d 198 (N.D. 1978) (contractor who did not obtain the required license until the day after bid opening was not a qualified bidder because the statute required bidders to have the license 10 days before the bid opening).

[15] See Affiliated Constr. Trades Found., 557 S.E.2d at 879 (among factors court should look at when determining whether competitive bidding statutes apply is whether public funds are used either directly for the costs of construction or indirectly by means of a lease arrangement which contemplates payments essentially covering the amount of the construction).

[16] See id. at 876 ("the determination whether a lease-construction contract calls for construction of a public building or public work likely will depend on the details of the particular arrangement").

Streamline, the Park District is exempt from complying with the competitive bidding requirements because N.D.C.C. ch. 48-02.1 exempts some projects from the competitive bidding laws.

The primary objective in construing a statute is to ascertain the Legislature's intent by looking at the language of the statute itself and giving it its plain meaning.[17] When construing statutes on the same subject matter, every effort must be made "to harmonize and give meaningful effect to each statute without rendering one or the other largely useless."[18] If a conflict between two statutes is irreconcilable, the more particular statute is construed as an exception to the general one.[19]

Chapter 48-02.1, N.D.C.C., does not require governmental entities, for certain projects, to let contracts by competitive bidding.[20] Instead, it authorizes a public authority to solicit proposals from private operators, negotiate with private operators, and accept proposals in the public interest after holding a public hearing.[21] The only reference to competitive bidding in N.D.C.C. ch. 48-02.1 is in N.D.C.C. § 48-02.1-12, which provides that "portions of the project that do not involve contractor ownership" are subject to all competitive bidding laws "if so determined by resolution of the governing body of the public authority."[22]

A public authority is given broad authority under N.D.C.C. ch. 48-02.1 to enter into agreements with private entities to facilitate constructing public facilities. This interpretation is supported by the legislative history, including the sponsoring senator's statement that the chapter's purpose is to enable a public entity to draw upon the private sector as the equity source of funding for infrastructure development.[23] If a public authority were required to let a development agreement by competitive bidding,

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[17] Overboe v. Farm Credit Servs., 623 N.W.2d 372, 375 (N.D. 2001); see N.D.C.C. § 1-02-02.
[18] Richter v. Houser, 598 N.W.2d 193, 197 (N.D. 1999).
[19] State v. Bachmeier, 729 N.W.2d 141, 147 (N.D. 2007) (quoting N.D.C.C. § 1-02-07).
[20] N.D.C.C. § 48-02.1-03 ("A public authority may solicit or accept proposals from private operators for the constructing . . . managing, and owning of a fee-based facility that will be situated in an area subject to the public authority's jurisdiction. After a hearing, the public authority may accept a proposal that it determines to be in the public interest. A public authority may negotiate and enter into a development agreement with any private operator.").
[21] N.D.C.C. § 48-02.1-03.
[22] N.D.C.C. § 48-02.1-12(2).
[23] See Hearing on S.B. 2478 Before the Senate Gov't & Veterans Affairs Comm., 1993 N.D. Leg. (Feb. 11) (Statement of Sen. Lindgren).

the purpose of N.D.C.C. ch. 48-02.1 would be hindered because a private entity would likely be reluctant to agree to finance a project if all of the construction portions of the project were then subject to competitive bidding requirements. In addition, N.D.C.C. § 48-02.1-03, which allows the public authority to "negotiate" and accept any proposal in the public interest after holding a public hearing, and N.D.C.C. § 48-02.1-12, which provides that competitive bidding requirements otherwise applicable only apply under certain circumstances, would both be rendered essentially meaningless. An interpretation that renders a statute "largely useless" must be avoided.[24] Thus, an irreconcilable conflict exists between N.D.C.C. chs. 48-01.2 and 48-02.1 when a project is both a public improvement and a fee-based facility being constructed by a private operator under a development agreement with a public authority. Therefore, N.D.C.C. ch. 48-02.1, which governs the more specific and narrowly defined area of fee-based facilities constructed under development agreements with private operators, should be construed as an exception to the general provisions in N.D.C.C. ch. 48-01.2 governing the construction of public improvements.[25] Accordingly, it is my opinion that a public authority is exempt from complying with the competitive bidding requirements in N.D.C.C. ch. 48-01.2 when entering into a development agreement under N.D.C.C. ch. 48-02.1 for the construction of a fee-based facility, such as the aquatic center.[26]

Of course, a governmental entity undertaking a construction project cannot take advantage of this exception unless it has the authority to act under N.D.C.C. ch. 48-02.1. To do so, it must, among other things, be a "public authority." A "'[p]ublic authority' means the state subject to legislative authority, a county, township, or city when ownership of or jurisdiction over a fee-based facility has been tendered to and accepted by said authority."[27]

A park district may implement its authority "in a manner similar" to the way in which a city implements its authority.[28] A park district is governed, in carrying out all its powers,

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[24] Richter, 598 N.W.2d at 197.
[25] See Stalcup v. Job Service, 592 N.W.2d 549, 553 (N.D. 1999); Conservatorship of Milbrath, 508 N.W.2d 360, 363 (N.D. 1993).
[26] N.D.C.C. § 48-02.1-01(4) (defining fee-based facility as "a facility that provides a service in which the charge is based on the level of service by users or a rental fee paid by a public authority. The facility may be a library, city hall, and an appurtenant building, a water or sewage treatment plant, or other public improvement; land lying within applicable rights of way; and other appurtenant rights or hereditaments that together comprise a project for which a private operator is authorized to operate or own and impose fees or derive a rent as expressed in the development agreement").
[27] N.D.C.C. § 48-02.1-01(6).
[28] N.D.A.G. Letter to Sorenson (Apr. 22, 1987) (citing N.D.C.C. § 40-49-18).

by the laws "applicable to municipalities of the kind in which the park district is established."[29] A power granted to park districts is the power "to maintain, govern, and improve the land, and to provide for the erection of structures thereon."[30] Because N.D.C.C. ch. 48-02.1 provides a mechanism by which a governmental entity, including a city, can carry out its power to construct public facilities, it is my opinion that a park district is a "public authority" within the meaning of N.D.C.C. § 48-02.1-01. Thus, the Park District is exempt from the competitive bidding requirements in N.D.C.C. ch. 48-01.2 if it enters into a development agreement with Streamline and follows the procedures outlined in the chapter.

C. Does the Board have the Authority to Allow a Long-Term Lease of BSC Land?

Your final question concerns the aquatic center's location on the BSC campus. Specifically, you ask whether the Board has the authority, without legislative authorization, to contract with another governmental entity for the long-term use of public lands.

The Board administers several state educational institutions, including BSC.[31] Its powers are found in the North Dakota Constitution and Century Code.[32] The powers granted to the Board in N.D. Const. art. VIII, § 6 "are limited to" administrating the operation of the schools, and do not "concern the disposition of real property."[33] However, "disposition" is a specific term that means "parting with, alienation of, or giving up property."[34] Thus, disposition denotes a more permanent action such as a sale or transfer of property, not a mere lease. There are a number of examples where the Board has entered into agreements involving the long-term lease of university lands for community purposes, such as the Community Bowl in Bismarck, the Fargodome in Fargo, and a senior living facility in Dickinson.[35] Further, "[s]ection 54-01-27, N.D.C.C., authorizes the state, or any agency or institution of the state, to lease any real or personal property belonging to the state, or any agency or institution of the state, if

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[29] N.D.C.C. § 40-49-18.
[30] N.D.C.C. §§ 40-49-04(3), 40-49-12(1).
[31] Peterson v. North Dakota Univ. Sys., 678 N.W.2d 163, 167 (N.D. 2004); see N.D. Const. art. VIII, § 6; N.D.C.C. § 15-10-01.3.
[32] Sacchini v. Dickinson State College, 338 N.W.2d 81, 84 (N.D. 1983); N.D.A.G. 2003-L-47.
[33] N.D.A.G. 2003-L-47. This opinion concerned the sale or transfer of real property bequeathed to a state university, not to the Board's administrative authority to lease or rent out property under its constitutional authority.
[34] Black's Law Dictionary 471 (6th ed. 1990).
[35] See, e.g., N.D.A.G. 2005-L-05.

certain conditions are met. Among other things, these agreements must be approved by the Industrial Commission."[36]

Here, the Board and Park District have entered into a joint powers agreement, as authorized by N.D.C.C. § 54-40.3-01. A joint powers agreement may provide the "manner of . . . holding" real property used in the joint undertaking and may allow property of one of the parties to "be used instead of other financial support."[37] As authorized by this statute, the Board and Park District have provided for the "shared use" of the BSC tract and have agreed that the value of this land contribution will be considered when negotiating aquatic center membership fees for BSC students and employees.

Although parties to a joint powers agreement may cooperatively exercise their powers, at least one of the parties must have the statutory authority to take the action that is the subject of the agreement.[38] Here, one of the actions that is a subject of the JPA is the lease of state land controlled by the Board to a private operator, Streamline. If the Board has the authority to enter the kind of arrangement contemplated here, giving Streamline a twenty-five-year lease to build the aquatic center – and eventually own it – then it can, under the JPA, "transfer" this authority to the Park District.

Therefore, it is my opinion that the Board, or the Park District on behalf of the Board under the JPA, may lease land on the BSC campus to Streamline for the construction of the aquatic center.

The Park District is not required to comply with the competitive bidding requirements in N.D.C.C. ch. 48-01.2 because it intends to follow N.D.C.C. ch. 48-02.1, which gives it the authority to enter into a development agreement with a private entity for funding and constructing a fee-based facility without following competitive bidding requirements. The Board has the authority to share use of land on the BSC campus with the Park

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[36] N.D.A.G. 2005-L-05, n.1.

[37] N.D.C.C. § 54-40.3-01(1); see N.D.C.C. § 54-40.3-01(2) (city park district and state institution may enter into an agreement in the manner provided in subsection 1); see also N.D.C.C. § 54-40-01(1) ("Two or more governmental units . . . by agreement entered into through action of their governing bodies, may jointly or cooperatively exercise their respective separate powers, or any power common to the contracting parties or any similar powers, including those which are the same except for the territorial limits within which they may be exercised for the purpose of acquiring, constructing, and maintaining any building for their joint use.").

[38] N.D.A.G. 2005-L-35; see N.D.C.C. § 54-40.3-01; N.D.A.G. 98-L-192.

District and to allow the Park District to lease the land to a private entity that plans to construct and own a fee-based aquatic center on the land.

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.[39]

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