

**LETTER OPINION
2009-L-07**

April 24, 2009

Ms. Rozanna C. Larson
Ward County State's Attorney
PO Box 5005
Minot, ND 58702-5005

Dear Ms. Larson:

Thank you for your letter asking several questions about the use of county emergency funds to pay for township and city snow removal and for providing sandbags for townships and cities. For the reasons stated below, it is my opinion that a home rule county may use its emergency fund to pay for snow removal, even when it constitutes maintenance for township and city roads, if it has the power to control its financial and fiscal affairs in its home rule charter and if it adopts an appropriate ordinance under the home rule charter. A non-home rule county may use its emergency fund if the snow removal constitutes an emergency and other statutory conditions are followed, but a non-home rule county may not use its emergency fund for snow removal which constitutes maintenance. It is my further opinion that a county may use its emergency fund to provide sandbags to townships and cities to prevent flooding as part of the administration of emergency management mutual aid agreements.

ANALYSIS

In your letter, you note that a number of townships and cities within the county have greatly exceeded their budgets for snow removal this winter. You also indicate that townships and cities are concerned about rapid melting in the spring and potential flooding and that the county commission is considering purchasing a number of sandbags for use by the county and other political subdivisions within the county to forestall any flooding.

Your first question concerns use of the county's emergency fund. State law authorizes counties to levy a tax for emergency purposes.¹ That statute provides, in part:

The governing body of any county may levy a tax for emergency purposes not exceeding the limitation in subsection 22 of section 57-15-06.7. The

¹ N.D.C.C. § 57-15-28.

emergency fund may not be considered in determining the budget or the amount to be levied for each fiscal year for normal tax purposes but must be shown in the budget as an “emergency fund” and may not be deducted from the budget as otherwise provided by law. Each county may create an emergency fund, and all taxes levied for emergency purposes by any county, when collected, must be deposited in the emergency fund, and must be used only for emergency purposes caused by the destruction or impairment of any county property necessary for the conduct of the affairs of the county, emergencies caused by nature or by the entry by a court of competent jurisdiction of a judgment for damages against the county. The emergency fund may not be used for any road construction or maintenance, except for repair of roads damaged by nature within sixty days preceding the determination to expend emergency funds, or for the purchase of road equipment; however, the emergency fund may be used to match federal funds appropriated to mitigate damage to roads related to a federally declared disaster that occurred more than sixty days preceding the determination.²

You ask whether the county’s emergency fund may be used to pay for snow removal for township and city roads within the county. As discussed in detail below, a county emergency fund may not be used for road maintenance under N.D.C.C. § 57-15-28 and consequently cannot be used if the snow removal constitutes maintenance. Ward County, however, has adopted a home rule charter that may permit the county to expand the uses for its emergency fund.

Once adopted, a home rule charter enables counties to exercise additional powers if those powers are included in the charter and implemented through an ordinance.³ Those powers include the power to control its finances and fiscal affairs, to exercise in the conduct of its affairs all powers usually exercised by a corporation, and the power to exercise any of its powers or perform any of its functions by contract with, or grants from, any other governmental entity or agency.⁴ The Ward County home rule charter includes these provisions.⁵ State statutes apply to home rule counties, “except as superseded by the charters of the counties or by ordinances passed pursuant to the charters.”⁶

“The charter and the ordinances made pursuant to the charter in county matters must be liberally construed to supersede within the territorial limits and jurisdiction of the county any conflicting state law except for any state law as it applies to cities or any power of a city to

² N.D.C.C. § 57-15-28 (emphasis added).

³ N.D.C.C. § 11-09.1-05.

⁴ N.D.C.C. § 11-09.1-05(2), (8), and (9).

⁵ Ward County Home Rule Charter, art. 2(b), (h), and (i).

⁶ N.D.C.C. § 11-09.1-05.

govern its own affairs, without the consent of the governing body of the city.”⁷ A county with home rule authority that includes the powers mentioned above in its home rule charter may be able to craft an appropriate ordinance to address the purposes for which its emergency fund may be used under N.D.C.C. § 57-15-28. An ordinance addressing the emergency fund may define excessive snow fall conditions as an emergency, may amend N.D.C.C. § 57-15-28 to distinguish snow removal in such an emergency from routine maintenance, and may permit cost sharing with other political subdivisions that include county citizens, such as townships and cities within the county.⁸ Therefore, it is my opinion that the provisions of N.D.C.C. § 57-15-28 concerning the use of a county’s emergency fund may be superseded in a home rule county if the proper authorization is included in the home rule charter and implemented through ordinances.

Any home rule ordinance crafted to meet Ward County’s purposes should address the application of state statutes which govern counties in the absence of home rule or which have not adopted an ordinance under home rule. The application of the county emergency fund statute, N.D.C.C. § 57-15-28, has been addressed in a number of opinions issued by this office. A prior opinion explained:

[T]here [are] three situations in which the county emergency fund [can] be used: (1) the destruction or impairment of any county property necessary for the conduct of the affairs of the county; (2) emergencies caused by nature; or (3) entry of a court order by a court of competent jurisdiction of a judgment for damages against the county.⁹

In a recent opinion analyzing the county emergency fund statute, I noted that:

The intent of the Legislature must be sought initially from the language of a statute. County of Stutsman v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985). If the Legislature does not define words used in a statute, the words are to be given their plain, ordinary, and commonly understood meanings. Kim-Go v. J. P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990); N.D.C.C. §§ 1-02-02, 1-02-03. For purposes of the emergency fund statute, the Legislature did not define either “emergency” or “necessary.” “Emergency” means an “unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate action.” The American Heritage Dictionary 448 (2d coll. ed. 1991). “Necessary” means “[a]bsolutely essential; indispensable.” The American Heritage Dictionary 834 (2d coll. ed. 1991). Determining whether an emergency

⁷ N.D.C.C. § 11-09.1-04.

⁸ There also may be other ways or approaches to be taken in a home rule ordinance to accomplish the county’s goals.

⁹ N.D.A.G. 74-136.

exists and whether the property is necessary for the conduct of the affairs of a county are questions of fact that must be made by the board in question.¹⁰

Even though it would normally be up to the county commission to determine, as a matter of fact, whether an emergency exists or whether necessary county property was impaired, the statute also provides that the emergency fund may not be used for road construction or maintenance except for certain repairs.¹¹ The term “maintenance” is not defined in the statute; however, the common meaning¹² is the “act of maintaining or the state of being maintained . . . [t]he work of keeping something in proper condition.”¹³ Although there may be instances where the removal of snow is of a routine nature and designed to keep roads in proper condition, there may also be instances where snow removal may constitute an emergency. Winter weather in North Dakota is sometimes severe and repeated snow fall, combined with wind and extreme cold, can turn into an emergency. Consequently, a county may use its emergency fund to pay for snow removal if the county determines an emergency exists and the other conditions of N.D.C.C. § 57-15-28 are satisfied. A county may not use its emergency fund to pay for snow removal when the removal constitutes maintenance, unless authorized under an ordinance adopted pursuant to appropriate authority in a home rule charter.

You next ask whether there is other statutory authority allowing the county to gift or grant other monies to cities and townships for snow removal. You specifically refer to the use of a joint powers agreement or the diversion of money from a county’s emergency fund to another fund.¹⁴

Section 54-40.3-01, N.D.C.C., permits political subdivisions like counties, cities, and townships to enter into joint powers agreements for the joint administration of any power or function that is authorized by law or assigned to any one of them. While a joint powers agreement may specify 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, this office has issued an opinion disapproving the use of a joint powers agreement to provide financing by a county to a township where the debt has already been incurred by

¹⁰ N.D.A.G. 2001-L-43. See also N.D.A.G. Letter to Hagerty (July 18, 1983).

¹¹ N.D.C.C. § 57-15-28. County emergency funds may be used for road repairs necessitated by nature and occurring no more than 60 days prior to the decision to use such funds.

¹² See N.D.C.C. § 1-02-02.

¹³ The American Heritage Dictionary 818 (3d coll. ed. 1993).

¹⁴ You also asked whether there was any other way the county could outright gift money to cities and townships. While the anti-gift provision in the state constitution, N.D. Const. art. X, § 18, has been held not to prohibit a gift or loan of public funds to another public body, it must be done pursuant to a specific statute. I too have not found a statute that would apply here. See N.D.A.G. 99-F-14.

the township.¹⁵ You indicate in your letter that the townships and cities within the county have already incurred the snow removal debt. Thus, I likewise agree with you that a joint powers agreement between the county and the other political subdivisions, which does not predate the expenditure of funds, could not be used to legitimize payment for the snow removal costs already incurred by those townships and cities.

You also noted the power of counties to transfer funds from one county fund to another under N.D.C.C. § 11-23-07 if an appropriation is not sufficient to meet the expenditures required by law.¹⁶ That provision has been construed in prior opinions of this office to include transfers from the emergency fund to other funds.¹⁷

This limited exception in state law authorizing counties to indirectly spend county emergency funds for non-emergency purposes, including the emergency fund created under N.D.C.C. § 57-15-28, only applies when the “appropriation for any purpose is not sufficient to meet the expenditures required by law.”¹⁸ This exception does not apply to county programs and activities under law that are merely authorized but are not required.¹⁹

For example, N.D.C.C. § 24-05-01 requires counties with a population of 2,000 or more to levy and collect a property tax for highway improvement. Twenty percent of the proceeds of the tax collected under that statute on account of property situated within any city must be turned over to the city for improvement of its streets and highways. None of these county road tax monies are allocated to townships.²⁰

This office has previously determined that emergency funds levied under N.D.C.C. § 57-15-28 may be transferred by a county out of the emergency fund and used for certain bridge repair and replacements as long as the 20 percent share mandated by N.D.C.C. § 24-05-01 was paid to the cities.²¹ However, any county road tax money provided to a city must be “expended under the direction of the governing body of the city in the

¹⁵ See N.D.A.G. 2000-L-46.

¹⁶ Section 11-23-07, N.D.C.C., provides in part that “[i]f the appropriation for any purpose is not sufficient to meet the expenditures required by law, the county auditor, on the order of the board of county commissioners, may make a transfer to the required fund from any other fund, except from sinking and interest funds set aside to pay the principal or interest on outstanding bond issues, or from funds set aside to retire any other outstanding indebtedness, or from funds received from the state for road, bridge, and highway purposes.” (Emphasis added.)

¹⁷ See, e.g., N.D.A.G. 97-L-175; N.D.A.G. Letter to Syverson (Mar. 18, 1988).

¹⁸ N.D.C.C. § 11-23-07; N.D.A.G. 97-L-175.

¹⁹ N.D.A.G. 97-L-175; N.D.A.G. Letter to Syverson (Mar. 18, 1988).

²⁰ See N.D.C.C. § 24-05-01.

²¹ See N.D.A.G. 69-377.

improvement of its streets and highways.”²² Further, “[p]roceeds of the tax not turned over to cities pursuant to this section must be kept in the county road fund and must be expended in the improvement of highways as provided in this chapter²³ under the direction of the board of county commissioners.”²⁴ None of these provisions for money transferred into the county road fund or allocated to cities for road improvements would appear to apply to the payment of previously incurred expenses for snow plowing since plowing snow, as you described in your letter, is more in the nature of road maintenance, not road improvements, as that term is used in N.D.C.C. ch. 24-05.²⁵ Therefore, transferring funds from the county emergency fund to the county road fund²⁶ would not authorize compensation to cities for amounts expended for snow removal.²⁷ However, a county with a home rule charter containing the authority to control its finances and to levy and collect property or other taxes, and which properly implements that power through ordinance, would have considerable ability to transfer funds.²⁸

Finally, you ask whether the county may utilize emergency funds in N.D.C.C. § 57-15-28 to purchase sandbags in preparation for possible flooding and provide the sandbags free of charge to other political subdivisions should the need arise. State law provides that counties, cities, and other political subdivisions may enter into arrangements or agreements for furnishing mutual aid in emergency management.²⁹ If the county and its

²² N.D.C.C. § 24-05-01 (emphasis added).

²³ Improvements authorized under N.D.C.C. ch. 24-05 include grading, ditching, and surfacing of roads. See N.D.C.C. § 24-05-02.

²⁴ N.D.C.C. § 24-05-01 (emphasis added).

²⁵ See n. 17.

²⁶ Nor am I aware of any other county fund to which emergency funds could be transferred that would permit such emergency funds to be used to compensate cities or townships for the costs of snow removal.

²⁷ As noted above, N.D.C.C. § 24-05-01 does not provide for allocating any monies in the county road fund to townships. County emergency funds, therefore, could not be transferred to the county road fund to pay for any type of road improvements by townships.

²⁸ See generally N.D.A.G. 2008-L-04; N.D.A.G. 2004-L-21; N.D.A.G. 95-L-48; N.D.A.G. Letter to Omdahl (Aug. 16, 1989).

²⁹ See N.D.C.C. § 37-17.1-14(1) (“Counties and cities must be encouraged and assisted by the division of homeland security to conclude suitable arrangements for furnishing mutual aid in emergency management. The arrangements must include provision of aid by persons and units in public employ.”); N.D.C.C. § 37-17.1-14.1(1) (“The division of homeland security shall encourage and assist political subdivisions to enter mutual aid agreements with other public and private agencies within the state for reciprocal aid and assistance in responding to and recovering from actual and potential disasters or emergencies.”). Disasters are defined to include floods and wave action. N.D.C.C. § 37-17.1-04(1).

cities and townships enter into such mutual aid type arrangements or agreements and if the county determines, pursuant to N.D.C.C. § 57-15-28, that an emergency exists and that destruction or impairment of any county property necessary for the conduct of the affairs of the county may occur or that an emergency caused by nature exists, then the county may determine to use its emergency fund for such emergency management purposes in the purchase of sandbags in preparation for possible flooding and provide these sandbags to other political subdivisions with which it has mutual aid agreements.³⁰

For the foregoing reasons, it is my opinion that a home rule county may use its emergency fund to pay for snow removal, even when it is in the form of maintenance and for township and city roads, if it has the power to control its financial and fiscal affairs in its home rule charter and if it adopts an appropriate ordinance under the home rule charter. A non-home rule county may use its emergency fund to pay for snow removal if the county determines an emergency exists and the other statutory conditions are followed but may not use its emergency fund if the snow removal constitutes maintenance. It is my further opinion that a county may use its emergency fund to provide sandbags to townships and cities to prevent flooding as part of the administration of emergency management mutual aid agreements.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/vkk

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.³¹

³⁰ See N.D.A.G. 62-45 (county which has statutorily authorized mutual aid arrangements for reciprocal civil defense aid and assistance with other agencies, public and private, may utilize the county emergency fund for such civil defense purposes).

³¹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).