

LETTER OPINION
96-L-93

May 9, 1996

Mr. Thomas L. Trenbeath
Attorney at Law
PO Box 633
Cavalier, ND 58220-0633

Dear Mr. Trenbeath:

Thank you for your letter asking about the water resource district's use of general tax revenues to fund certain activities and expenses of the Pembina County Water Resource District. Your letter states that funds are used for regular maintenance of water retention structures in the Tongue River Watershed, and occasionally for cleaning and clearing natural watercourses such as rivers and coulees that have not been created as a formal drainage project. Recently, the water resource district's use of its general funds for these kinds of purposes has been questioned. You ask whether it is lawful for the water resource district to use general tax revenues for a specific project such as cleaning natural water courses which are not part of an assessment drain.

N.D.C.C. § 61-16.1-06 provides in part:

The acquisition of rights of way, easements, and the construction, operation, and maintenance of a project in a district may, in the discretion of the water resource board, be financed in whole or in part by special assessments against property benefited by such project, or from revenues realized from general tax collections, or from net revenues to be derived from service charges to be imposed and collected for the services of the project, or any combination of such sources.

(Emphasis added.)

Project is defined as:

Any undertaking for water conservation, flood control, water supply, water delivery, erosion control and watershed improvement, drainage of surface waters, collection, processing, and treatment of sewage, or discharge of sewage effluent, or any combination thereof, including incidental features of any such undertaking.

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N.D.C.C. § 61-16.1-02(7).

A 1987 opinion from this office, regarding N.D.C.C. § 61-16.1-06 and use of general fund revenues by water resource districts, provides:

The limits placed upon the [water resource] Board's use of its funds are broad, allowing the Board considerable discretion. However, all expenditures of the general levy must be set forth in the Board's budget. N.D.C.C. § 61-16.1-06. These expenditures may include everything relating to the Board's functions ranging from land acquisition to per diem payments to Board members. The only apparent limit upon the Board's allocation of the funds raised is that the money be spent on items related to the Board's powers. Those are set forth in several statutes including N.D.C.C. §§ 61-16.1-09, 61-16.1-15, and 61-02-24.1.

Letter from Attorney General Nicholas J. Spaeth to Alfred Thompson (June 30, 1987).

N.D.C.C. § 61-16.1-09(5) authorizes a water resource district to "plan, locate, relocate, construct, reconstruct, modify, maintain, repair, and control all dams and water conservation and management devices of every nature . . . and other water storage devices within the district." Water retention structures are structures the board has authority to maintain under this provision and also would fall within the definition of "project" in N.D.C.C. § 61-16.1-02(7) Thus, the board has the authority to use its general tax revenues for their maintenance.

You also stated that funds are used to clean and clear natural watercourses that are not a part of a formal drainage project. By that I assume you mean they are not projects established through creation of a special assessment district.

N.D.C.C. § 61-21-42 places all drains constructed in the state, except township drains, under the charge of the water resource board and requires the board to keep the drains open and in good repair. N.D.C.C. § 61-21-01(4) defines "drain" as any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains constructed for the purpose of drainage. In a 1990 opinion the Attorney General stated that drain as defined in N.D.C.C. § 61-21-01(4) includes privately constructed drains as well as assessment drains. Letter from Attorney General

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Nicholas J. Spaeth to Douglas G. Manbeck (November 13, 1990). Thus, if a natural watercourse has been opened, or is proposed to be opened, and improved for the purpose of drainage, the water resource district not only has the authority, but also has a duty, to keep it open and in repair, even if the watercourse is not a part of an assessment district. Additionally, "project" as defined in N.D.C.C. § 61-16.1-02(7) includes an undertaking for the drainage of surface waters and section 61-16.1-06 specifically authorizes a water resource board to use general fund revenues to finance the operation or maintenance of such a project. Consequently, the board has the authority to use its general tax revenues for cleaning and clearing natural watercourses opened or proposed to be opened and improved for drainage.

The use of general fund revenues for other water resource district projects should be reviewed within the context of the board's powers. However, despite the broad grant of authority over district funds, a water resource board must comply with the prohibition of Article X, Section 18 of the North Dakota Constitution; that is, donations may not be made to or in aid of any private individual, association or corporation except for reasonable support of the poor. See 1986 N.D. Op. Att'y Gen. 8.

Also, public funds can only be used for public purposes. See Green v. Frasier, 253 U.S. 233 (1920). The legality of a given expenditure turns on whether it is primarily for a private or public purpose. See 1993 N.D. Op. Att'y Gen. L-313. A public purpose or public business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all of the inhabitants or residents within a given political subdivision. Gripentrog v. City of Wahpeton, 126 N.W.2d 230 at 237, (N.D. 1964) quoting Green v. Frasier, 176 N.W. 11, 17 (N.D. 1920) aff'd 253 U.S. 233. Although each case is dependent upon its own unique facts and circumstances, courts will generally defer to a legislative determination that a particular expenditure will promote the public welfare. Green v. Frasier, 253 U.S. 233. N.D.C.C. § 61-16.1-01 specifically states that water management, conservation, protection, development, and control "are affected with and concern a public purpose."

The following discussion in 1987 N.D. Op. Att'y Gen. 4 may provide you with guidance on the proper use of public funds:

In determining whether an appropriation of public funds is an unconstitutional donation, the primary question is

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whether the funds are to be used for a public or private purpose. It is not determinative that the appropriation is made to private persons or that private persons receive a special benefit. Marks v. City of Mandan, 296 N.W. 39, 44 (N.D. 1941); Stanley v. Jeffries, 284 P. 134, 138 (Mont. 1929). If a public purpose justifies or serves as a basis for an expenditure, it will be constitutional. Stutsman v. Arthur, 16 N.W.2d 449, 454 (N.D. 1944). A public purpose is one that promotes the general welfare. Green v. Frasier, 176 N.W. 11, 17 (N.D. 1920).

A universal test does not exist for deciding whether a public purpose is served by a expenditure and, if so, whether such purpose is paramount or merely incidental. 'Each case must be decided with reference to the object sought to be accomplished and the degree and manner in which that object affects the public welfare.' Allydonn Realty Corp. v. Holyoke Housing Authority, 23 N.E.2d 665, 667 (Mass. 1939).

I am enclosing a copy of the Attorney General's opinions cited in this opinion for your information.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jak/dmm
Enclosures