

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 97-F-08

Date Issued: September 26, 1997

Requested by: John E. Greenwood, Stutsman County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a loan by a county to a nonprofit organization under N.D.C.C. § 11-11-58 would violate Article X, Section 18 of the North Dakota Constitution.

II.

Whether a county's power to establish and maintain programs and activities for senior citizens through a contract with a nonprofit organization under N.D.C.C. § 11-11-58 includes the power to lend money to the nonprofit organization to provide those services.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that lending money to a nonprofit organization under N.D.C.C. § 11-11-58 would not violate Article X, Section 18 of the North Dakota Constitution.

II.

It is my opinion that under proper circumstances, N.D.C.C. § 11-11-58 authorizes a county to lend money to a nonprofit organization that has contracted with the county to provide services to senior citizens under that section.

- ANALYSES -

I.

Article X, Section 18 of the North Dakota Constitution provides:

The state, any county or city may . . . engage in any . . . enterprise or business, . . . but neither the state

September 26, 1997

Page 2

nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association, or corporation except for reasonable support of the poor

(Emphasis added). "In other words, making loans or giving credit may be done in connection with [a political subdivision's] engaging in any permissible industry, enterprise, or business, but not otherwise." Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964).

An "enterprise" permitted under this section also must serve a public purpose. Green v. Frazier, 176 N.W. 11 (N.D. 1920), aff'd 253 U.S. 233; 1995 N.D. Op. Att'y Gen. L-196 (August 10 letter to Fabian Noack). "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 the inhabitants or residents within a given political subdivision" Id.

N.D.C.C. § 11-11-58 authorizes a county "to establish or maintain programs and activities for senior citizens . . . which will . . . assist such persons in providing volunteer community or civic services." Counties are further authorized to levy a tax for this purpose, N.D.C.C. § 57-15-56, although the fact a county is authorized to levy a tax for this specific purpose does not prohibit the county from spending county general funds to "establish and maintain" senior citizen programs and activities. See Letter from Attorney General Nicholas Spaeth to Kenneth Thompson (April 15, 1992).¹

By adopting these statutes, the Legislature has acknowledged that providing services to senior citizens is a permitted enterprise in which counties may engage. Promoting community or civic service by senior citizens in a county benefits all county residents. A county exercising its authority under N.D.C.C. § 11-11-58 would therefore be engaged in an "enterprise" serving a "public purpose." See 1993 N.D. Op. Att'y Gen. 40 ("enterprise" means any activity of some scope, complication, or risk). As a result, it is my opinion that in this circumstance lending money to a nonprofit organization under N.D.C.C. § 11-11-58 would not violate Article X, Section 18 of the North Dakota Constitution.

¹ However, the matching funds available from the Department of Human Services under N.D.C.C. § 57-15-56(5) are limited to the amounts levied under that section.

II.

This office has previously addressed a non-home rule county's authority to lend money or transfer property at less than fair market value to a private corporation.

Article X, Section [18] of the North Dakota Constitution does not prohibit a political subdivision from making loans as part of an industry, enterprise, or business. Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964). However, political subdivisions possess and may exercise only those powers provided by law. N.D. Const. art. VII, § 2. Therefore, a political subdivision must also have "specific statutory authority to make loans or donations or the statute must contain language from which the authority can be necessarily implied." [1993 N.D. Op. Att'y Gen. L-129 (April 12 letter to Walter Lipp)].

1995 N.D. Op. Att'y Gen. L-233 (October 11 letter to F.C. Rohrich). This opinion concluded there was no statutory authority for a county to lend money to a private corporation for economic development unless the county was a home rule county, the county created a job development authority, the county contracted with an industrial development corporation, or the county entered into a joint powers agreement with another political subdivision having this authority.²

In another 1995 opinion, I concluded that a county's statutory authority to contract with a private organization for county ambulance services included the authority to transfer county property to the corporation at less than fair market value. 1995 N.D. Op. Att'y Gen. L-186 (August 10 letter to Fabian Noack). The question presented here is very similar.

Under N.D.C.C. § 11-11-58, a county is authorized to contract with a nonprofit corporation to provide services to senior citizens in the county. Like the statute at issue in the 1995 opinion regarding ambulance services, by authorizing a county to enter into a contract

² It does not appear that the nonprofit corporation could be defined as a "political subdivision" authorized to enter into joint powers agreements under N.D.C.C. ch. 54-40.3. See 1995 N.D. Op. Att'y Gen. L-281 (November 30 letter to Robert W. Peterson); Letter from Attorney General Nicholas Spaeth to James Odegard (July 12, 1990) ("Mere economic support by the county is not sufficient by itself to transform what is essentially a private non-profit corporation into a political subdivision.").

September 26, 1997

Page 4

for services, N.D.C.C. § 11-11-58 authorizes an exchange of county assets (such as a loan, transfer of property, or payment of funds) in exchange for services to county senior citizens provided by the nonprofit corporation. The express authority of a county under this section to contract necessarily includes a wide range of implied powers to determine an appropriate contract amount and to renegotiate the contract when appropriate. Therefore, it is my opinion that under proper circumstances, N.D.C.C. § 11-11-58 authorizes a county to lend money to a nonprofit organization that has contracted with the county to provide services to senior citizens under that section. Whether this authority may be exercised will depend on whether the county's decision to lend money to the corporation is a reasonable use of public funds, which is a question of fact on which I cannot issue an opinion.

- EFFECT -

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 questions presented are decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: James C. Fleming
Assistant Attorney General

vkk