

**N.D.A.G. Letter to Gibbens (Sep. 19, 1988)**

September 19, 1988

Ms. Lisa Beckstrom Gibbens  
Towner County State's Attorney  
P.O. Box 601  
Cando, ND 58324

Dear Ms. Gibbens:

Thank you for your letter dated September 8, 1988, in which you inquire of the obligation of a state's attorney to pursue citizen complaints concerning the transfer of sinking funds by a municipality.

N.D.C.C. § 11-16-01 requires the state's attorney to provide legal advice, when required and without a fee, to county, district, township, and school district officers on matters relating to the duties of their respective offices. N.D.C.C. § 11-16-01(9). In addition, the state's attorney acts as the legal advisor of the board of county commissioners, N.D.C.C. § 11-16-01(12) and defends all suits brought against the state's attorney's county, N.D.C.C. § 11-16-01(5).

Unless specifically appointed by a municipality to fill the position of city attorney, a state's attorney is not the legal advisor of a municipality. That function is performed by the duly appointed city attorney.

Although N.D.C.C. § 11-16-01(13) and (14) authorize the state's attorney to institute actions in the name of the county to recover or restrain the payment of any money paid upon the order of the board of county commissioners without authority of law, this responsibility does not extend to alleged similar actions by a city commission.

A state's attorney may, however, have a duty to institute criminal proceedings against persons reasonably suspected of committing public offenses, including members of a city commission. If a state's attorney concludes that a criminal offense has been committed and that it can be proven to the satisfaction of a court or jury beyond a reasonable doubt, the state's attorney may institute a criminal charge; of course, the state's attorney may also consider the presence of certain other circumstances which permits him or her as a prosecutor, to exercise discretion and refuse to authorize the institution of a criminal proceeding.

In the materials I received from you, I noted that N.D.C.C. § 21-03-44 was cited as justification for the institution of proceedings against the city. That section does not, however, contain a criminal penalty section. In addition, both N.D.C.C. § 21-03-48, concerning the penalty for diversion of sinking and interest funds; and N.D.C.C. § 21-03-49, pertaining to the penalty for diversion of borrowed money fund, were repealed

by the North Dakota Legislature in 1975. 1975 N.D. Sess. Laws ch. 106, 673. Absent applicable statutory provisions in other areas of the Century Code, it is possible that the 1975 legislative action resulted in the removal of criminal penalties for any violation of N.D.C.C. § 21-03-44.

Absent an applicable criminal penalty, the only recourse available for the alleged unlawful transfer of sinking funds would be a civil action directed against the appropriate city officials or the city commission itself. I see no authority within N.D.C.C. § 11-16-01 which would permit you, as state's attorney, to initiate such proceedings in that capacity.

I hope that I have adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

ja