

## **N.D.A.G. Letter to Lange (Dec. 3, 1991)**

December 3, 1991

Mr. Gregory L. Lange  
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Dear Mr. Lange:

Thank you for your October 15, 1991, letter in which you inquire whether a county participating in a regional airport authority pursuant to North Dakota Century Code ch. 2-06 must levy the tax certified to the county by the airport authority pursuant to N.D.C.C. § 2-06-14.

For the following reasons, it is my opinion that a county which is participating in a regional airport authority under N.D.C.C. ch. 2-06 must levy the tax certified to the county by the airport authority under N.D.C.C. § 2-06-14.

N.D.C.C. ch. 2-06 provides for the creation of a regional airport authority. Two or more municipalities may, by joint resolution, create a public body known as a regional airport authority ("authority"). N.D.C.C. § 2-06-03. The members of the authority are appointed by the boards of the participating municipalities. N.D.C.C. § 2-06-03(1). N.D.C.C. § 2-06-16 provides the conditions for joint operation of the authority by several municipalities. It provides, in part,:

4. a. The total expenditures to be made by the joint board for any purpose in any calendar year must be as determined by a budget approved by the constituent public agencies on or before the preceding December 1, or as otherwise specifically authorized by the constituent public agencies.

N.D.C.C. § 2-06-16(4)(a).

This section requires the various participating agencies to approve the budget of the authority. Inherent in the authority to approve a budget is the authority to disapprove various line items in the budget including the total amount of the budget.

N.D.C.C. § 2-06-14 provides, in part:

The airport authority may certify annually to the governing bodies, the amount of tax to be levied by each municipality, participating in the creation of the airport authority, and the municipality shall levy the amount certified,

pursuant to provisions of law authorizing cities and other political subdivisions of this state to levy taxes for airport purposes. The levy may not exceed the maximum levy permitted by the laws of this state for airport purposes.

(Emphasis supplied.)

N.D.C.C. §§ 2-06-15 and 57-15-06.7(1) provide that a county may levy a tax not exceeding four mills for the operation of an airport authority.

Mercer County contends that it is not required to levy the amount of tax certified by the Mercer County Regional Airport Authority. The airport authority argues that the use of the word "shall" in N.D.C.C. § 2-06-14 requires that the county levy the amount certified.

The power to tax is a legislative power. Scott v. Donnelly, 133 N.W. 2d 418 (N.D. 1976). The legislative power to tax may only be delegated to a board whose members are elected by the people. Fargo v. Gearey, 156 N.W. 552 (N.D. 1916); Vallelly v. Board of Park Com'rs, 111 N.W. 615 (N.D. 1907). The Court, in Vallelly, indicated:

It has become a well-recognized principle of constitutional law that local boards and councils elected by the people are bodies to which the power to tax may be delegated. This is so upon the principle that the legislative power to levy taxes rests with the people; and, so long as the people have a voice in the selection of bodies to which the power to tax is delegated, the constitutional restriction is not violated. The power of the Legislature to delegate the authority to levy taxes is generally held to be limited to boards or councils elected by the people, and is not sanctioned when delegated to those appointed, when the appointment has not been assented to by a vote of the people.

Vallelly v. Board of Park Com'rs, 111 N.W. 615, 618 (N.D. 1907).

The issue becomes whether the mandatory nature of N.D.C.C. § 2-06-14 is an unlawful delegation of the legislative power to tax. That is, whether requiring an elected board to levy the amount of tax certified by an appointed board is an unconstitutional delegation of legislative authority. As stated previously, the elected boards of the municipalities must approve the budget of the appointed airport authority. N.D.C.C. § 2-06-16. This budget approval process takes place prior to the levy. N.D.C.C. § 2-06-16(4)(a). The amount of tax certified to the county by the board is based on the budget approved and the county's proportional responsibility for the operation of the authority. N.D.C.C. § 2-06-16. By approving a budget, the county determines the amount of tax that will be certified and levied by the county through the budget approval process. Requiring the county to levy the amount of tax certified by the authority is not an unconstitutional delegation of legislative authority.

Therefore, it is my opinion that it is the county which controls the amount of the levy

through the budget process. It is my further opinion that once the budget is approved, the county must levy a tax certified by the airport authority to the county pursuant to N.D.C.C. § 2-06-14 which is sufficient to support the budget approved.

I trust this responds to your inquiry. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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