

Office of the Attorney General
State of North Dakota

Opinion No. 85-16

Date Issued: May 1, 1985

Requested by: Mikal Simonson
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--QUESTIONS PRESENTED--

I.

Whether a board of county commissioners must approve the expenditure of funds by a water resource district for participation in a joint or cooperative water resource district.

II.

Whether taxes which have been levied by a water resource district without prior approval from the board of county commissioners should be disposed of through refund or abatement procedures.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that a board of county commissioners must approve the expenditure of funds by a water resource district for participation in a joint or cooperative water resource district.

II.

It is my further opinion that taxes which have been levied by a water resource district without prior approval from the board of county commissioners should be disposed of through refund or abatement procedures.

--ANALYSES--

I.

North Dakota law provides that two or more water resource districts may agree to jointly or cooperatively exercise their powers as authorized by law. N.D.C.C. § 61-16.1-11(2) provides that:

The districts which are parties to such an [joint powers] agreement may provide for disbursements from their individual budgets

to carry out the purpose of the agreement. In addition, a joint board . . . may adopt, by resolution, on or before July first of each year, a budget showing estimated expenses for the ensuing fiscal year and the proposed contributions of each member district as determined by the agreement. The boards of the member districts then shall levy by resolution, an ad valorem tax not to exceed two mills upon the real property within each district. The levy may be in excess of any other levy authorized for a district. N.D.C.C. § 61-16.1-11(2)

This subsection provides for two procedures by which a water resource district can finance its participation in a joint board; the first being through its individual budget with the four mill cap and the second through an additional levy not to exceed two mills. This additional levy is levied by the 'boards of the member districts.' There is some ambiguity as to whether 'boards,' as used in this phrase, means water resource boards or boards of county commissioners.

N.D.C.C. § 1-02-39 states that if a statute is ambiguous, consideration may be given to the consequences of a particular construction. Furthermore, statutes are presumed to comply with the North Dakota Constitution. N.D.C.C. § 1-02-38. Where possible, statutory construction or interpretation which places a statute in disharmony with the Constitution is avoided. Grace Lutheran Church v. North Dakota Employment Sec. Bureau, 294 N.W.2d 767 (N.D. 1980). Finally, where a statute is susceptible of two constructions, one which will be compatible with constitutional provisions or one which will render the statute unconstitutional, the courts will adopt that construction which will make the statute valid. Paluck v. Board of County Com'rs, Stark County, 307 N.W.2d 852 (N.D. 1981).

The North Dakota Constitution vests the taxing power in the Legislature. The Legislature cannot enact a law which authorizes a body not elected by the people to levy taxes. Vallelly v. Board of Park Com'rs., 111 N.W. 615 (N.D. 1907).

The water resource board members are not elected by the people; they are appointed by the county commissioners. Thus, the Legislature could not constitutionally delegate authority to tax to the water resource board. The county commissioners, on the other hand, are elected by the people. Therefore, the Legislature may delegate the authority to tax to the board of county commissioners.

If the word 'boards' in the phrase 'boards of member districts' is construed to mean water resource boards, N.D.C.C. § 61-16-11(2) would be unconstitutional and ineffective; a result presumably not intended by the Legislature. Construction of the word 'boards' to mean the boards of county commissioners, however, will give effect to the Legislature's enactment.

Thus, it is the board of county commissioners which levies the ad valorem tax of up to two mills to finance joint water resource board activities under N.D.C.C. § 61-16.1-11(2).

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

The water resource board shall estimate the expenses of the district before July first of each year. . . . Upon completion and adoption of a budget covering necessary expenses, the board shall send a copy of the budget to the county auditor. . . . Each county auditor shall transmit the same to the board of county commissioners . . . if approved as amended or as submitted, the board shall, by resolution, levy and authorize and direct the county auditor to extend and spread upon the tax roll of the county . . . not exceeding the limitation in section 57-15-26.6. . . .

All funds expended by a water resource board must be approved by its board of county commissioners, including funds expended for participation in joint water resource boards. If budget items relating to joint boards are not approved pursuant to N.D.C.C. § 61-16.1-06, the water resource board has no authority under N.D.C.C. § 61-16.1-11(2) to circumvent the budgetary process.

II.

In Great Northern Railway Co. v. Flaten, 225 N.W.2d 75 (N.D. 1974), a taxpayer challenged a park district's levy of real estate taxes in excess of ordinary limits. In holding that the excess levy was effective for only one year, the court noted that it was not authorizing 'wholesale tax refunds.' 225 N.W.2d at 80. The court held that 'refunds for the years in question are limited to those who have made appropriate and timely application for tax abatement,' pursuant to N.D.C.C. § 57-23-03. Id.

Accordingly, it is my opinion that the county make the taxes subject to refund or abatement pursuant to N.D.C.C. § 57-23-03 and 57-23-04. If all of the taxes are not disposed of through refund or abatement, the county should apply the remaining taxes against the next county levy pursuant to N.D.C.C. § 57-15-31.

--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 question presented is decided by the courts.

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