

N.D.A.G. Letter to Burke (May 20, 1991)

May 20, 1991

Ms. Patricia L. Burke
Burleigh County State's Attorney
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, ND 58501

Dear Ms. Burke:

Thank you for your April 23, 1991, letter requesting my opinion on the legality of a request by the North Dakota Association of Counties ("NDACo") which was apparently sent to the chairmen of all North Dakota County Commissions. The request concerns the inauguration of Richland County Commissioner Kaye Braaten as president of the National Association of Counties, which will take place at the national convention of that association in July of this year. The language in the memorandum which is the subject of your request is the following:

We also are requesting gifts to support the presidency. A suggested donation of \$250 to \$500 would help take care of a number of obligations. If your county can give more, it would help compensate for those counties which do not have the resources available. Gifts are needed as soon as possible and may be sent to the NDACo office.

You question whether honoring this request would violate N.D. Const. art. X, § 18. That provision provides in part:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, . . . but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in the aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

The North Dakota Supreme Court has interpreted N.D. Const. art. X, § 18, stating:

[N.D. Const. art. X, S 18] does not prohibit the making of loans or giving of credit or making donations in connection with a city's engaging in any industry, enterprises, or business except engaging in liquor traffic. What it does prohibit is for a city "otherwise to make loans or give its credit or make donations. In other words, making loans or giving credit may be done in connection with the city's engaging in any permissible industry, enterprises, or business, but not otherwise.

Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-238 (N.D. 1964). Although Gripentrog involved a city, the Supreme Court's reasoning is equally applicable to counties.

Following its discussion in Gripentrog, the court focused on the public purpose aspect of a statute which appropriated moneys to the Industrial Commission to make loans to privately or cooperatively owned enterprises for facilities to convert North Dakota natural resources into low cost power and to generate and transmit the low cost power. Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965). The court reasoned that because it would be for a public purpose, the state could engage directly in the business of transmitting power generated by lignite generation plants as a means of making electric power available to the consuming public. Therefore a loan to further the same purpose would also be permissible and not in violation of N.D. Const. art. X, § 18.

In a February 11, 1991, letter to Representative Clarence Martin, I stated that it is my opinion that the state, a county, or a city may loan or give its credit or make donations only through an industry, business or enterprise in which it is engaged. I also stated that the industry, business, or enterprise must be engaged in a public purpose.

In a letter dated February 19, 1991, to Senator Ken Solberg, I stated that it is my opinion that the contribution of money by counties to NDACo, as provided by N.D.C.C. S 11-11-14(15), does not violate the provisions of N.D. Const. art. X, § 18.

Based upon the foregoing, it is my opinion that it would be a violation of N.D. Const. art. X, § 8 for a county to make a direct gift to an individual as requested in the NDACo memorandum. However, it would not be a violation of that section for a county to make an otherwise lawful contribution to NDACo. Whether a particular contribution meets the provisions of N.D.C.C. § 11-11-14(15) however, is a question of fact.

I note that NDACo is a private corporation which has been established under N.D.C.C. S 11-10-24. That section authorizes counties to organize and participate in an association of counties. Subsection 2 of N.D.C.C. § 11-10-24 requires any such association to be organized pursuant to N.D.C.C. chs. 10-24 through 10-28, the North Dakota Nonprofit Corporation Act. If authorized by the Nonprofit Corporation Act, and its charter and bylaws, NDACo may make a gift of money to Commissioner Braaten.

I hope that this discussion is helpful to you.

Sincerely,

Nicholas J. Spaeth

cc: Mark Johnson, Association of counties