

N.D.A.G. Letter to Thompson (April 15, 1992)

April 15, 1992

Honorable Kenneth N. Thompson
District 39
PO Box 595
Beach, ND 58621

Dear Representative Thompson:

Thank you for your February 5, 1992, letter in which you ask several questions concerning a job development authority established pursuant to N.D.C.C. ch. 11-11.1.

You state that your questions have arisen in connection with your appointment as a member of the job development authority (the "Authority") which has recently been created by the Billings County board of county commissioners (the "Board"). You also state that the Board has indicated its willingness to contribute certain general fund moneys to the Authority to provide financial assistance to an entity or project consistent with the objective of a job development authority, i.e., to encourage and assist in the development of employment within the county.

Your questions, which I have restated for the purpose of this letter, are as follows:

1. Whether the Board may transfer legally available general fund moneys to the Authority to be used by the Authority to provide financial assistance to qualifying entities or projects, or whether the Board may only transfer moneys collected through the levy of a job development authority tax to the authority to provide financial assistance to such entities or projects.
2. Whether the Board may use general fund moneys to pay the operating expenses of the Authority.
3. Whether the Board must levy a job development tax certified by the Authority pursuant to N.D.C.C. § 11-11.1-03(6), or whether the amount of the job development tax levy is a matter solely for the Board's determination.
4. Whether the Board must levy a tax to support the Authority.
5. Whether a job development tax must continue to be levied to meet committed obligations in the event of the dissolution of the Authority, or whether the dissolution of the Authority would automatically result in a discontinuance of the tax levy.

In response to your first question, it is my opinion that the Board may make budgeted general fund moneys available to the Authority to be used for purposes consistent with N.D.C.C. ch. 11-11.1.

The North Dakota Supreme Court addressed a similar question concerning school districts in Peterson v. McKenzie County Public School Dist. No. 1, 467 N.W.2d 456 (N.D. 1991). In Peterson, the school district had transferred moneys from its general fund to its building fund and the petitioners sought to have those moneys replaced in the general fund. The court began its analysis by stating that although the rule of strict construction applies in defining the powers of a municipality (as defined in N.D.C.C. § 57-02-01(9)), once these "powers have been determined, the rule of strict construction no longer applies, and there is a range of reasonableness within which a municipality's manner and means of exercising those powers will not be interfered with or upset" Id. at 458. The court, through an extensive analysis of various statutes concerning the levy of general and special fund taxes by a school district, then concluded that (a) a listing of general purposes for which general fund moneys may be expended does not necessarily preclude using those funds for other legitimate purposes, (b) N.D.C.C. §§ 57-15-16 and 57-15-17, which authorize the levy of a school building fund tax and provide for the disposition of revenues collected from a building fund tax levy or realized from other sources, do not preclude the transfer of money from a school district's general fund to its building fund, and (c) a school board has implied authority to transfer money from the district's general fund to its building fund.

A review of several relevant statutes which confer powers upon boards of county commissioners is necessary to determine whether the conclusions reached by the court in Peterson concerning school boards are equally applicable to boards of county commissioners.

N.D.C.C. § 57-15-06 provides, with certain exceptions, that the taxes levied for general or special county purposes each year, including taxes levied for road and bridge purposes, may not exceed the amount produced by a levy of twenty-three mills on the dollar of the taxable valuation of the county. N.D.C.C. § 57-15-06(3) authorizes the fiscal year-end transfer of any unexpended balance in the county road fund to a special road fund, subject to certain limitations. Reviewing similar statutes concerning the authority of school boards, the court in Peterson stated that N.D.C.C. § 57-15-14 sets mill levy limitations but that it does not address the budgeting or transferring of general fund moneys. The court also stated that it was not persuaded that the authority set out in N.D.C.C. § 57-19-03 to transferred unencumbered surplus funds to a special reserve fund implies that transfers of general fund moneys into any other fund are precluded. In other words, the court concluded that the authority of a school board to transfer special fund money to the general fund is not relevant to the question of whether general fund moneys may be transferred by the school board to a special fund.

N.D.C.C. § 57-15-14.2 provides a list of purposes for which a school board may levy general taxes. There is no corresponding section concerning the levy of general taxes by a board of county commissioners. In levying taxes, school boards and boards of county commissioners are both limited by statute to the amount necessary to be raised for the

purpose of meeting the appropriations included in their budgets (N.D.C.C. § 57-15-05) and to provide an interim fund (school boards) and a reserve fund (boards of county commissioners), together with an amount sufficient to pay the bonded debt of the school district or the county. In Peterson, the court stated that the purposes to which general fund moneys may be put are not limited to the purposes listed in N.D.C.C. § 57-15-14.2(1). The court stated that it was not persuaded that such things as the maintenance, construction, or erection of buildings could not be included as general expenses. Therefore, because the relevant statutory language is similar, it is my opinion that in the absence of a statute prohibiting or otherwise limiting the use of general fund moneys for a particular county purpose, the question of whether the Board may use general fund moneys for that purpose would be a policy matter to be addressed by the Board. (The Board may only make appropriated expenditures (N.D.C.C. § 11-23-06), but transfers can be made between funds when necessary (N.D.C.C. § 11-23-07)).

N.D.C.C. § 57-15-06.7(29) provides that a county levying a tax for a job development authority pursuant to N.D.C.C. § 11-11.1-04 may levy a tax not exceeding four mills on the taxable valuation of property within the county, subject to certain limitations. N.D.C.C. § 11-11.1-04 provides:

The board of county commissioners of a county which has a job development authority shall establish a job development authority fund and levy a tax not exceeding the limitation in subsection 29 of section 57-15-06.7. The county treasurer shall keep the fund separate from other money of the county and transmit all funds received pursuant to this section within thirty days to the board of directors of the job development authority. The funds when paid to the job development authority shall be deposited in a special account in which other revenues of a job development authority are deposited and may be expended by the job development authority as provided in sections 11-11.1-02 and 11-11.1-03.

Similarly, N.D.C.C. §§ 57-15-16 and 57-15-17 provide for the levy and disposition by a school board of a school building fund tax not in excess of 20 mills. N.D.C.C. § 57-15-17(1)(a) provides, in part, that "[a]ll revenue accruing from appropriations or tax levies for a school building fund together with such amounts as may be realized for building purposes from all other sources, shall be placed in a separate fund known as a school building fund. . . ." The court in Peterson rejected the argument that N.D.C.C. §§ 57-15-16 and 57-15-17 comprise the exclusive authority granted to school districts by the Legislature to deal with building matters. The court stated that N.D.C.C. § 57-15-16 does not preclude the use of general fund money for building purposes and that it expands a school board's taxing authority rather than limiting that authority. The court also stated that N.D.C.C. § 57-15-17(1)(a), by allowing for moneys from "other sources" to be placed in a school building fund, allows the transfer of money from the school district's general fund to the school building fund.

N.D.C.C. § 11-11.1-04 allows for the deposit of "other revenues" in a job development authority fund. Following the analysis of the court in Peterson, it is my opinion that this language is broad enough to include a transfer of legally available general fund moneys by a board of county commissioners to a job development authority fund.

It is my opinion, based upon the similarities between the statutes discussed above and the rationale of Peterson, that the Board may transfer general fund moneys to the Authority to be expended for purposes consistent with N.D.C.C. ch. 11-11.1.

In response to your second question, it is my opinion that the Board may use general fund moneys to pay the operating expenses of the Authority.

It necessarily follows from the above discussion concerning your first question that if the Board determines that the payment of the operating expenses of the Authority is a legitimate county purpose, available general fund moneys may be used by the Board to pay such expenses.

In response to your third question, it is my opinion that the amount of the job development tax levy is a matter solely for the Board's determination and that the Board is not required to levy a tax in the amount certified by the Authority pursuant to N.D.C.C. § 11-11.1-03(6).

N.D.C.C. § 57-15-06.7(29) provides in part that "[a] county levying a tax for a job development authority as provided in section 11-11.1-04. . . . may levy a tax not exceeding four mills on the taxable valuation of property within the county." The levy of taxes by a county for a job development authority is one of the tax levies by a county which is an exception to the general limitation upon county tax levies set out in N.D.C.C. § 57-15-06(1), which provides that:

The board of county commissioners shall not levy any taxes for general or special county purposes which will exceed the amount produced by a levy of twenty-three mills on the dollar of the taxable valuation of the county.

There is no statutory authority for a county job development authority to levy a job development tax. N.D.C.C. § 57-15-05 provides in part that:

The board of county commissioners, in levying county taxes, shall be limited to the amount necessary to meet the appropriations included in the county budget for the ensuing fiscal year. . . . The county budget shall show the complete expenditure program of the county for the ensuing fiscal year, and the sources of revenue from which it is to be financed.

Although N.D.C.C. § 11-11.1-03(6) provides that a county job development authority may "certify a tax levy as provided in section 11-11.1-04," it is my opinion that the certification referred to in that provision is merely a certification to the board of county commissioners which, as the governing body of the county, must set the amount of the job development tax levy and certify such amount as a part of the county budget before the job development tax may be levied. A county job development authority is not a "taxing district" within the meaning of that term as defined in N.D.C.C. § 57-02-01(9).

In response to your fourth question, it is my opinion that the Board is not required to levy a job development tax to support the Authority unless the Board has, in the process of approving its budget, included a budgeted amount for the Authority.

I addressed a similar question in a December 3, 1991, letter to the city attorney for Hazen, North Dakota. The question I responded to was whether a county which is participating in a regional airport authority pursuant to N.D.C.C. ch. 2-06 must levy the tax certified to the county by the airport authority pursuant to N.D.C.C. § 2-06-14, which 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 proceeds of such taxes must be deposited in a special account or accounts in which other revenues of the authority are deposited and may be expended by the authority as provided for in this chapter.

Following a brief discussion of the relevant statutes and issues, I stated that it is my opinion that the county must levy the tax certified by the airport authority if the budget approved by the county includes an amount for the airport authority represented by the amount of tax certified to the county by the authority. I based this opinion upon the general rule, as stated by the North Dakota Supreme Court in Vallely v. Board of Park Com'rs, 111 N.W. 615 (N.D. 1907), that

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. This limitation is recognized under the principle that all powers of taxation are reposed in the people, and, unless the people assent by vote to the appointment or election of the taxing authorities, the law authorizing such powers of taxation to those not thus assented to is repugnant to the Constitution, and not to be upheld.

Id. at 618. Therefore, the Board may not be required to levy a job development tax in the amount certified to it by the Authority. However, if the Board has approved a budget for the Authority, it must levy taxes sufficient to fund that budget, whether through the levy of a job development tax or through the levy of general taxes, as discussed above.

In response to your last question, it is my opinion that the Board is not required to continue to levy a job development tax in the event of the dissolution of the Authority. It is my further opinion that the dissolution of the Authority would not automatically result in a discontinuance of the job development tax levy.

A job development authority has no power to commit to the payment of any obligations other than those obligations which may be satisfied out of current revenues. Obligations

which are not payable from current revenues are "debt" or "indebtedness" within the meaning of those terms in N.D. Const. art. X, §§ 15 and 16, which provide in part as follows:

The debt of any county . . . shall never exceed five per centum upon the assessed value of the taxable property therein. . . .

N.D. Const. art. X, § 15.

Any . . . county . . . incurring indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due, and all laws or ordinances providing for the payment of the interest or principal of any debt shall be irrevocable until such debt be paid.

N.D. Const. art. X, § 16. The North Dakota Supreme Court, in Lang v. City of Cavalier, 228 N.W. 819 (N.D. 1930), stated that the purpose of the provision in N.D. Const. art. X, § 16 is to prevent political subdivisions from "imprudently contracting debts for other than ordinary current expenses of administration, and to restrict their borrowing capacity." Id. at 825.

The provisions of N.D.C.C. ch. 11-11.1 and N.D.C.C. § 57-15-06.7(29) authorizing the levy of a job development tax do not authorize a county to pledge the revenues of the tax to the payment of an obligation which is payable beyond the current year.

With respect to the second part of this question, N.D.C.C. § 11-11.1-01 provides that a job development authority may be discontinued either by the board of county commissioners or by a majority of the electors voting on the question of discontinuance which has been placed on the ballot by a petition signed by the required number of electors of the county. The election, therefore, is on the question of discontinuing the job development authority rather than the job development tax levy. As discussed above, it is the board of county commissioners which has the authority to levy a job development tax and, impliedly, the power to discontinue the levy of a job development tax.

In a March 31, 1986, letter to the Glen Ullin city attorney, in response to a question concerning the use of accumulated job development tax moneys if the job development authority has been discontinued by an election pursuant to N.D.C.C. § 11-11.1-01, I stated that the only alternative use specified for these moneys is to fund a contract with an industrial development organization pursuant to N.D.C.C. § 11-11.1-06. Letter from Attorney General Spaeth to Mike L. Halpern (March 31, 1986).

It follows that if the job development authority has been discontinued and there is no active industrial development organization existing within the county, the purpose for levying a job development tax is no longer present and the board of county commissioners must discontinue the tax levy on its own initiative. In other words, if the statutory purpose for levying the job development tax is discontinued, the tax itself must also be discontinued. Therefore, although it is my opinion that the discontinuance of the Authority would not

automatically result in the discontinuance of the job development tax, the Board must discontinue the tax levy if there is not an industrial development organization within the county with which the Board may contract for the use of the proceeds of the job development tax.

I trust that this discussion has been responsive to your questions.

Sincerely,

Nicholas J. Spaeth

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