

LETTER OPINION
94-L-214

August 18, 1994

Honorable Arthur Goffe
State Representative
231 NE 15th Street
Valley City, ND 58072

Dear Representative Goffe:

Thank you for your letter requesting an opinion regarding certain actions of the Valley City Parks and Recreation Board (hereafter, Board) formed pursuant to N.D.C.C. ch. 40-49.

You state in your letter: "About 1991 the Board decided to build a municipal golf course. The arrangement was made with a private individual to get financing. The person would loan the money for the golf course and would be repaid at a later date when the course was profitable."

You refer to the financing provided by the private individual as a loan. In the Board's attempt to clarify the agreement, it issued a statement which provides, in part, as follows:

The agreement was not reduced to writing. So that the community will have a written account of this agreement the board has retained legal counsel to commit to writing this understanding. After formal execution, the document will be available to the media and community. In this way the board can assure taxpayers that it has not undertaken any obligation not otherwise discussed and approved publicly.

Mr. Tharaldson and the board remain committed to the original understanding and goal which provided that Mr. Tharaldson would assume responsibility for developing, constructing and funding the golf course project; assume control over whom to hire to perform actual construction;

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and upon completion to pass with improvements to the park district the completed course along with control over operation and maintenance. In addition to control over construction, Mr. Tharaldson's agreement was conditioned on the park district repaying the cost of construction in the event but only in the event that the district earned a profit from the course operations and further that Jim Sullivan independent of his duties as the Park Director be authorized to construct the golf course under the direction of Mr. Tharaldson and independent of the board when acting as Tharaldson's agent/contractor. To this, the board agreed.

Mary Berglund, Park Board Issues Statement Regarding Golf Course Project, Valley City Times Record, May 27, 1994.

If the golf course was developed with private monies and was a gift, the Board would be authorized to accept it. N.D.C.C. ? 1-08-04. However, the golf course appears to have been developed with Board monies as well as private monies, and does not appear to be a gift since the Board's statement indicates that the Board would repay the cost of construction if the golf course became profitable.

You first ask whether N.D.C.C. ? 40-49-14 applies to this type of project. More specifically, you ask:

1. The Board did not bid for any of this project. Was this action of the Board legal?

2. The Board made an oral financing arrangement for the golf course project with a private individual, but did not put the agreement in writing. Was this action of the Board legal?

State law governing parks and park districts provides, "[a]ll contracts exceeding ten thousand dollars must be let to the lowest responsible bidder after advertisement in the official newspaper of the municipality once each week for two successive weeks."

N.D.C.C. ? 40-49-14. Thus, in my opinion, to the

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extent more than \$10,000 was paid out by the Board for a particular project or for particular work done, such expenditure would appear to be a contract exceeding \$10,000 required to be bid.

N.D.C.C. ? 40-49-14 also states "[a]ll contracts must be in writing and must be signed by the president of the board or a designated representative and unless so executed, they shall be void." It is my opinion that this provision applies to any agreements made by the Board.

You state that now it appears that the Board will no longer be authorizing any of the expenditures for the golf course. This will be done by the private lender. You ask whether the Board can delegate its authority for control and oversight of the project as well as delegate its authority to authorize expenditures. State law provides:

40-49-12. Powers of the board of park commissioners. A board of park commissioners may:

1. Acquire by purchase, gift, devise, condemnation, or otherwise, land . . . for parks, boulevards, and ways. The board shall have the sole and exclusive authority to maintain, govern, and improve the land, and to provide for the erection of structures thereon

N.D.C.C. ? 40-49-12. Thus, if the land on which the golf course is being developed is owned by the Board, the Board has "sole and exclusive authority to . . . improve the land, and to provide for the erection of structures thereon." Id. It may be possible for a person to act as an agent for the Board for purposes of control and oversight of the project. An agreement authorizing a person to act as an agent for the Board would need to be in writing, however. N.D.C.C. ? 40-49-14.

In conclusion, it is my opinion that if the land on which the golf course is being developed is owned by the Board, the Board may not delegate its authority for control and oversight of the project; however, it may be possible for the Board to authorize an agent to do these acts for it pursuant to a written agreement. However, it is my opinion that the Board may not delegate its authority to authorize expenditures.

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You state that the Board at times has spent money without formal itemized statements, and without formal motions and voting on the expenditures. You ask whether the Board can legally do this. State law governing parks and park districts provides:

Yea and nay votes must be taken on all propositions involving the expenditure of money, Approval of an expenditure of money must be recorded in the record of the board's proceedings No bill, claim, account, or demand against the district may be audited, allowed, or paid until a full, written, itemized statement has been filed with the governing body or unless otherwise authorized by the governing body pursuant to contract or other action.

N.D.C.C. ? 40-49-14. "Other action" of the Board presumably might include the passing of an ordinance or a resolution, for example. In any case, it is my opinion that any action of the Board approving expenditures would require a motion and a vote, and that N.D.C.C. ? 40-49-14 does not permit the Board to delegate its authority to authorize expenditures.

You state that the Board has appropriated money each year for this project; however, the money spent has far exceeded the appropriation. You state that Fund 300 Golf Course was created in 1992 but no funds were appropriated, yet \$7,632.51 was spent, and that in the 1993 budget-making process, Fund 300 does not appear, but \$68,617.56 was spent from the fund. You state that at the end of the year, the Board appears to be taking from other areas to meet the amount spent for this project. You ask whether the Board can legally do this. State law provides:

Except as otherwise provided in this chapter [40-49 regarding parks and park districts], the board of park commissioners and its officers and the park district shall be governed . . . in carrying out, enforcing, or making effective any of the powers granted in this chapter [40-49], by the provisions of the laws of this state applicable to municipalities of the kind in which the park district is established.

N.D.C.C. ? 40-49-18. N.D.C.C. ch. 40-40 regarding municipal budgets generally applies to park districts.
N.D.C.C. ?? 40-49-18, 40-40-02. N.D.C.C. ch. 40-40 provides, in part:

40-40-04. Municipality to prepare preliminary budget statement. The governing body of . . . [the park district], annually on or before September 10, shall make . . . an itemized statement known as the preliminary budget statement showing the amounts of money which, in the opinion of the governing body, will be required for the proper maintenance, expansion, or improvement of the . . . [park district] during the year

40-40-05. Contents of preliminary budget statement. The preliminary budget must include a detailed breakdown of the estimated revenues and appropriations requested for the ensuing year for the general fund, each special revenue fund, and each debt service fund of the . . . [park district]. . . .

40-40-06. Notice of preliminary budget statement - Contents - How given. After the governing body has prepared the preliminary budget statement, the auditor of the . . . [park district] shall give notice that:

. . . .

3. The governing body shall hold a public session at the time and place designated in the notice of hearing at which any taxpayer may appear and discuss with the body any item of proposed expenditures or may object to any item or amount.

. . . .

40-40-08. Hearing of protests and objections - Changes in preliminary budget - Preparation of final budget - Contents. The governing body shall meet at the time and place specified in the notice and shall hear any and all protests or objections to the items or amounts set forth in the preliminary budget statement. At the hearing, the governing body shall make any changes in the items or amounts shown on the preliminary budget statement as it may deem advisable except as limited in this chapter [40-40], and shall prepare the final budget

40-40-20. Contracts made prior to appropriation prohibited - Contracts for water for fire protection excepted. Except as otherwise provided [no exceptions apply here] . . . no contract shall be made by the governing body of a . . . [park district] and no expense shall be incurred by any officers or departments of the corporation unless there shall have been a previous appropriation providing for such expense. . . .

N.D.C.C. ? 40-40-18 authorizes fund transfers to meet emergencies. It is a question of fact as to whether the fund transfers were made to meet an emergency. N.D.C.C. ? 57-15-31.1 provides:

57-15-31.1. Deadline date for amending budgets and certifying taxes. No taxing district may certify any taxes or amend its current budget and no county auditor may accept a certification of taxes or amended budget after the tenth day of October of each year if such certification or amendment results in a change in the amount of tax levied. The current budget, except for property taxes, may be amended during the year for any revenues and appropriations not anticipated at the time the budget was prepared.

This section would authorize a park district to amend its budget even after October 10 if such an amendment does not result in a change in the amount of tax levied and if the amendment was for an appropriation not anticipated at the time the budget was prepared. Under these circumstances, a park district could transfer moneys between funds and could even transfer moneys for a new appropriation that was not budgeted for at all during the budgeting process. Letter from Attorney General Nicholas J. Spaeth to Allen Koppy (February 23, 1987). I would emphasize that such transfers would only be authorized for any revenues and appropriations not anticipated at the time the budget was prepared.

Therefore, it is my opinion that the Board may appropriate and transfer monies only in accordance with the provisions of N.D.C.C. ch. 40-40 and N.D.C.C. ? 57-15-31.1.

Finally, state law also provides:

40-40-15. Expenditures made or liabilities incurred beyond appropriation - Joint and several liability of members of governing body. Except as otherwise provided in section 40-40-18 [emergencies], no . . . [park district] expenditure may be made nor liability incurred, and no bill may be paid for any purpose in excess of the appropriation made therefor in the final budget. Expenditures made, liabilities incurred, or warrants issued in excess of the appropriations are a joint and several liability of the members of the governing body who authorized the making,

incurring, or issuing thereof or who were present when they were authorized and did not vote against authorizing the same.

54-10-14. Political subdivisions -- Audits -- Fees -- Alternative audits and reports. The state auditor shall audit the following political subdivisions once every two years, except as provided in this section or otherwise by law:

. . . .

3. Park districts

. . . .

The state auditor may require the correction of any irregularities, objectionable accounting procedures, or illegal actions on the part of the governing board, officers, or employees of the political subdivision disclosed by the audit report or workpapers, and failure to make the corrections shall result in audits being resumed by the state auditor until the irregularities, objectionable accounting procedures, or illegal actions are corrected.

54-10-15. Audits of political subdivisions by order of governor or upon petition. The state auditor, by duly appointed deputy auditors or other authorized agents, shall audit the books, records, and financial accounts of any political subdivision when ordered by the governor, requested by the governing board, or upon petition of at least thirty-five percent of the qualified electors of any political subdivision enumerated in section 54-10-14 voting for the office of governor at the preceding general election. . . . Fees for the audits must be paid in accordance with the provisions of section 54-10-14.

40-40-16. State's attorney to sue for excessive expenditures. Upon good and sufficient information laid before him by any taxpayer in the . . . [park district] or obtained from any other source, the state's attorney of the county in which the . . . [park district] lies shall bring suit to recover from the members of the governing body, jointly and severally, the amount of expenditures, payments, or warrants in excess of the amount shown in any group of the final budget.

I realize that resolving this matter may be difficult for the Valley City community. Our office will

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certainly provide assistance in any way we can.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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Error!Honorable Arthur Goffe
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