

LETTER OPINION
2000-L-176

December 21, 2000

Mr. Duane R. Breitling, Attorney
Red River Joint Water Resource Board
15 Broadway, Suite 206
Fargo, ND 58102-4907

Dear Mr. Breitling:

Thank you for your letter in which you asked whether the Red River Joint Water Resource Board (Joint Board) may use funds from a tax levied pursuant to N.D.C.C. § 61-16.1-11(2) to provide financial assistance for the construction or maintenance of farmstead ring dikes.

According to your letter, the Joint Board was formed pursuant to N.D.C.C. § 61-16.1-11. It has been asked to participate in the costs of building farmstead ring dikes in Walsh and northern Cass Counties. Both the North Cass County Water Resource District and the Walsh County Water Resource District are members of the Red River Joint Water Resource District. It is my understanding that there are 14 water resource districts that are members of the Joint Board. In addition to Walsh County Water Resource District and North Cass County Water Resource District, the other member districts are Ransom County, Richland County, Sargent County, Pembina County, Grand Forks County, Traill County, Barnes County, Maple River, Southeast Cass County, Rush River, Nelson County, and Steele County Water Resource Districts.

N.D.C.C. § 61-16.1-11(2) authorizes the members of a joint water resource board to levy a tax not to exceed two mills upon the taxable valuation of the real property within each district. The proceeds of one-half of the levy must be used for regulatory activities and for the construction and maintenance of projects of common benefit to the member districts. N.D.C.C. § 61-16.1-11(3). The other half of the levy must be used for the construction and maintenance of projects of common benefit to more than one district. Id. According to your letter, any funds used by the Joint Board to construct or maintain the farmstead ring dikes would come from money generated from the two mill levy authorized by N.D.C.C. § 61-16.1-11(2). You ask whether a farmstead ring dike is a "project of common benefit to the member districts" or a "project of common benefit to more than one district" where the farmstead ring dike is built solely within the jurisdictional boundaries of a member joint water resource district.

It is my understanding that the farmstead ring dike project for which the Joint Board has been asked to provide funding does not consist of one ring dike, but instead is a project proposing to construct several ring dikes and raise several others throughout various water resource districts that are members of the joint water resource district. A

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project in the Grand Forks Water Resource District consists of constructing six rural ring dikes for landowners. Minutes of the State Water Commission (September 13, 1999). North Cass Water Resource District has requested cost-sharing assistance from the State Water Commission for a project that consists of constructing or raising 32 farmstead ring dikes in Wiser and Noble Townships, which are the northernmost townships along the Red River in Cass County. Minutes of the State Water Commission (December 21, 1998). Walsh County Water Resource District requested cost-sharing assistance from the State Water Commission to construct 44 ring dikes and raise another 34 existing ring dikes. Minutes of the State Water Commission (August 13, 1998). The State Water Commission has approved funds to be used to share in the costs of each of these projects. Minutes of the State Water Commission (August 13, 1998, December 21, 1998, and September 13, 1999).

The question of whether these projects confer a common benefit to more than one district or to all of the districts is a question of fact. This office does not issue opinions on questions of fact. 1997 N.D. Op. Att'y Gen. L-71 (June 18 to William Binek); 1996 N.D. Op. Att'y Gen. L-174 (Oct. 3 to Kevin Pifer); 1994 N.D. Op. Att'y Gen. L-327 (Dec. 13 to Doug Mattson). A fact question of this nature can best be answered by the Joint Board. It may be helpful to the Joint Board, in its analysis of this issue, to review the basis for the State Water Commission's determination to provide funding for the farmstead ring dike projects.

According to the minutes of the State Water Commission, farmstead ring dikes are the most acceptable and efficient way to protect farmsteads during a flood event. The ring dikes would protect farmsteads, grain bins, and other developed areas. Minutes of the State Water Commission (August 13, 1998, December 21, 1998). In addition, at the September 13, 1999, meeting of the State Water Commission, the State Engineer explained that farmstead ring dike projects provide "protection for personal safety and health related concerns, which include the prevention of farm chemicals and other debris from reaching the river." Minutes of the State Water Commission (September 13, 1999). At the July 14, 2000, meeting of the State Water Commission, the State Engineer stated that protecting a farm with a ring dike can amount to a savings to the county and to the state. The State Engineer said that is the justification the state uses to approve cost sharing for ring dike projects, and believes the same rationale would apply to local funding of ring dikes. Minutes of the State Water Commission (July 14, 2000). A memorandum prepared for and presented at the July 14, 2000, State Water Commission meeting described the ring dike projects as follows:

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When viewed cumulatively, the projects are a multi-district program. Farmstead ring dikes provide benefits to multiple districts during floods by eliminating the potential for widespread common dangers including physical hazards from scattered debris and health threats due to water pollution resulting from the inundation of septic systems, fuel, farm chemicals, fertilizer, etc. Common benefit may exist, even if small in comparison to private benefit, when the larger picture of public health and safety are taken into account. The consequences of economic hardships placed on Red River Valley farmers who have suffered flood losses have repercussions felt Valley-wide. In that view, a program of farmstead ring dikes does provide a common benefit to more than one district.

Minutes of the State Water Commission (July 14, 2000) (Appendix D).

In making your decision, you may want to keep in mind that the standard by which you make your decision could be challenged in court. Courts generally defer to factual determinations made by local governing bodies. In an appeal from the decision of a local governing body, a court's review is very limited. Graber v. Logan County Water Resource Bd., 598 N.W.2d 846, 848 (N.D. 1999). The North Dakota Supreme Court has consistently stated that the courts must not substitute their judgment for that of the local governing body who initially made the decision. Pic v. City of Grafton, 460 N.W.2d 706, 710 (N.D. 1990). A decision of a local governing body will not be overruled unless the governing body's decision is arbitrary, capricious, or unreasonable. Pic v. City of Grafton, 586 N.W.2d 159, 161 (N.D. 1998); Smith v. Burleigh County Bd. of Com'rs, 578 N.W.2d 533, 535 (N.D. 1998); City of Fargo v. Ness, 529 N.W.2d 572, 576 (N.D. 1995). A decision is not arbitrary, capricious or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation. Graber, 598 N.W.2d at 848; Ames v. Rose Twp. Bd. of Twp. Supervisors, 502 N.W.2d 845, 851 (N.D. 1993).

Sincerely,

Heidi Heitkamp
Attorney General

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