

**LETTER OPINION
2001-L-22**

July 3, 2001

Honorable Jeff Delzer
State Representative
2919 5th St NW
Underwood, ND 58576

Dear Representative Delzer:

Thank you for your request for my opinion regarding whether the McLean County Commission may, on behalf of the county, take out a loan under N.D.C.C. ch. 57-62 from the Coal Development Trust Fund to finance the construction of a new county courthouse, without a vote under N.D.C.C. § 11-11-18. I understand the loan would be repaid from monies allocated from the trust fund to the county over a 20-year period. You indicate that you are seeking this opinion at the request of the local "Committee to Preserve McLean County's Courthouse."

In your request, you cite two statutes, N.D.C.C. §§ 11-11-16 and 11-11-18, that have a direct bearing on this analysis. Section 16 of N.D.C.C. ch. 11-11 provides as follows:

The board of county commissioners may provide for the purchase, erection, repair, and maintenance of the courthouse, hospitals, jails, and other necessary buildings within and for the county. It may purchase the sites for such county buildings if necessary and may make contracts on behalf of the county for the building, repairing, and maintaining thereof if the expenditures therefor are not greater than can be paid out of the revenue of the county for the current year. The board shall have the entire supervision of the construction of such buildings.

Section 18 of N.D.C.C. chapter 11-11 provides as follows:

The board of county commissioners shall submit to the electors of the county at any regular or special election any proposal for an extraordinary outlay of money by the county when the proposed expenditure is greater in amount than can be provided for by the annual tax levies. If the board considers the

courthouse, jail, or other public buildings of the county inadequate for the needs of the county or deems it necessary to build a county hospital, and if it is thought that it is not for the best interests of the county to issue bonds to aid in the construction of such buildings or that the construction of such buildings by any other procedure is not for the best interests of the county, it shall submit to the electors of the county, at any regular or special election, the proposal for the construction of a courthouse, jail, or other public building by establishing a building fund to aid in the construction thereof. The requirements of this section shall not apply to lease-purchase agreements authorized by section 24-05-04.

In order to understand the intended interaction between the two sections it is necessary to review the legislative history. Prior to the 1943 code revision, the equivalent to what is now section 11-11-16 required a vote of the electors if the expenditure was greater than that which could be paid out of the revenue of the county for the current year. When North Dakota's code was revised in the late 1930's by the code revision commission,¹ the portion of the law equivalent to section 16 addressing extraordinary expenditures was combined with section 18.² In addition, the requirement for submitting the issue to the voters was omitted because it was repetitious of the language found in what was then section 11-11-18.³ Thus, the history clarifies that there was no legislative intent to prohibit

¹ In 1939 the legislature enacted the Recodification Act, establishing a code revision commission. S.B. No. 88, Chapter 110, 1939 Session Laws. The commission was authorized to revise, annotate, and index all laws of the state, and in effecting such revision, to eliminate all statutes that had been repealed, to reconcile all inconsistencies, to eliminate all duplication, to eliminate or restate all useless, contradictory and confusing words and language, to incorporate all amendments and statutes of general application, to harmonize the statutory and the declaratory law so far as possible, and to revise all laws wherever it may deem it necessary to make a perfect, complete and consistent code of laws. § 3, S.B. No. 88, Chapter 110, 1939 Session Laws. The commission was to report to the legislature in 1941, but unforeseen circumstances delayed submission of the final report until 1943.

² "That portion of 1925 Supp., s. 3294 which provides for extraordinary expenditures has been combined with C.L. 1913, s. 3290 to avoid repetition." Code Revision Report Covering the Work of the Code Revision Commission – Twenty-Eighth Session of the Legislative Assembly – Title: Counties.

³ "The provision 'unless the question of such expenditure shall have first been submitted to a vote of qualified electors of such county and shall have been approved by a majority of

a county from building when the construction costs exceed the revenues generated in the current year. In fact, the legislative history of the two sections suggests just the opposite, that when a county is faced with an extraordinary expenditure for building construction, the provisions of section 11-11-18 should be followed.

This is consistent with the North Dakota Supreme Court's holding in Brusegaard v. Schroeder, 201 N.W.2d 899 (N.D. 1972). The Court held that the proposed expenditure for erection of a new county shop building was not greater than could be paid out of funds on hand plus revenue available to the county for the current year and, therefore, an election was not required by the statute. This holding implies that if the proposed expenditure had been greater than could be paid out of the funds on hand and the revenues available to the county for the current year, such an expenditure could still be made if it was approved by the voters at an election under N.D.C.C. § 11-11-18.

The North Dakota Supreme Court has previously decided that no vote is required under N.D.C.C. § 11-11-18 when the cost is not greater than what could be paid out of funds on hand and the revenue from tax levies available to the county for the current year. Brusegaard v. Schroeder, 201 N.W.2d 899 (N.D. 1972). See also Eddy v. Krekow, 209 N.W. 225 (N.D. 1926), and Boettcher v. McDowall, 174 N.W. 759 (N.D. 1991). Thus, interim borrowing by certificates of indebtedness under N.D.C.C. ch. 21-02 does not require a vote under N.D.C.C. § 11-11-18 because such borrowing is in anticipation of levies already made. Brusegaard, 201 N.W.2d 899. However, in the McLean County situation, the cost of constructing the new county courthouse would be paid not only from revenues and tax levies available to the county for the current year, but also from anticipated revenues of the county for the next 20 years.

In Schoonover v. Morton Cty., 267 N.W. 819 (N.D. 1978), the North Dakota Supreme Court stated that "[t]he mere fact that an expenditure will be greater than an amount provided for by county tax levies for one year does not make it an extraordinary outlay." However, the Supreme Court went on to discuss the fact that a vote is not required if an annual levy for a particular fund is less than the expenditures from that fund. Schoonover, at 824-25. Thus, a county's expenditure of money from a particular fund in excess of the annual levy for that fund is not an extraordinary outlay of money as contemplated by N.D.C.C. § 11-11-18. Id. In contrast, a county's proposed expenditure on one project that exceeds the county's tax levies for that year is an extraordinary outlay of money requiring a vote of the county's electors. N.D.C.C. § 11-11-18.

votes so cast; and the board shall determine the amount and rate of taxes to be submitted to a vote for such purpose' has been omitted as it is a repetition of s. 11-11-18." Id.

July 3, 2001

Page 4

In an April 9, 1979, opinion, this office addressed whether a county had the authority to purchase property using a contract for deed, without holding an election. Letter from Attorney General Allen Olson to John Olson (Apr. 9, 1979). That opinion examined the above statutes and determined that the total cost of the project, not the yearly payment, was the amount required to fit within the requirements of the statutes. The opinion concluded that if the total cost of the project exceeded the amount which may be paid from the county's revenues for the year in question, the project would be prohibited by N.D.C.C. § 11-11-16. Id.

That opinion's applicability to this situation is straightforward: if the total cost of the proposed courthouse is greater than the county's revenues for the current year, N.D.C.C. § 11-11-16 prohibits the project unless the matter is approved by the voters under N.D.C.C. § 11-11-18. Further, monies the county obtains through a financing arrangement resulting in payments to be made by the county in future years should not be included in the amount determined to be county "revenues" in N.D.C.C. § 11-11-16. Accordingly, if the county does not have enough reserve funds and tax revenues for the current year to pay for the courthouse construction project, it is my opinion N.D.C.C. § 11-11-16 prohibits the county from pursuing the project unless an election is held under N.D.C.C. § 11-11-18.

In conclusion, it is my opinion that McLean County must have a vote by the county's electors on the issue of whether the county should build a new courthouse because the cost of the courthouse will be repaid from revenues that will be received by the county beyond the current year.

I understand there may be an issue with the requirement in N.D.C.C. § 11-11-21 that the question submitted to the electors "must be accompanied by a proposition to levy a tax" to pay for the construction. An interpretation of that section is beyond the question presented in your request, however, I offer the proposition that a possible interpretation of that statute might be that if a tax is not required to pay for the construction, then no vote is required. However, N.D.C.C. § 11-11-18 specifically requires a vote if the proposed expenditure is greater than the annual tax levies.

Sincerely,

Wayne Stenehjem
Attorney General

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LETTER OPINION 2001-L-22

July 3, 2001

Page 5