

**FORMAL OPINION
2002-F-03**

DATE ISSUED: January 31, 2002

REQUESTED BY: Representative Merle Boucher

QUESTION PRESENTED

Whether a political subdivision may make a donation of public funds to another political subdivision.

ATTORNEY GENERAL'S OPINION

It is my opinion that a political subdivision may make a donation of public funds to another political subdivision through a joint powers agreement, and cites and counties may also make such donations through their home rule authority.

ANALYSIS

Your letter indicates that, as you understand it, the city of Bismarck intends to donate money to the Bismarck School District for the construction of a school gymnasium. The city of Bismarck has indicated to our office that if the voters approve the use of city sales tax money for a school gymnasium and other purposes by an amendment to the city's home rule charter, the city intends to enter into a joint powers agreement with the Bismarck School District whereby the city of Bismarck will help fund the gymnasium and the Bismarck School District will agree to make the gymnasium available to other public and private entities, subject to the school district's scheduling preferences.

This opinion will address the general question of whether a political subdivision may make a donation of public funds to another political subdivision.

The North Dakota Constitution prohibits a political subdivision from loaning or giving its credit or making donations to or in aid of any individual, association, or corporation unless it is for the reasonable support of the poor or as part of a permitted industry, enterprise, or business. N.D. Const. art. X, § 18; Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964). But a political subdivision is not an individual, association, or corporation under this constitutional provision; therefore, this provision

does not prohibit a donation from one political subdivision to another political subdivision. See 1999 N.D. Op. Att'y Gen. F-14 (Article X, § 18 does not prohibit a loan from a county to a township); Letter from Attorney General Nicholas Spaeth to Eugene Belisle (Apr. 7, 1992) (Article X, § 18 does not prohibit a loan or grant from a city to a school district); 1983 N.D. Op. Att'y Gen. F-17 (Article X, § 18 does not prohibit a loan from a county to a rural fire protection district).

Although a donation by one political subdivision to another is not prohibited by article X, § 18 of the N.D. Constitution, the political subdivision must have statutory authority to donate money to another political subdivision. A political subdivision possesses only those powers expressly granted to it by the Legislature or those necessarily implied from the powers expressly granted. Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991) (cities); Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924) (counties). See generally N.D. Const. art. VII, § 2.

The Legislature has provided such authority in N.D.C.C. ch. 54-40.3, regarding joint powers agreements. That state law authorizes a political subdivision to enter into a joint powers agreement with another political subdivision "for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them." N.D.C.C. § 54-40.3-01(1). Thus, only one of the parties to the agreement needs to have the statutory authority to take the action that is the subject of the joint powers agreement. 1998 N.D. Op. Att'y Gen. L-192, 1995 N.D. Op. Att'y Gen. L-115, 1994 N.D. Op. Att'y Gen. F-02, 1994 N.D. Op. Att'y Gen. L-258, 1993 N.D. Op. Att'y Gen. L-190, 1993 N.D. Op. Att'y Gen. F-23.

The joint powers agreement may address, among other things, "[t]he manner in which the parties to the agreement will finance the cooperative or joint undertaking" N.D.C.C. § 54-40.3-01(1)(d). "The parties . . . may expend funds . . . and otherwise share or contribute property in accordance with the agreement" Id. Thus, if a school district intends to build a school, which is within the school district's statutory authority, N.D.C.C. § 15.1-09-33(4), a city may enter into a joint powers agreement with the school district and cooperate by giving money to the school district to help finance the school. Consistent with this conclusion, this office previously determined that a joint powers agreement may be entered into between a home rule city and a school district whereby the city's sales taxes may be used to fund construction of a school to be owned, maintained, and primarily used by the school district. 2000 N.D. Op. Att'y Gen. F-04. See also 1994 N.D. Op. Att'y Gen. F-02 (joint powers agreement whereby a city may provide free electricity to a school district); 1994 N.D. Op. Att'y Gen. L-258 (joint powers agreement whereby a health unit may acquire the county social service's authority to do investigations); 1995 N.D. Op. Att'y Gen. L-115 (joint powers agreement whereby city funds may be used to maintain and improve properties under the exclusive authority of a park district); 1995 N.D. Op. Att'y Gen. L-233 (joint powers agreement whereby a county may exercise with a city the city's authority to engage in the

enterprise of economic development and loan money to a private entity); 1998 N.D. Op. Att'y Gen. L-192 (joint powers agreement whereby a non-home rule political subdivision may exercise with a home rule political subdivision the latter's authority to participate in an investment pool); 1999 N.D. Op. Att'y Gen. F-07 (joint powers agreement whereby a township may exercise the county's authority to zone).

In addition to the authority to enter into joint powers agreements, the Legislature has provided that cities and counties may acquire home rule authority in certain subject areas. N.D. Const. art. VII, § 6 (Legislature shall provide for home rule in counties and cities). Home rule authority allows cities or counties to enact ordinances in those subject areas and do things differently than is generally provided in state law. N.D.C.C. §§ 11-09.1-05, 40-05.1-06. Home rule cities and counties may control their finances and fiscal affairs, and home rule cities may implement a sales tax, if these powers are listed in the home rule charter and implemented through ordinances. N.D.C.C. §§ 11-09.1-05(2), 40-05.1-06(2), (16).

Because the city of Bismarck has a home rule charter which includes these powers, the city may donate sales tax money to another political subdivision, including a school district, if such authority is authorized in its home rule charter and implemented through its ordinances, without the use of a joint powers agreement.

In conclusion, a political subdivision may make a donation of public funds to another political subdivision through a joint powers agreement under N.D.C.C. ch. 54-40.3, and cities and counties may also make such donations through their home rule authority under N.D.C.C. chs. 11-09.1 and 40-05.1.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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