

**LETTER OPINION  
2004-L-21**

March 11, 2004

Mr. John P. Van Grinsven III  
Ward County State's Attorney  
PO Box 5005  
Minot, ND 58702-5005

Dear Mr. Van Grinsven:

Thank you for your letter asking whether the Ward County Commission may contribute \$5,000 for a feasibility study by a private consulting firm regarding an intermodal transportation facility which may be located in Ward County. You indicate that the county would require that the study address and identify the county road system's potential role in the facility's development. You point out that Ward County is a home rule county and you provided a copy of the county's home rule charter.

In N.D.A.G. Letter to Lindgren and Bjornson (Oct. 1, 1992), it was noted that

Political subdivisions such as counties and cities have only those powers expressly conferred upon them by statute, and those powers necessarily implied from powers expressly granted. Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924); Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991). Both counties and cities are authorized to adopt home rule charters and ordinances pursuant thereto.

Counties in general have a number of specific powers related to county roads. See, e.g., N.D.C.C. § 24-05-17 ("The boards of county commissioners in their respective counties have the sole authority and responsibility to acquire land for, construct, maintain, and operate the county road system as designated and selected by them."); N.D.C.C. § 24-05-16 (county road system must be the roads designated and selected by the boards of county commissioners; county road system may be extended beyond the mileage limits fixed in statute); N.D.C.C. § 11-11-14(14) (board of county commissioners has the power to "maintain, in its discretion, all public roads and private highways and roads that are being used as part of regularly scheduled public schoolbus routes").

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A home rule county has certain powers under N.D.C.C. § 11-09.1-05, “if included in the charter and implemented through ordinances”; it may “[c]ontrol its finances and fiscal affairs [and] appropriate money for its purposes . . .” and it may “[l]ay out or vacate public grounds, and provide through its governing body for the construction, use, operation, designation, and regulation of a county road system.” N.D.C.C. § 11-09.1-05(2) and (6). Ward County has these home rule powers in its charter.<sup>1</sup> See Ward County Home Rule Charter Article 2(b) and (f) (Jan. 1, 2001).

None of the laws referred to above expressly permit a home rule or other county to pay a private consulting firm to study an intermodal transportation facility. Consequently, it must be determined whether this power is necessarily implied from the powers expressly granted.

In N.D.A.G. 2004-L-08, it was noted that

In cases where the North Dakota Supreme Court has found an incidental or implied power to exist, there appears to be a direct correlation between the express and incidental or implied power. . . . [For example, in one case,] the Court found that the general powers conferred upon a city to contract for electrical energy necessarily includes implied powers, such as the power to engage engineering and legal services to explore the feasibility of such undertaking. Anderson v. City of Hankinson, 157 N.W.2d 833 (N.D. 1968).

(Emphasis added.) Because a home rule county has the authority to include in its charter the power to lay out or vacate public roads and to construct, use, operate, designate, and regulate a county road system and because the county here is requiring the study address and identify the county road system’s potential role in the intermodal transportation facility’s development, it is my opinion that it has the implied power, if implemented through an appropriate ordinance, to expend funds for a study to determine the proposed intermodal transportation facility’s impact on the county road system. See N.D.C.C. § 11-09.1-05(2) and (6).<sup>2</sup> Likewise, a non-home rule county, in my opinion, would also

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<sup>1</sup> Although county home rule is modeled after city home rule, county home rule does not include the power to engage in an enterprise as does city home rule. Compare N.D.C.C. § 11-09.1-05 and N.D.C.C. § 40-05.1-06(10) (A home rule city has the power to “engage in any utility, business, or enterprise permitted by the constitution or not prohibited by statute.”). Consequently, prior opinions and court cases dealing with the power of a home rule city to engage in an enterprise if adequate supervisory controls are in place are not pertinent to a home rule county.

<sup>2</sup> Because the county is requiring that the study address the impact of any intermodal transportation facility on its county road system, it arguably is receiving value for its funding of the study which would counter any argument that the \$5,000 funding is a donation in violation of N.D. Const. art. X, § 18. See N.D.A.G. 2004-L-14.

have the implied authority to contribute to such a feasibility study if it required the study address and identify the county road system's potential role in the facility's development. Again, such authority may be implied from the county's authority under N.D.C.C. §§ 24-05-16 and 24-05-17 to designate and select a county road system, to extend it as determined by the county, and to acquire land for, construct, maintain, and operate a system as designated and selected by it.

In your letter you also refer to the powers of local units of government under the recently enacted port authority law. N.D.C.C. ch. 11-36. That chapter provides a number of powers for political subdivisions to engage in and support a facility such as the intermodal transportation facility you reference in your letter. See N.D.C.C. §11-36-02 (general power of port facilities operated by a port authority). Port authorities may be created either by a single political subdivision or through a regional port authority. See N.D.C.C. §§ 11-36-03 and 11-36-04. Port authorities have, inter alia, the power to plan, establish, acquire, develop, construct, purchase, enlarge, improve, maintain, equip, operate, regulate, and protect transportation, storage, or other facilities and to "provide financial and other support to organizations in its jurisdiction, including corporations whose purpose is to promote, stimulate, develop, and advance the economic development and prosperity of the jurisdiction." N.D.C.C. §11-36-08(3) and (6). Further, counties are authorized to support ports or port authorities through a county tax levy. N.D.C.C. § 11-36-15. Also, the law provides flexibility for public entities to enter into agreements with each other for joint action related to port authorities. N.D.C.C. § 11-36-16.

In your letter you indicated that it was uncertain as to whether it would be the city of Minot, the county, or a combination of these entities creating a port authority. Subsequently, however, you indicated that the city of Minot passed a resolution establishing a port authority. Although it would be possible to fund the study through a properly structured port authority, because of the uncertain role that the county may or may not play with regard to the port authority, and because I have concluded that the county may otherwise contribute to the study, it is not necessary at this time to analyze whether the county could participate in the study under the provisions of N.D.C.C. ch. 11-36.

Sincerely,

Wayne Stenehjem  
Attorney General