

**LETTER OPINION**  
**2008-L-05**

April 23, 2008

The Honorable Steven L. Zaiser  
State Representative  
802 7th Street South  
Fargo, ND 58103-2706

Dear Representative Zaiser:

Thank you for your letter raising several questions about financing the construction of a new high school by the Fargo Public School District ("District") and its power to form a building authority. For the reasons indicated below, it is my opinion that the District has the authority to finance construction of a new high school from the combined building fund tax levies provided in N.D.C.C. §§ 15.1-09-47, 15.1-09-49, and 57-15-16. It is my further opinion that a public school district, as a political subdivision, lacks the power to form a non-profit corporation building authority, although one or more individuals, age 18 or over, may do so. It is my further opinion that a non-profit corporation building authority as a separate legal entity is not generally subject to the same limitations on building and construction as a school district, and that the non-profit corporation building authority may issue bonds as part of a three-step transaction with a non-appropriation mechanism with the District.

**ANALYSIS**

You question the current financing practices and spending authority of the District, particularly as they relate to financing the construction of a new high school in the district. At the outset it should be noted that there are a number of provisions in state law that pertain solely to the District.<sup>1</sup> These special provisions are in addition to the powers and authority of other public school districts in the state. For example, the governing body of any school district in the state has authority to levy taxes for a school building fund not in excess of 20 mills, if authorized to do so by 60% of the qualified electors voting on the question at any regular or special election.<sup>2</sup> The District's governing body may levy an

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<sup>1</sup> The District is referred to as the board of education of the city of Fargo a number of times in state law. See, e.g., N.D.C.C. §§ 15.1-09-47 through 15.1-09-52. Some of the special provisions that apply only to the District include broader powers with respect to raising revenue and dealing with real property and buildings. Id. See also N.D.C.C. § 21-03-07(7).

<sup>2</sup> N.D.C.C. § 57-15-16. See also N.D.C.C. § 21-03-07(7).

additional building fund levy of 15 mills.<sup>3</sup> The District took advantage of the latter authority and established a building fund tax levy of 15 mills a number of years ago.<sup>4</sup> The proceeds of the additional 15-mill tax levy under N.D.C.C. §§ 15.1-09-47 and 15.1-09-49 may be used for the purpose of purchasing or improving sites for schools, or building, purchasing, enlarging, improving, or repairing schools and their appurtenances.<sup>5</sup>

In addition to the 15 mills levied under N.D.C.C. §§ 15.1-09-47 and 15.1-09-49, the District also utilized the more generally available building fund levy under N.D.C.C. § 57-15-16 in the amount of 11.4 mills for the school building fund.<sup>6</sup> Under state law, the proceeds raised by the 11.4-mill building fund levy may be used generally for the “erection of new school buildings or facilities.”<sup>7</sup>

Thus, the two building fund levies available to the District in the total amount of 26.4 mills may be used to finance construction of any new schools, not just the middle school construction financed in Fargo in 1991. The District is using these combined levies of 26.4 mills to fund construction of the new high school.<sup>8</sup> Although you indicate that your question may also be applicable to other schools in this state, it would be unwise to attempt to generalize what other school districts may or may not do based on what the District may or may not do because of the District’s broad powers.

Your first specific question concerns whether the District may use its general funds or general fund reserve to finance a new high school. According to information supplied by the District on its website entitled “Next High School Q&A,” as well as information from the District contained in its official statements for the two bond issues to be used to finance the construction of the new high school building, “[n]o General Fund or operational fund resources will be used to build the building.”<sup>9</sup> Thus, in this instance, it is unnecessary to

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<sup>3</sup> See N.D.C.C. §§ 15.1-09-47 and 15.1-09-49.

<sup>4</sup> See N.D.A.G. Letter to Koppang (June 7, 1988); the 15-mill building fund levy was authorized by then N.D.C.C. §§ 15-51-11 and 15-51-13, the predecessors to current N.D.C.C. §§ 15.1-09-47 and 15.1-09-49.

<sup>5</sup> N.D.C.C. §§ 15.1-09-47 and 15.1-09-49.

<sup>6</sup> This 11.4-mill levy was authorized by a special election held on December 3, 1991, as provided for in N.D.C.C. § 57-15-16, and as reflected in the legal notice dated December 10, 1991, attached to your letter.

<sup>7</sup> N.D.C.C. § 57-15-17(1)(b)(1).

<sup>8</sup> See note 9.

<sup>9</sup> [www.fargo.k12.nd.us](http://www.fargo.k12.nd.us) (select “Parents”; select “Fargo’s Next High School”; select “High School Funding Q & A”). See also Official Statement, \$10,000,000 Limited Tax School Building Bonds, Series 2007, Fargo Public School District No. 1 at p. 3, and Official Statement, \$33,000,000 Limited Tax School Building Bonds, Series 2008, Fargo Public School District No. 1 at p. 3. (“The Obligations are special obligations of the District payable from the School Building Fund Levy, which may be levied upon all taxable property located in the District at the rate of 26.4-mills.”)

determine whether general funds may be so used since the District is not financing the construction of a new high school from general funds or general fund reserves.

You next ask whether the 11.4-mill building fund levy may be used to finance construction of a new high school. As indicated above, the 11.4-mill building fund levy was instituted by the District in 1991 under the authority of N.D.C.C. § 57-15-16 and the vote of the electors in the school district at that time. Once in place, the levy continues unless specifically discontinued “at the discretion of the governing body of the school district, or upon petition of twenty percent of the qualified electors who voted in the last school election . . . and, upon a favorable vote of sixty percent of the qualified electors voting, . . . .”<sup>10</sup> Also as indicated above, state law provides that the building fund may be used for the “erection of new school buildings or facilities.”<sup>11</sup> Consequently, the 11.4-mill building fund levy, once established, may be used to finance the erection of any new school building or facility, including a new high school, until discontinued.<sup>12</sup>

As noted above, construction of the new high school is being financed both with the 11.4 mills levied under N.D.C.C. § 57-15-16 and the 15 mills levied under N.D.C.C. §§ 15.1-09-47 and 15.1-09-49. Thus, based on the foregoing, it is my opinion that the District has the authority to finance construction of a new high school from the combined building fund tax levies provided in N.D.C.C. §§ 15.1-09-47, 15.1-09-49, and 57-15-16.<sup>13</sup>

The remaining questions you ask relate to the use of a building authority by the District. The financing of the new high school by the District does not involve a building authority structure.<sup>14</sup> Even though a building authority is not being utilized in this current financing, you indicated to a member of my staff that you wished to have this office address your remaining questions regarding the use of a building authority.

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<sup>10</sup> N.D.C.C. § 57-15-16(1). Of course, the levy may only be discontinued after payment of any obligations payable from the levy. Id.

<sup>11</sup> N.D.C.C. § 57-15-17(1)(b)(1).

<sup>12</sup> The purpose of the 11.4-mill levy was to provide money for the school building fund, not to just specifically fund the construction of the middle school in 1991.

<sup>13</sup> See note 1.

<sup>14</sup> See generally Official Statement, \$10,000,000 Limited Tax School Building Bonds, Series 2007, Fargo Public School District No. 1, and Official Statement, \$33,000,000 Limited Tax School Building Bonds, Series 2008, Fargo Public School District No. 1.

You ask whether the District has the authority to form a building authority.<sup>15</sup> School districts are political subdivisions created by the state.<sup>16</sup> “A political subdivision may not form a corporation in the absence of statutory authority.”<sup>17</sup> “Before a political subdivision may act it must have specific authority to act in that subject area. ‘In defining a [political subdivision’s] powers, the rule of strict construction applies and any doubt as to the existence or the extent of the powers must be resolved against the [political subdivision].”<sup>18</sup>

“The incorporation of a separate nonprofit or for-profit corporation is not merely a manner and means of exercising powers, but is instead a power in and of itself to create a separate entity which has an independent identity. . . . [Former North Dakota non-profit corporation law] neither specifically grants nor necessarily implies the authority of a political subdivision to incorporate a non-profit corporation.”<sup>19</sup>

As noted above, building authorities are generally formed as non-profit corporations. Under North Dakota non-profit corporation law, only “[o]ne or more individuals age eighteen or more may act as incorporators of a corporation.”<sup>20</sup> Based on the foregoing, it is my opinion that a public school district, as a political subdivision, does not generally have the power to form a non-profit corporation building authority, although one or more individuals, age 18 or over, may do so. And in this specific instance, the Fargo School District Building Authority (“Authority”) was evidently incorporated by three individuals, not by the public school district.<sup>21</sup>

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<sup>15</sup> Building authorities are generally formed as non-profit corporations. Typically, a building authority will sell bonds, acquire property, construct a building, and lease the building to a political subdivision. The lease payments made to the building authority are then used to pay debt service on the building authority’s bonds. If certain federal tax law requirements are met, the bonds issued by a non-profit building authority may be issued on a federally tax-exempt basis. See Rev. Rul. 63-20, 1963-1 C.B. 24. Assuming all lease payments are made as scheduled, there are often provisions allowing for the facility to be sold to or acquired by the political subdivision when the bonds are paid off and the lease expires. See also Articles of Incorporation, North Dakota Nonprofit Corporation, Fargo School District Building Authority.

<sup>16</sup> Bismarck Public School District #1 v. State of North Dakota, 511 N.W.2d 247, 251 (N.D. 1994); Azure v. Belcourt Public School District, 681 N.W.2d 816, 818 (N.D. 2004).

<sup>17</sup> N.D.A.G. 2007-L-17.

<sup>18</sup> N.D.A.G. 97-F-07 (quoting Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980)).

<sup>19</sup> N.D.A.G. 97-F-07. See also 1996 Op. Att’y Gen. No. 101-96 (Mo. A.G.) (port authority as political subdivision can neither own nor organize non-profit corporation).

<sup>20</sup> N.D.C.C. § 10-33-05. See also N.D.C.C. § 10-33-29, requiring that directors of a non-profit corporation also be individuals.

<sup>21</sup> See Articles of Incorporation, North Dakota Nonprofit Corporation, Fargo School District Building Authority.

You next ask<sup>22</sup> whether a building authority is subject to the “same legal limitations on building and construction of new schools as the school board itself.”<sup>23</sup> In N.D.A.G. 97-F-07, it was noted that

A corporation is looked upon as a separate legal entity from the individuals or corporations which incorporated the new corporation. Family Center Drug Store, Inc. v. North Dakota St. Bd. of Pharm., 181 N.W.2d 738, 745 (N.D. 1970). “A corporation is not in fact or in reality a person, but is created by statute and the law treats it as though it were a person by the process of fiction, or by regarding it as an artificial person distinct and separate from its individual stockholders.” Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, 602 (N.D. 1983).<sup>24</sup>

The Authority is listed in the records of the Secretary of State’s office as a non-profit corporation incorporated on May 18, 1988.<sup>25</sup> The Authority was organized to construct and improve school buildings or fixtures and to lease the facilities to the District.<sup>26</sup> Non-profit corporations have a number of powers provided by law, including the authority to: “purchase, lease, or otherwise acquire, own, hold, improve, and use and otherwise deal in and with real or personal property, or any interest in property, wherever situated”; “sell, convey, mortgage, create a security interest in, lease, exchange, transfer, or otherwise dispose of all or any part of its real or personal property, or any interest in property, wherever situated”; and “take and hold real and personal property . . . as security for the payment of money loaned, advanced, or invested.”<sup>27</sup>

The Authority is currently leasing several facilities to the District.<sup>28</sup> The District’s obligation to pay rent is subject to annual appropriation by the school board.<sup>29</sup> If the District fails to make an appropriation to pay the rent due, possession and rights to the buildings would revert to the Authority and the bond trustee who may re-lease the facilities or foreclose any

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<sup>22</sup> You premised your final questions on whether “the Fargo School Board does have the authority to form a building authority.” Even though I have determined that it does not have that authority, I presumed you wanted your last two questions addressed.

<sup>23</sup> You do not specify what “legal limitations” to which you are referring. See, e.g., N.D.C.C. § 15.1-36-01; N.D.C.C. ch. 48-01.2. Consequently, my response is somewhat general.

<sup>24</sup> N.D.A.G. 97-F-07.

<sup>25</sup> See Articles of Incorporation, North Dakota Nonprofit Corporation, Fargo School District Building Authority.

<sup>26</sup> Id.

<sup>27</sup> N.D.C.C. § 10-33-21(4), (5), and (9).

<sup>28</sup> See note 14; id. at 16.

<sup>29</sup> Id.

mortgage.<sup>30</sup> It is my opinion that a properly incorporated non-profit corporation building authority, as a separate and distinct legal entity that acquires real property and constructs or improves buildings for lease to a school district, is not generally subject to the same limitations as a school district for the building and construction of new schools.

Finally, you ask whether a building authority may legally issue bonds to be repaid by the District's general fund or reserves or revenues from the 11.4-mill levy. As noted above, a non-profit corporation has a number of powers to deal with its property; additionally it may "make contracts and incur liabilities, borrow money, issue its securities, and secure any of its obligations by mortgage of or creation of a security interest in all or any of its property, franchises, and income."<sup>31</sup> Thus, under state law, a non-profit corporation has the authority to borrow money and issue its bonds.

Your question, however, also concerns whether the District may make payments to the Authority from its general funds and reserves or from the 11.4-mill levy. As indicated above, the District is leasing several projects from the Authority. According to the District, "[t]he lease payments of the District will be paid primarily from the General Fund of the District although the general fund levy is not pledged to the payment of the Bonds. . . . The District's obligation to pay rent is subject to annual appropriation by the School Board. There is no assurance that all such appropriations will be made."<sup>32</sup> Thus, it appears the District is not utilizing reserves or the 11.4-mill levy to make its lease payments, but rather it is making the lease payments from its general fund.

Under the law, the District "may levy taxes, as necessary for any of the following purposes: a. To purchase, exchange, lease, or improve sites for schools. b. To build, purchase, lease, enlarge, alter, improve, and repair schools and their appurtenances."<sup>33</sup> Further, "[t]he tax for purchasing, leasing, or improving sites and the building, purchasing, leasing, . . . of schools may not exceed in any one year fifteen mills on the dollar valuation of the

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<sup>30</sup> See, e.g., Official Statement, \$23,000,000 Lease Revenue Bonds, Series 2000, Fargo School District Building Authority at p. 2.

<sup>31</sup> N.D.C.C. § 10-33-21(7). See also the purposes of the Authority set out in its Articles of Incorporation: "1. To lease land and construct improvements thereon for a lease to Board of Education of the City of Fargo for school district purposes; 2. To become indebted and to execute and deliver Bonds to accomplish such acquisition and construction."

<sup>32</sup> See Official Statement, \$23,000,000 Lease Revenue Bonds, Series 2000, Fargo School District Building Authority at p. 2. See also Official Statement, \$2,150,000 First Mortgage Revenue Refunding Bonds, Series 2004, Fargo School District Building Authority at p. 2; Official Statement, \$23,005,000 First Mortgage Revenue Refunding Bonds, Series 2005, Fargo School District Building Authority at pp. 2 and 4; and Official Statement, \$3,600,000 Lease Revenue Bonds of 2006, Fargo School District Building Authority at p. 2.

<sup>33</sup> N.D.C.C. § 15.1-09-47(1).

taxable property of the city.”<sup>34</sup> In addition to the powers granted to other school boards by law, the District has the express authority to “lease houses or rooms for school purposes, lease lots or sites for schools, and fence real property” and to “build, enlarge, alter, improve, and repair schools . . . owned or leased for school purposes.”<sup>35</sup> Thus, under the law, the District has the authority to lease school facilities and also to levy a building fund tax for such purpose up to 15 mills.

While the District could have chosen to finance the projects constructed by the Authority through the issuance of general obligation bonds under N.D.C.C. ch. 21-03,<sup>36</sup> there are other means of financing school construction and improvements. In 1988,<sup>37</sup> the North Dakota Supreme Court, in analyzing a three-step sale-leaseback-purchase financing transaction by a city similar to the use of a building authority,<sup>38</sup> noted that the general powers of a city do not necessarily provide the exclusive method for borrowing money.<sup>39</sup> The court noted that in addition to general obligation borrowing authority under N.D.C.C. title 21, cities also have the authority to convey, sell, or dispose of municipal property, construct public buildings, and specifically authorize a municipal governing body to acquire real property by lease or purchase.<sup>40</sup>

The financing plan in Haugland involved the improvement of a civic center, library, and a water main, the transfer of city properties to a trustee, and the subsequent leaseback of the improved property with annual lease payments sufficient to pay principal and interest on bonds issued by the trustee. The leaseback to the city was subject to cancellation under a non-appropriation clause similar to that employed in the present situation. Revenues from several city taxes were expected to be sufficient to make the annual payments but, as with the present situation, the city did not pledge these tax revenues.<sup>41</sup> The court concluded that “the three-step sale-leaseback-purchase transaction employed by the City to fund the construction of improvements to its civic center, library and a watermain, with a nonappropriation mechanism to make clear that its general taxing

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<sup>34</sup> N.D.C.C. § 15.1-09-49; see also Anderson v. City of Fargo, 186 N.W. 378, 380 (N.D. 1922) (board of education of the city of Fargo as a body corporate is exclusively charged with control and management of all the school property and has full and complete dominion over it).

<sup>35</sup> N.D.C.C. § 15.1-09-50(2) and (3).

<sup>36</sup> See N.D.C.C. §§ 15.1-36-04, 21-03-06(4), and 21-03-07(7).

<sup>37</sup> Haugland v. City of Bismarck, 429 N.W.2d 449 (N.D. 1988).

<sup>38</sup> A building authority financing also generally is a three-step transaction, except that it may be a lease-leaseback-purchase transaction or a sale-leaseback-purchase transaction. See note 15.

<sup>39</sup> Haugland at 453.

<sup>40</sup> Id.

<sup>41</sup> Id. at 450-51.

powers are not obligated, was a reasonable exercise of the general powers granted [to the city].<sup>42</sup>

Similarly, in the present case, N.D.C.C. ch. 21-03 is not the exclusive method for financing a project. Like the city in Haugland, the District has the authority to convey, sell, and dispose of school property.<sup>43</sup> In addition, it has the authority to construct school buildings.<sup>44</sup> The District also has the authority to acquire real property by lease or purchase.<sup>45</sup> Thus, it is my further opinion that, like the city in Haugland, the Authority's three-step transaction with a non-appropriation mechanism was a reasonable exercise of the general powers granted to the District, and use of the non-pledged general fund money to make lease payments is lawful.

Sincerely,

Wayne Stenehjem  
Attorney General

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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.<sup>46</sup>

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<sup>42</sup> Id. at 454.

<sup>43</sup> N.D.C.C. §§ 15.1-09-52, 15.1-09-33(3), (4), (5), and (6), and 15.1-09-50(2) and (3).

<sup>44</sup> N.D.C.C. §§ 15.1-09-47(1), 15.1-09-33(4), and 15.1-09-50(3).

<sup>45</sup> N.D.C.C. §§ 15.1-09-47(1), 15.1-09-33(4) and (6), and 15.1-09-50(2) and (3).

<sup>46</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).