

**LETTER OPINION
2010-L-16**

December 28, 2010

Ms. Elizabeth L. Pendlay
Divide County State's Attorney
PO Box 289
Crosby, ND 58730-0289

Dear Ms. Pendlay:

Thank you for your letter requesting my opinion on whether a county commission may make a direct donation to a private hospital located within the county for the purpose of assisting in financing the construction of an affiliated clinic, or if that is not lawful, whether the county may indirectly make a donation for the clinic construction through the local hospital district. Consistent with prior guidance issued by this office, it is my opinion that the county commission may not make a direct contribution to a private hospital located in the county absent a statute authorizing such a donation. It is my further opinion that under the circumstances here, the county commission may not indirectly make a donation to the hospital through the local hospital district.

ANALYSIS

You indicate that the Divide County Commission would like to make a donation to a private hospital located within the county for the purpose of assisting with the costs of constructing a new affiliated clinic, but you question the legality of such a direct donation. You further ask that if a direct contribution to the hospital is not lawful, whether the county commission may make a contribution to the local hospital district with the funds being passed through to the hospital to finance its new clinic.

In your letter you refer to N.D. Const. art. X, § 18,¹ which is commonly called the anti-gift provision and to N.D. Const. art. VII, § 2.² You indicate that the donation might be justified

¹ "The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation." N.D. Const. art. X, § 18.

² "The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law." N.D. Const. art. VII, § 2.

as reasonable support of the poor within the meaning of N.D. Const. art. X, § 18, but point out the lack of an authorizing statute as would seem to be required under N.D. Const. art. VII, § 2. Your first question was addressed in a prior opinion issued by this office³ which concluded that:

[A] political subdivision may not make a donation to a private local hospital without specific statutory authority or a statute from which that authority can be necessarily implied. Even though a political subdivision may give donations for support of the poor without engaging in an industry, business, or enterprise under N.D. Const. art. X, § 18, N.D. Const. art. VII, § 2 requires specific statutory authority, or a statute from which that authority can be necessarily implied before such donations may be made. Merely construing a donation to a private hospital as one that can be attributed to be for the reasonable support of the poor is not a sufficient basis upon which to make such a donation.⁴

Consistent with the prior guidance issued by this office, it is my opinion that a county may not directly donate county funds to a local private hospital for the purpose of constructing a clinic, absent statutory authority for such a purpose.

You next ask whether the county commission may indirectly contribute funds to a local private hospital for financing the construction of a clinic by means of a pass-through donation to the local hospital district. Hospital districts are governed by N.D.C.C. ch. 23-30. A hospital district is defined as being a “district organized pursuant to section 23-30-02 for the purpose of supporting one or more of the following types of institutions: a

³ See N.D.A.G. Letter to Isakson (Sept. 29, 1992). This opinion and N.D.A.G. Letter to Belisle (Apr. 7, 1992) clarified an issue left open in N.D.A.G. Letter to Ratcliff (Nov. 15, 1991) that specific statutory authority (or necessarily implied authority) must exist in order for a county to loan its funds to a private hospital.

⁴ Id.; see also N.D.A.G. 2003-L-51 (“While Article X, section 18 does allow a political subdivision to make donations in support of the poor, this office has previously opined that Article VII, section 2 of the North Dakota Constitution tempers that ability by requiring specific statutory authority before doing so. E.g., N.D.A.G. Letter to Larson (Sept. 25, 1987). Because that statutory authority does not currently exist, a city cannot make a donation in support of the poor.”); N.D.A.G. 2000-L-153 (“[A]ny authority for a county to use money to make internal improvements, to make donations for the support of the poor, or to distribute money pursuant to an authorized industry, enterprise, or business, must be derived from state law passed by the North Dakota Legislature. . . . I am not aware of any state law that would authorize a county commission to donate money to the Devils Lake Improvement Association.”).

hospital, an intermediate health care facility, and a nursing home,”⁵ each of which provides inpatient care.⁶

There is no specific provision in N.D.C.C. ch. 23-30 that permits a hospital district to support a clinic associated with a community hospital. The term “clinic” is not defined in chapter 23-30 and will therefore be given its plain ordinary meaning.⁷ “Clinic”⁸ means “[a] medical establishment run by several specialists . . . that deals chiefly with outpatients.”⁹ Based on its plain meaning, a clinic does not meet the definition of a hospital, intermediate health care facility or nursing home as set out in the pertinent statutory definitions.¹⁰ Thus, it is questionable whether a hospital district has authority to accept funds for the purpose of supporting a clinic, as opposed to a hospital, intermediate care facility, or nursing home. When the Legislative Assembly has authorized tax levies to support community clinics, the Legislature has given express authority for that support.¹¹

While a hospital district does have the apparent authority to accept donations and contributions, nothing in N.D.C.C. ch. 23-30 explicitly permits a county to make donations or contributions to a hospital district. Even if I were to conclude that a hospital-based clinic came within the definition of a hospital for the purposes of chapter 23-30, the mechanism for the support of a hospital district is not a donation. Rather, this support structure comes from the authority of the board of directors of the hospital district to incur indebtedness on behalf of the hospital district and to certify the probable expense for operating the hospital district to the county auditor for the purpose of levying a tax for support of the hospital district both as authorized by chapter 23-30.¹²

Moreover, “[T]he law does not permit by indirection what cannot be accomplished directly.”¹³ As I previously noted in an analogous context:

⁵ N.D.C.C. § 23-30-01(2).

⁶ “Inpatient” means a patient who has been admitted to a medical institution as an inpatient . . . and who (1) [r]eceives room, board and professional services in the institution for a 24 hour period or longer.” 42 C.F.R. § 440.2(a); “[i]ntermediate care facility” or “ICF/MR services” means “those items and services furnished in an intermediate care facility for the mentally retarded” 42 C.F.R. § 440.150.

⁷ N.D.C.C. § 1-02-02.

⁸ The American Heritage Dictionary 281 (2d coll. ed. 1991).

⁹ “Outpatient” means “a patient of an organized medical facility, or distinct part of that facility who is expected by the facility to receive and who does receive professional services for less than a 24-hour period” 42 C.F.R. § 440.2(a).

¹⁰ N.D.C.C. § 23-30-01(1), (3), and (4).

¹¹ See N.D.C.C. § 23-18.1-01 (authorizing the establishment of a county or community clinic association); and N.D.C.C. § 23-18-02 (authorizing an election to give county commissioners authority to levy a tax in aid of a county or community clinic).

¹² See N.D.C.C. § 23-30-06(5) and N.D.C.C. § 23-30-07.

¹³ N.D.A.G. 2005-L-38, quoting Langenes v. Bullinger, 328 N.W.2d 241, 246 (N.D. 1982).

Since it is beyond dispute that a county could not directly provide the proceeds of the tax levy to a local sectarian hospital, neither may it do so indirectly by means of channeling the tax levy proceeds through an entity recognized by the county as a nonprofit county hospital association, particularly where, as here, the sectarian local hospital would actually be using the equipment financed by the tax levy.¹⁴

Likewise, in this instance, since I have determined that absent statutory authority to do so, a county may not directly contribute to the financing of a clinic for a local hospital, neither may it do so indirectly by means of channeling the funds through a hospital district.

Thus, it is my further opinion that a county commission may not indirectly contribute funds to a hospital using a pass-through donation to a hospital district to finance the construction of an affiliated clinic, absent a statute permitting such a donation.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

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.¹⁵

¹⁴ N.D.A.G. 2005-L-38.

¹⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).