

LETTER OPINION
2011-L-08

August 11, 2011

Ms. Renae Korslien
General Manager
North Dakota State Fair Association
PO Box 1796
Minot, ND 58702-1796

Dear Ms. Korslien:

Thank you for your letter requesting my opinion on whether the North Dakota State Fair Association is a state agency, and further asking about the relationship between the North Dakota State Fair Association and a private non-profit corporation named the North Dakota State Fair Foundation. Based on the following discussion, it is my opinion that the North Dakota State Fair Association is an agency of the state of North Dakota and it is my further opinion that the North Dakota State Fair Foundation is a private non-profit corporation that exists to provide charitable support for the North Dakota State Fair Association's public functions, but is not itself a state agency.

ANALYSIS

I.

Your question arises in the context of whether the North Dakota State Fair Association is an agency of state or local government for purposes of eligibility for federal assistance for public entities, which is a Federal Emergency Management Agency (FEMA) program.¹ Neither the Act under which FEMA operates² nor the federal regulations promulgated pursuant to the Act³ defines what is a state agency. Therefore, state law will be the determinative factor in whether the North Dakota State Fair Association is a state agency.

In an early case, the North Dakota Supreme Court determined that the North Dakota Mill and Elevator Association was an agency of the state because it was created by the state

¹ See generally 44 C.F.R. § 206.220 et seq.

² The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 et seq.

³ 44 C.F.R. § 206 et seq.

Legislature “to accomplish purposes that have been defined as public by the Legislature.”⁴ Similarly, the North Dakota State Fair Association was created by the state Legislature “for the purpose of conducting an annual North Dakota state fair and for the purpose of exhibiting at such fair the agricultural, stockbreeding, horticultural, mining, mechanical, industrial, and other products and resources of this state.”⁵ In fact, this statute’s statement that the Legislature created the North Dakota State Fair Association for a public purpose was sufficient for the North Dakota Supreme Court to find “[t]he Association is a statutory agency created under Section 4-02.1-01, N.D.C.C., to conduct an annual state fair”⁶

The strongest argument that the North Dakota State Fair Association is a state agency is found in three statutes. One requires that the State Fair operating fund must be maintained in the North Dakota state treasury,⁷ the second requires that the Attorney General be the legal advisor for the State Fair Association,⁸ and finally a third statute requires the title to all property obtained for use in the operation of the State Fair Association be obtained or conveyed in the name of the State of North Dakota and written instruments be executed in the name of the State of North Dakota.⁹ These statutory provisions demonstrate that the North Dakota State Fair Association is a state agency because none of these provisions could be applicable to a private entity.

Further evidence that the North Dakota State Fair Association is a state agency can be found throughout its governing chapter, N.D.C.C. ch. 4-02.1. Membership in the State Fair Association is determined by statute, including a requirement that a majority of members must be of a classification of county residents chosen by governmental entities such as the board of county commissioners and the county agent, or by quasi-governmental entities such as county fair boards.¹⁰ The compensation of members is set by statute.¹¹ Meeting requirements are set by several statutes.¹² State law also addresses vacancies and

⁴ State v. Bonzer, 279 N.W. 769, 770-71 (N.D. 1938).

⁵ N.D.C.C. § 4-02.1-01.

⁶ Bolinske v. North Dakota State Fair Association, 522 N.W.2d 426, 428 (N.D. 1994).

⁷ N.D.C.C. § 4-02.1-15.

⁸ N.D.C.C. § 4-02.1-19 (the Attorney General is required to appoint an assistant attorney general or a special assistant attorney general to represent the North Dakota State Fair Association).

⁹ N.D.C.C. § 4-02.1-17.

¹⁰ N.D.C.C. § 4-02.1-03. County fair boards are private nonprofit corporations that are approved by a county commission to conduct a county fair. N.D.C.C. §§ 4-02-08, 4-02-26.

¹¹ N.D.C.C. § 4-02.1-05.

¹² N.D.C.C. §§ 4-02.1-04 (time, place, and notice of meeting), 4-02.1-06 (requirement that the affairs of the State Fair Association must be managed by its board of directors, and setting each director’s term of office), 4-02.1-07 (requiring a regular annual meeting, and permitting special meetings upon specific notice requirements), 4-02.1-08 (specifying the requirements of a quorum of the board for business to be conducted).

removal of officers,¹³ specifying the numbers and titles of officers as well as their duties.¹⁴ The State Fair Association is to make arrangements with local law enforcement agencies for the provision of law enforcement personnel,¹⁵ and the Association is further charged with compiling and filing an annual report with the office of the state Agriculture Commissioner.¹⁶ These provisions strongly support a conclusion that the North Dakota State Fair Association is a state agency.

However, it may be possible that some confusion has entered into the topic by the Legislature's statement that the "state fair association possesses all the rights, privileges, and liabilities pertaining to corporations under the corporation laws of this state."¹⁷ While this may lead some to question whether the State Fair Association is a corporation, this statutory grant of authority is specifically limited by the terms specified in N.D.C.C. ch. 4-02.1, which is the chapter governing the State Fair Association.¹⁸ Any confusion about the Legislature's choice in defining the rights of the North Dakota State Fair Association through incorporating by reference North Dakota's corporation laws is dispelled by other provisions in this same statute. In particular, this same statute requires that the North Dakota State Fair Association may contract in its own name "but as an agency of the state" and it is also required to make all of its purchases pursuant to the purchasing laws of this state applicable to state agencies through the Office of Management and Budget, except when exempted under law by the director of that office.¹⁹ Therefore, there is nothing in the statute defining the State Fair Association's powers as being those pertaining to corporations which would contradict the conclusion that the North Dakota State Fair Association is a state government agency.²⁰

¹³ N.D.C.C. §§ 4-02.1-09, 4-02.1-10.

¹⁴ N.D.C.C. § 4-02.1-11.

¹⁵ N.D.C.C. § 4-02.1-20.

¹⁶ N.D.C.C. § 4-02.1-26.

¹⁷ N.D.C.C. § 4-02.1-16.

¹⁸ Id.

¹⁹ Id.

²⁰ This is not the only instance where the Legislature has given corporate-type powers to a North Dakota state agency. The North Dakota Mill and Elevator Association, which has been determined to be a state agency in State v. Bonzer, 279 N.W.2d at 770, likewise has a corporate powers provision similar to the North Dakota Fair Association. See N.D.C.C. § 54-18-02 ("The business of the association, in addition to other matters specified in this chapter, may include anything that any private . . . corporation . . . lawfully may do in conducting a similar business except as restricted by the provisions of this chapter."); see also N.D.C.C. § 6-09-02 (the Bank of North Dakota may do "anything that any bank or bank holding company lawfully may do, except as it is restricted by the provisions of this chapter.").

Therefore, it is my opinion that the North Dakota State Fair Association is an agency of the State of North Dakota.

II.

The North Dakota State Fair Foundation is a non-profit corporation organized under North Dakota state law.²¹ Its purposes include supporting and making distributions to the North Dakota State Fair Association²² and accepting property to be used to support the North Dakota State Fair Association.²³ There is no evidence indicating that the North Dakota State Fair Foundation was created by the Legislature, nor was it created by any state agency.

There are several private non-profit corporations organized for promoting charitable or educational purposes in support of agencies of the State of North Dakota. For example, this office has previously addressed issues that arise when a private non-profit corporation that was organized to support an educational institution has entered into certain contractual relations with the institution.²⁴ There are other private non-profit corporations that were formed to support state agencies; for example, the State Historical Society of North Dakota Foundation is a private non-profit corporation that supports the State Historical Society's projects and programs. The North Dakota State Fair Foundation fits within the general pattern of a private non-profit corporation that exists to raise charitable contributions on behalf of state agencies to supplement legislative appropriations for public purposes.

²¹ See Articles of Incorporation on file with the North Dakota Secretary of State (May 13, 2010).

²² The North Dakota State Fair Association is authorized to accept gifts and donations, and has a standing appropriation to use such funds for the purposes provided in chapter 4-02.1, N.D.C.C., which is the chapter governing the North Dakota State Fair Association. N.D.C.C. § 4-02.1-15.

²³ Articles of Incorporation of North Dakota State Fair Foundation, art. 3 (May 13, 2010).

²⁴ See generally N.D.A.G. 2000-L-62 (examining contractual relationship between higher education institutions and their respective alumni organizations), N.D.A.G. 2003-L-47 (addressing questions concerning whether a decedent may have intended to will property to the University of North Dakota or the University of North Dakota Foundation), N.D.A.G. 2006-O-01 (determining whether a contractual agency relationship existed between the North Dakota State University and the North Dakota State University Research Foundation for purposes of the open records laws), and N.D.A.G. 2009-O-08 (determining whether the University of North Dakota Alumni Association and the University of North Dakota Foundation had a contractual relationship with the University of North Dakota sufficient to be agents of the University of North Dakota for purposes of the open records laws).

LETTER OPINION 2011-L-08
August 11, 2011
Page 5

Therefore it is my further opinion that the North Dakota State Fair Foundation is a private non-profit corporation that exists to provide charitable support for the North Dakota State Fair Association's public functions, but is not itself a state agency.

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.²⁵

²⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).