

LETTER OPINION
2014-L-07

May 13, 2014

The Honorable Ray Holmberg
State Senator
621 High Plains Court
Grand Forks, ND 58201-7717

Dear Senator Holmberg:

Thank you for your letter asking whether the Grand Forks Public School District may contribute to its building fund both through a voter-approved building fund levy of ten mills, as well as from a partial allocation and transfer of mills from a voter-approved unlimited general fund mill levy. Based on the following, it is my opinion that the Grand Forks Public School District may contribute to its building fund both from a voter-approved ten-mill building fund levy, as well as from a partial allocation and transfer of mills from the unlimited general fund levy also approved by the voters.

ANALYSIS

You indicate the voters in Grand Forks Public School District No. 1 passed a ten-mill building fund levy in order to fund its building fund in 1948.¹ You indicate that voters also approved an unlimited general fund levy in 1961 and 1969.² You ask whether the district may transfer mills from the unlimited general fund levy to the building fund. State law provides, in part:

¹ See N.D.C.C. § 57-15-16.

² Although you framed your question in terms of a school district transferring mills from its unlimited general fund levy to its building fund, it is not determinative for this analysis whether the school district is allocating and transferring cash proceeds derived from its unlimited general fund levy or transferring mills (representing an equivalent amount of cash proceeds) to the district's building fund. Either way, the origin of the funding being transferred to the building fund (in addition to the ten-mill building fund levy) would be derived from the same source, i.e., the unlimited general fund levy, and would be used for the same purpose of financing school construction, improvements, repairs, etc. See N.D.C.C. § 57-15-17(1)(b). To analyze this question differently, depending on whether the transfer involves cash proceeds or an equivalent cash value of mills, could be seen as elevating form over substance. See N.D.C.C. § 31-11-05(19) ("The law respects form less than substance."). You apparently do not question the transfer of cash from the general fund to the building fund.

The governing body of any school district shall levy taxes annually for a school building fund, not in excess of twenty mills, which levy is in addition to and not restricted by the levy limitations prescribed by law, when authorized to do so by sixty percent of the qualified electors voting upon the question at a regular or special election in any school district. The governing body of the school district may create the building fund by appropriating and setting up in its budget for an amount not in excess of twenty percent of the current annual appropriation for all other purposes combined, exclusive of appropriations to pay interest and principal of the bonded debt, and not in excess of the limitations prescribed by law. . . . Any portion of a levy for a school building fund which has not been allocated by contract with the state board of public school education must be allocated by the governing body pursuant to section 57-15-17. Upon the completion of all payments to the state school construction fund, or upon payment and cancellation or defeasance of the bonds, the levy may be 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, the question of discontinuance of the levy must be submitted to the qualified electors of the school district at any regular or special election and, upon a favorable vote of sixty percent of the qualified electors voting, the levy must be discontinued. . . .³

There has been a fairly long line of opinions issued by this office discussing this provision of law or related ones dealing with similar types of funding transfers. In a 1945 opinion issued by this office, the Attorney General noted:

Chapter 311 of the Session Laws of 1945 authorizes school districts to establish a building fund – two methods are provided. One method is by submitting the matter to a vote of the electors. With that method we are not concerned for this purpose. The other method provides that the governing body of such school district may create such building fund by appropriating and setting up in its budget for such an amount not in excess of twenty percent of the current annual appropriation for all other purposes combined, exclusive of appropriations to pay interest and principal of the bonded debt, and not in excess of the limitations prescribed by law.

³ N.D.C.C. § 57-15-16 (emphasis added). See also N.D.C.C. § 57-15-17(1)(a) (“All revenue accruing from appropriations or tax levies for a school district building fund together with such amounts as may be realized for building purposes from all other sources must be placed in a separate fund known as a school building fund and must be deposited, held, or invested in the same manner as the sinking funds of such school district or in the purchase of shares or securities of federal or state-chartered savings and loan associations within the limits of federal insurance.”).

It will thus be seen that a school district has the power and authority under the chapter quoted to establish a building fund which may equal a sum not in excess of twenty percent of the current annual appropriation for all other purposes combined, provided that the same would not be in excess of the limitations prescribed by law.

. . . .

Stated in a different way, if the [sinking fund balance to be transferred] now remaining in the sinking fund does not exceed twenty percent of the current annual appropriation for all other purposes combined, and which, if added to the general levy, is not in excess of the limitations prescribed by law, then I see no valid reason why the said sum . . . may not be transferred from the sinking fund, upon which there is no longer any claim, to the building fund.⁴

In later correspondence, this office was asked whether a school district may transfer money from a general fund to a sinking fund to pay off bonded indebtedness. The letter states:

General Fund moneys can be used for any legitimate (sic) school purpose including the payment of bonds the proceeds of which were used to construct school buildings. The only limitation is a practical one, i.e., that sufficient moneys be left in the General Fund to carry on the normal operations of the school district.⁵

Similarly, in 1994, the question was raised whether a city may transfer general fund money to a job development authority to be used to encourage and assist in the development of employment within the city subject only to general fund spending limitations. In that instance, there was a four-mill levy limitation for city job development authorities. The opinion concluded by noting that "a city can budget annually for job development authority projects when revenues will be derived from general fund taxes and not a job development tax and that the amount so budgeted is not limited by the cap on a job development authority tax."⁶

In a more recent Attorney General opinion, several questions were raised about financing construction of a new high school by the Fargo Public School District. In that instance, it was the position of the school district that the construction of the high school was being financed with a combination of 11.4 mills levied under N.D.C.C. § 57-15-16 and 15 mills

⁴ N.D.A.G. 45-261 (emphasis added).

⁵ N.D.A.G. Letter to Orser (May 26, 1966).

⁶ N.D.A.G. 94-F-01. This opinion was supported in part by N.D.A.G. Letter to Thompson (Apr. 15, 1992), determining that a county job development authority law allowing for the deposit of other revenues in the job development authority fund was broad enough to include a transfer of legally available general fund moneys by a board of county commissioners to the job development authority fund.

levied under two financing statutes unique to the Fargo district.⁷ The opinion concluded that the school district had the authority to finance the construction from the combined building fund tax levies, i.e., from the separate sources of funding provided in those three statutes and not just one.⁸ Similarly, in the current situation, the Grand Forks Public School District would have the authority to finance building fund projects both through a ten-mill building fund levy as well as additional mills, or cash proceeds from a prior levy, to be transferred from the unlimited general fund levy. Both sources are being funneled through the building fund and both have been independently authorized by the voters and by law.

The North Dakota Supreme Court has likewise weighed in on this subject. In Peterson v. McKenzie Cnty. Pub. Sch. Dist. No. 1, 467 N.W.2d 456 (N.D. 1991), the question on appeal was whether the school board had the authority to transfer money from its general fund to its building fund. The court concluded that “a school board may lawfully transfer money from its general fund to its building fund”⁹ The court also noted that while N.D.C.C. § 57-15-14 sets mill levy limitations, it does not address the budgeting or transferring of general fund money.¹⁰ Similarly, in discussing the statute in question, the court stated the following:

Section 57-15-16(1) permits a school board to levy extra taxes for a school building fund if authorized to do so by sixty percent of the qualified electors in a school district election. It does not require the school board to levy taxes for such a fund. Rather than limiting the authority of the school board, it expands the board’s taxing authority. Section 57-15-16 does not preclude the use of general fund money for building purposes.¹¹

The court further noted that language in a related statute¹² “is broad enough to encompass a transfer of money from a school district’s general fund. It recognizes that a school building fund may be funded from ‘other sources’ than a specific appropriation or tax levy for a school building fund.”¹³

In the question at hand, the electors in the district authorized the establishment of a school building fund and funded it with a levy of ten mills in 1948. Because the voters also authorized the unlimited general fund levy in 1961 and 1969, that authorization provides another source of funding for the district’s building fund. These two sources of funding are separate and independently authorized. As determined by the North Dakota Supreme

⁷ N.D.C.C. §§ 15.1-09-47 and 15.1-09-49.

⁸ N.D.A.G. 2008-L-05.

⁹ Peterson v. McKenzie Cnty. Pub. Sch. Dist. No. 1, 467 N.W.2d 456, 457 (N.D. 1991).

¹⁰ Id. at 459.

¹¹ Id. at 461.

¹² N.D.C.C. § 57-15-17(1)(a).

¹³ Peterson, 467 N.W.2d at 461.

Court and opinions from this office, moneys derived from an unlimited general fund authority may be transferred to the building fund for the purpose of financing school construction. If moneys from an unlimited general fund levy may be transferred to a building fund, it follows that mills representing an equivalent amount of money may also be transferred to the building fund.

The North Dakota Supreme Court also noted the following in the context of litigation surrounding the state school construction fund:

We are influenced in this holding by the testimony that the Board has consistently construed the statute to permit such long-term building plans, including gymnasiums, since the inception of the Act and has made many loans in accordance with that interpretation, without any change in the law by the Legislature.¹⁴

Likewise, in this instance, the Grand Forks Public School District has, for a long period of time,¹⁵ engaged in the partial allocation and transfer of funds from the unlimited general fund levy to the building fund through its interpretation of applicable law and legal opinions, and the Legislature has not changed the law to modify or prohibit that method of financing by the district.

Based on the foregoing, it is my opinion the Grand Forks Public School District may lawfully contribute to its building fund both from a 1948 voter-approved ten-mill building fund levy and from a partial allocation and transfer of mills from the unlimited general fund levy approved by the voters in 1961 and 1969.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pab

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.¹⁶

¹⁴ Halldorson v. State Sch. Const. Fund, 224 N.W.2d 814, 821 (N.D. 1974).

¹⁵ In the present case, a school district resolution provided to this office, appropriating funds to the building fund and pledging the building fund for payment of bonds, recites that the school district has bolstered its building fund by the transfers of mills from 1981 to the present time, a period of over 30 years. During that time, its position has not been questioned, until now.

¹⁶ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).