

**OPINION  
73-122**

March 7, 1973           (OPINION)

Mr. James E. Sperry  
Superintendent  
State Historical Society  
Liberty Memorial Building  
Bismarck, ND 58501

Dear Mr. Sperry:

This is in response to your letter of February 20, 1973, with regard to county historical societies.

You inform us that you have been contacted by members of the Board of Directors of a named county historical society for advice in broadening their activities to include financial support to several museums in the county. You indicate that their county historical society was originally organized under the name of "Frontier Museum Inc." You indicate that the name has now been changed to "\_\_\_\_\_ " (deletion ours) "County Historical Society". You state that it is now their wish to apportion funds received from the county toward operating their former museum plus two additional museums and yet retain a degree of local autonomous control over each. You state that the problem seems to be in devising a way which can accomplish this within the authority of the law and to the satisfaction of the county commissioners.

You inform us that a state's attorney's opinion has been issued relative to the matter, and enclose a copy of same. You inform us that you do need to have several points clarified in order to offer sound advice on organizational and policy matters to the various county societies in the state and carry out the functions of your organization as relates to this section of the code. You request our opinion on the following:

1. Although we advise as a matter of sound policy in historical operations not to accept loans of museum items except under unusual circumstances a number of county historical societies and local museums have not adopted such a policy. Relative to section 11-11-53 of the North Dakota Century Code and specifically section 11-11-53.1, does the practice of accepting temporary loans of items by a museum preclude them from receiving county funding or appear to be a violation of the intent of the law on the part of those museums now receiving county funding and following this practice?
  
- . If a county historical society is to apportion county funds to other museums in the county under the provisions of chapter 11-11-53, does it appear that title to all property owned by these museums must vest in the name of the county society or would it seem permissible for each museum to retain separate legal structures and be linked to the county society through an affiliation agreement or similar

arrangement?

3. Chapter 11-11-53 authorizes funds either from the general fund of the county or from a levy to in general defray the expense of carrying on historical work in the county. It also provides in subsection 3 that the funds authorized shall not be expended until among other things the society has contracted with the board of county commissioners in regard to the manner in which such funds received will be expended and the services to be provided. Am I correct in assuming that the purposes for which county funds may be expended for historical work in a county is limited only by the agreement with the county commissioners or such other limitations governing expenditures of county funds as might be covered by law and can be used for broad and varied historical purposes?
- . Relative to the previous question, would direct grants of county funds to museums located within the county and not under the governing authority or ownership of the county historical society be permissible by law, or likewise a contract for operation of a museum or other historical services between the county society and other organizations or individuals be permissible if approved by the board of county commissioners?"

We should probably commence this dissertation with the quotation of subsections 9 and 12 of section 11-16-01 of the North Dakota Century Code as follows:

"11-16-01. DUTIES OF THE STATE'S ATTORNEY. The state's attorney is the public prosecutor, and shall:

\* \* \*

9. Give, when required and without fee, his opinion in writing to the county, district, township, and school district officers on matters relating to the duties of their respective offices;

\* \* \*

2. Act as legal adviser of the board of county commissioners, attend the meetings thereof when required, and oppose all claims and actions presented against the county which are unjust or illegal;

\* \* \*"

On this basis, the state's attorney of the county is the official legal adviser of county officials on matters relating to the duties of their offices. While certainly, the duties of your office and the affiliation provisions of section 11-11-53 of the 1971 Supplement to the North Dakota Century Code would allow you to assist in problems of the county historical societies and perhaps prepare general guidelines, affiliation agreement, etc., with them, the official legal adviser of county officials with regard to county historical

matters remains with the state's attorney of the county, not your office. Likewise, while we would see no problem with your distributing opinions and other materials received from this office to county historical societies or county officials, the state's attorney of the county is in the last analysis the official legal adviser of the county officials concerned. The state's attorney of the county is, of course, entitled in proper cases to request the opinion of this office on matters relating to his county's affairs, however, this again does not abrogate the above quoted provisions of section 11-16-05 of the North Dakota Century Code.

In response to your first question, subsection 1 of section 11-11-53 does permit the board of county commissioners to appropriate not exceeding \$5,000.00 from the county general fund to be paid to the historical society of the county and used generally for historical work within the borders of the county. Subsection 2 thereof further permits the board of county commissioners to levy a tax for the promotion of historical works within the borders of the county, and to it general defray the expense of carrying on historical work in the county. However, even though such funds may be paid to the county historical society, and even though such county historical society may act on behalf of the county within its jurisdiction, we do note that said section 11-11-53 does indicate that the county historical society there specified will be a corporate entity, with certain historical responsibilities, particularly with regard to county historical funds, nothing therein indicates that such county historical society derives its powers and duties solely from the provisions of chapter 11-11 of the North Dakota Century Code. On such basis while we would recognize your authority to "advise" county historical societies against adopting a policy of acceptance of loans of museum items, we find nothing in the statutes that would prevent them from disregarding such advice and adopting a policy of acceptance of loans of museum items. We are not suggesting that the county itself could be held responsible for the return or replacement of lost or damaged loaned materials, merely that as a separate corporate entity, the corporation does have the power to borrow or lend historical materials, if such authorization is included in its charter or bylaws, or both. We would likewise assume that the provisions of section 11-11/53.1 of the 1971 Supplement to the North Dakota Century Code would not apply to the "res" of loaned property, only to the bailee's interest therein.

In response to your second question, we do not believe that a county historical society would be in a position to "apportion" county funds to other museums in the county, however, dependent, of course, upon their contract with the county through its board of commissioners, we would see nothing against their contracting with other museums of the county for historical services to the benefit of the people of the county, and expending county funds in payment of the obligations created by such contracts. It would seem permissible for each museum in the county to retain separate legal structures, and title to its own property, even though it has received or would receive in exchange for county historical services, moneys, raised by the county. If desirable, we would see no legal objection to other museums to be linked to the county historical society through affiliation agreement or similar arrangement. Even though another museum had obtained county raised funds in payment for service

rendered, there would be no requirement that all property owned by such museum would vest in the name of the county society.

In response to your third question we would agree basically with your premise that the purposes for which county funds may be expended for historical work in a county is limited only by the agreement with the county commissioners or such other limitations governing expenditures of county funds as might be covered by law, and same can be used for broad and varied historical purposes. On this point we should also mention, though, that section 11-11-53 does of itself limit the purposes and uses of the county funds available for county historical purposes. In this same line we might also mention that the principles of taxation generally and other authority would prevent arbitrary or discriminator favoring or disfavoring of segments of the population or areas within the county historical society's limits. Provision for such limitation would probably in the usual instance be written into the contract between county historical society and the county. Even in the absence of such provisions in the contract, we would assume that such limitations would be imposed upon these funds.

In response to your fourth question, section 11-11-53 would not authorize "grants" of county funds, without consideration to either the county historical society or other organizations. Assuming, however, you are referring to contractual expenditures, rather than to gifts made without consideration, there would appear to be a distinction between funds raised under subsection 1 and funds raised under subsection 2 of said section 11-11-53. Under the provisions of subsection 1, the funds are "to be paid to the historical society of the county and used" for specified purposes. We would incline to the view that this language implies that all of the funds are to be paid first to the county historical society and by them used as thereafter specified.

Subsection 2 of said section 11-11-53 does not require payments of the funds raised thereunder to the county historical society, but rather only indicates that same used for specified purposes. As one of the purposes specified is "furthering the work of the historical society of such county", we would assume that funds raised under said subsection 2 could also be paid to the county historical society to be used by them pursuant to the provisions of said section 11-11-53. Funds raised under either subsection 1 or subsection 2 of said section 11-11-53 could be used as consideration for contracts for operation of a museum or other historical services between the county society and other organizations or individuals.

In regard to all of the foregoing information and material, we note that the county general fund and the historical tax are raised in large part from taxes upon all taxable property in the county. Any expenditure program should necessarily attempt, so far as possible, to equally benefit all members of the public in the county. While obviously it would not be practical to have a separate private museum for every member of the public in the county, where spreading of county aided museums in various locations in the county will make such services more readily available to the members of the public in the county, as opposed to one central county museum, such result would be desirable, from a legal standpoint. On the other hand, maintenance of a museum where same will only be of benefit to a very

small portion of the members of the public in the county, would not be desirable.

We note in your questions references to "apportion" of county funds, "direct grants" of county funds, and other terminology of similar import. We assume that you are aware of the provisions of section 185 of the North Dakota Constitution providing:

"Section 185. 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."

As you are also aware, chapter 11-11 of the North Dakota Century Code does make county history, promotion of historical work within the borders of such county, and the carrying on of historical work in the county, within the limits of the provisions of said chapter, a proper, legal, valid and public enterprise, function and responsibility, of the county, which can be paid with the tax raised funds therein provided for. This chapter does not and in view of the above quoted section 185, cannot authorize an "apportionment", or "direct grant" of such county owned, tax raised funds which would constitute a loan, or gift, to or in aid of any individual, association, or corporation, or which would make the county the owner of capital stock in any such association or corporation.

What the considered provisions of the chapter do, is authorize the expenditure of the specified funds, pursuant to contract, for services, property and materials, orientated to the county public functions of "promotion of historical work within the borders of such county" and the "carrying on of historical work within the borders of such county" as such phrases are further defined in that chapter and the considered provisions thereof. A contract necessarily requires a "consideration" from both or all parties thereto. The consideration must be a real value received, a "quid pro quo" an actual "value received". Thus, if \$100 of the county money is granted or apportioned to a county historical society, the contract must provide for the county to receive \$100 worth of appropriate services, material or property, and the county must receive such appropriate services, material or property. Under the terms of the statutory provisions considered, such services could obviously consist of labor, materials, rentals, etc., involved in making a museum display depicting county history, available to the public at a specified location or locations within the county.

As heretofore mentioned, the county historical society as such is designated as a separate corporate entity and from that point of view, not necessarily subject directly to the provisions of section 185 of the North Dakota Constitution as to moneys previously earned by them, or otherwise received by them from other than state, county or city sources. However, the officers and director of any corporate entity do not necessarily have the authority to deplete the corporate assets by gifts, donations, charitable contributions, etc., at least

in the absence of appropriate charter provisions giving them such authority. While we do not claim to have examined the appropriate corporate charters, bylaws with respect to this question, we would assume that in most instances, the county historical society owned funds, also, could be expended for valid actual considerations in services, property, or materials, appropriate to their corporate purposes, but could not be donated, given, apportioned, or granted to other individuals or entities, without such actual consideration or value received.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely yours,

ALLEN I. OLSON

Attorney General