OPINION
73-150

July 17, 1973 (OPINION)

Mr. Robert W. Peterson
State Auditor
State Capitol
Bismarck, ND 58501

Dear Mr. Peterson:

In your letter to this office of June 19, 1973, you state:

> "It has been called to our attention that certain counties in our state have authorized the giving of revenue sharing funds to county conservation districts for environmental protection. In turn, these districts are using the funds for tree plantings on a cost sharing basis with individual landowners or occupiers. We understand that states attorneys from other counties have held that revenue sharing funds cannot be used for individual tree plantings, but only tree plantings for public enterprise, such as in a part."

You also provided us with the following: (1) letter from Barnes County Soil Conservation District, (2) opinion from the Attorney General of South Dakota, (3) letter from Senator Young, (4) letter from Office of Revenue Sharing, (5) revenue sharing bill analysis, and (6) letter from Association of Soil Conservation Districts. We also have a copy of a letter to Ms. Mischel from Karen Spaight from the Office of Revenue Sharing dated June 26, 1973.

You then ask for an opinion from this office on the following question:

> "Do County Commissioners have the authority to give revenue sharing funds to County Conservation Districts for environmental protection, and, if so, what expenditures may be made with these funds and can the money be used specifically for projects such as tree planting on a cost sharing basis with landowners and occupiers?"

Basically, governmental units, political subdivisions, etc., have only such authority as is granted to them and as is necessarily implied from such grant. This includes the expenditure of funds, whether they be appropriated by the legislature or generated by authorized tax levies.

On June 22, 1973, this office issued an opinion to Cass County States Attorney, John Garaas. This opinion addresses itself to the expenditure of revenue sharing funds. (A copy of the opinion is enclosed.)

The 1973 legislature enacted Chapter 213 (Senate Bill 2038) pertaining to expenditure of revenue sharing funds. Section 1 sets forth the declaration and finding of public purpose and authorizes governmental units to expend such funds even though they have not

been included in the current budget. Section 2 authorizes the expenditure of revenue sharing funds by local units of government and makes reference to federal law and regulations as being the guideline under which such expenditures may be made. Whatever else may be read into this section is at the moment not of great consequence because the provisions of Chapter 213 in effect expired on June 30, 1973. Consequently, this opinion does not address itself to actions heretofore taken by local units of government prior to July 1, 1973.

We have examined various provisions of law and have not been able to find any provision which grants authority to the county commissioners to expend funds for planting trees, except by inference on its own property, but not as to private property.

The soil conservation districts have authority under Section 4-22-26(06) as amended to engage in a tree planting program as a soil conservation activity. It provides as follows:

> "4-22-26. POWERS AND DUTIES OF DISTRICTS AND SUPERVISORS. A soil conservation district may exercise the public powers ordinarily exercised by a governmental subdivision of the state, and the district and the supervisors thereof shall have the following powers in addition to those granted in other sections of this chapter:
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> 6. To make available, on such terms as it shall prescribe, to land occupiers, government units or qualified electors within the district, agricultural and engineering machinery and equipment, fertilizer, seeds and seedlings, and such other material or equipment as will assist such land occupiers, government units or qualified electors to carry on operations upon their lands for the conservation of soil and water resources and for the prevention and control of soil erosion;
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> * * *"

We have examined Section 54-40-08 which provides as follows:

> "54-40-08. JOINT FUNCTIONS - WHO MAY PARTICIPATE. Any municipality, county, park district, school district, or other political subdivision of this state upon approval of its respective governing body may enter into agreements with one another for joint or cooperative action, on a cost sharing basis, or otherwise, to carry out any function or duty which may be authorized by law or assigned to one or more of them, and to expend funds of such municipality, county, park district, school district, or other political subdivision pursuant to such agreement, to use unexpended balances of their respective current funds, to enter into lease option to buy and contract for deed agreements between themselves and with private parties, and to accumulate funds from year to year for the provision of services and facilities, and to otherwise share or contribute property in accordance with such agreement in jointly and cooperatively carrying out such function or

duty."

This section initially came into being by the enactment of Chapter 353 of the 1963 legislature without any specific code number. This chapter in 1963 was codified as Section 54-40-08 by the L. R. C. After it was so codified, it was amended and reenacted, in its codified form and section number, by Chapter 451 in the 1971 legislature, and by Chapter 509 of the 1971 legislature. This provision, as initially enacted, had a pari materia relation to Chapter 54-40 of the North Dakota Century Code. We must assume that in codifying this provision and assigning section number 54-40-08, this interrelationship was recognized. By the amendment and reenactment of this section as part of Chapter 54-40, the relationship was recognized, and because it initially was a pari materia provision, it became an integral part of Chapter 54-40.

The language "to carry out any function or duty which may be authorized by law or assigned to one or more of them" is subject to construction. Taking this provision separately without regard to other basic principles of law, the result could be reached that any governmental until may join with another governmental unit and perform any act authorized by either one or the other. Such construction, however, would do violence to the provisions of Section 54-40-01. The pertinent provision of this section is the following language: "Two or more governmental units or municipalities * * * may jointly or cooperatively exercise their respective separate powers or any power common to the contracting parties * * *".

This provision clearly illustrates that the authority and power to jointly perform an act is predicated on the provision that all of the governing bodies acting jointly independently have either specific or general authority to engage in the activity. Chapter 54-40 only grants authority to do jointly what may be done separately.

This concept has been recognized indirectly in an opinion issued by this office to Richard Bear, state's attorney, dated June 16, 1970, with reference to the joining of counties for purposes of employing a common public defender. This concept was also recognized in a letter written to Mrs. Rosella M. Harr, Clerk of the Harvey Public School District, dated December 1968.

In addition to the discussion above as pertaining to Section 54-40-08 and Chapter 54-40, we must also recognize section 185 of the North Dakota Constitution and Section 175. Section 185 proscribes a political subdivision from loaning or giving its credit or making donations to or in aid of any individual, association or corporation except for support of the poor. Under the proposal set forth in the basic request, we note there is a lack of "quid pro quo". Section 175 prohibits the levying of the tax except as permitted by law and stating the purposes and objects to which the tax shall be applied. While the revenue sharing funds are not funds raised by local taxes, nevertheless, they take on sharing funds are not funds raised by local taxes, nevertheless, they take on all of the characteristics of general tax fund money once they are transferred to the political subdivision. In this respect Sections 175 and 185 militate against rather than in favor of using county funds for a general tree planting program. Any doubt in this respect must be resolved in

favor of the constitutional provisions.

This office, as it should be, is not entrusted or empowered with the authority to legislate. If the question were simply whether or not a tree planting program should be instituted or carried out, we could give many valid reasons and convincing arguments in favor of such program. However, we are confined simply to the legal questions involved. We must operate within the framework of the North Dakota Constitution and the laws enacted by the Legislature.

Based on the foregoing, it is our opinion that the county commissioners, under the present constitutional and statutory provisions, do not have authority to give its revenue sharing funds to conservation districts for a tree planting program on private land or to individual landowners or occupiers.

I trust this answers your inquiry.

Yours very truly,

ALLEN I. OLSON

Attorney General