

**OPINION
73-154**

June 22, 1973 (OPINION)

Mr. John O. Garaas
State's Attorney
Cass County
10 1/2 Broadway
Fargo, ND 58102

Dear Mr. Garaas:

This is in response to your letter of 12 June 1973, requesting clarification of the Federal Revenue Sharing Program.

You point out that there are many mill levies which the county cannot assess unless it is authorized by a petition of the voters or by an election of the voters. You mention that there are also may levies that are limited to a certain number of mills for specific purposes.

You request that we give you our opinion as to what the county could do in the following situations, which you feel should cover all of the situations that may arise.

Your examples are given as:

1. Section 57-15-56 provides that the Board of County Commissioners may levy a tax for the purpose of establishing and maintaining programs for older persons, which tax shall not exceed the amount produced by the levy of one mill. No vote of the people is necessary to establish this mill levy. Under this type of statute, could the County Commissioners use revenue funds over and above the amount that could be produced by a one mill levy? In other words, could Federal Revenue Sharing Funds be used without limitation for such purpose in the discretion of the County Commissioners?

- "2. Another situation arises where a levy can be made for a specific purpose only after approval by the voters of the county, either by vote or by petition. sections 40-38-01 and 40-38-02 of the North Dakota Century Code are sections in point wherein a library fund can be established only after a petition of 51 percent of the voters.

In this particular situation in Cass County, the County Commissioners have been asked for library funds for the revenue sharing funds, even though there has been no prior petition setting up the fund in the past, nor is there contemplated petition being made. My question is whether the County Commissioners could give to the library under the above set of facts, when such facts are taken exclusively from Federal Revenue Sharing money?

- . The third situation would arise pursuant to section 11-11-14 of the North Dakota Century Code. Paragraph 14

authorizes a county to establish garbage collection systems but it provides that the entire financing shall be from fees and special assessments and not from general tax levies. In view of this statute, would the County Commissioners be able to spend money from federal revenue sharing funds to set up a garbage collection system?"

As you are aware, the federal "revenue sharing" program went into effect prior to state legislative action in regard to same. The 1973 legislature did consider the program after it was already in effect. We are enclosing herewith Senate Bills 2038 and 2039, which did pass as emergency measures; House Bill 1307, which failed to pass; House Bill 1506, which was indefinitely postponed; and House Concurrent Resolution 3004, also indefinitely postponed, which will give a general picture of the legislative action and determinations not to act, in regard to same.

Generally speaking, as the money is given to governmental bodies, as such, and as such governmental bodies have only such powers as are granted by law, they can only be expended for purposes for which such governmental bodies have authority to make expenditures. The North Dakota Legislative Assembly, in the past, has generally not expressly limited the amounts that could be spent by such governmental bodies, except by limiting the amount that could be levied by such governmental bodies. House Bill 1506 introduced in the 1973 legislature apparently was intended, in effect, to limit expenditures that could be made by counties, from revenue sharing plus general fund levy in accordance with a factor connected with the general fund levy limitations. You will note that said House Bill 1506 was indefinitely postponed.

Going to your specific examples and looking first to your example numbered 1, 23 should first call to your attention the first sentence in subsection 3 of section 57-15-56 thereof, providing that:

"The levy authorized by this section shall be imposed or removed only by a vote of at least sixty percent of the electorate of the county or city directing the governing body to do so."

If your county has not voted for this levy, the question would not come up in your county. Assuming, however, for the sake of this general discussion that such a favorable vote had been received, we do not feel that revenue sharing funds could be used to augment, supplement or substitute for the tax raised funds provided for in said section 57-15-56. Said section does not grant to the board of county commissioners a general power and authority to spend general fund moneys for the purposes there enumerated, it grants only the authority to expend the tax raised funds there provided for, for such purposes.

Looking to your second example, section 40-38-01 of the 1971 Supplement to the North Dakota Century Code provides that upon petition or upon a vote, the governing body of any county shall establish and maintain public library service. In view of the specific language of the statute and looking to its legislative history, the converse is also true, i.e., in the absence of such

petition or vote, the governing body of any county shall not establish or maintain public library service. Being without authority to establish public library service, by reason of the absence of petition or vote, the board of county commissioners would have no authority to expend county money, whether derived from tax levies or from the federal revenue sharing program for public library service.

As to your third example, we note that section 11-11-14 of the North Dakota Century Code as amended to date does give the board of county commissioners the power to establish a garbage and trash collection system. As to the financing of same, the statute provides:

" * * * If the board of county commissioners resolves to establish such a system, the expenses of establishing, operating maintaining it may be financed by fees charged to persons receiving direct benefits or by special assessment against the parcels of land properly charged therewith, or by both such fees and assessments. * * * "

We note that the statute uses the permissive word "may" rather than the mandatory word "shall" with regard to the financing of such system, however, we note that it uses same with regard to three alternatives, i.e., (1) fees, (2) special assessments, or (3) both fees and special assessments. We note also that with regard to issuance of certificates of indebtedness, in order to purchase the initial equipment and land necessary for operation of the system, it indicate that same are repayable from such fees or special assessments, "or repayable in such other manners as may be provided by law". We have found no other specific provision of law authorizing other methods of repayment of such certificates of indebtedness.

Considering the use of the word "may" rather than "shall" it is perhaps arguable whether such a project might be financed by general fun levy rather than necessarily from the methods specifically authorized, however, considering the nature of the projects there authorized, the lack of any specific provision of law authorizing other methods of repayment of certificates of indebtedness, and the fact that three alternative methods of financing follow the use of the permissive word "may" we do not feel that the legislature intended in the enactment of this statute to authorize the use of county general fund moneys for such purpose. On such basis we would also conclude that revenue sharing funds could not be used for such purposes.

We hope the within and foregoing will be sufficient for your purposes. As we, of course, do not in the first instance attempt to construe the federal statutes involved, we have not considered herein, the limitations imposed in the federal enactments on the expenditures of these moneys, other than, of course, the fact that these moneys are transferred to counties, as such counties, rather than as federal agencies.

Sincerely yours,

ALLEN I. OLSON

Attorney General