

**OPINION
73-585**

July 6, 1973 (OPINION)

Mr. Harold G. Vavra
Director
Aeronautics Commission
Box "U"
Bismarck, ND 58501

Dear Mr. Vavra:

This is in response to your letter in which you advise of the following:

Lake Williams Township in Kidder County (T 142N and Range 71W), in a special meeting of the electors, in the fall of 1971, voted unanimously to create a township municipal airport authority and to appoint five airport authority commissioners pursuant to the provisions of Chapter 2-06 of the North Dakota Century Code.

You further advise that the special meeting was called as a result of the township clerk, township supervisors and twelve freeholders calling for a special meeting and election. The proceedings to call a special meeting are further explained in Exhibit 1 attached to your letter.

A resolution was adopted creating Lake Williams Township Municipal Authority and five commissioners were appointed as follows: See Exhibit B. Reinhold Guthmiller, Morris Madson, Ward Whitman, Lester Dobbert and Frank Whitman, with the respective terms for each office.

Mr. Ward Whitman holds the following positions: (1) Clerk of Williams Township, Kidder County, (2) Commissioner of Lake Williams Township Municipal Authority (three-year term) (his term expires November 1, 1974), (3) Secretary of the North Dakota Aeronautics Commission and a member of the Aeronautics Commission, (4) he and his wife, Edith A. Whitman, are owners of the airport land leased by Williams Township Municipal Airport Authority.

The lease entered into by Lake Williams Township Municipal Airport (lessee) and Ward Whitman and Edith A. Whitman, is for a period of five years subject to an option granted to lessee to renew such lease for an additional five years upon the same terms and conditions as the initial five-year lease. The leased area consists of approximately 15.1 acres. See Exhibit C. The basic consideration for the five-year lease is \$1.00. It also provides that no fee or charge shall be charged the lessor for using the facilities as an airport, and that the lessor shall be held harmless for any and all uses made by any parties of such facilities as an airport.

The Lake Williams Township Municipal Airport Authority made application to the North Dakota Aeronautics Commission requesting matching funds for asphalt paving of the runway, taxiway, and aircraft parking apron. The Aeronautics Commission is authorized by law to match funds for such purposes. The Aeronautics Commission, as

a condition of granting the matching funds, insisted and required that the newly granted runway be first built with a minimum of 3,000 feet of runway to meet the minimum length standards for public airports, and that if these conditions were met, the Aeronautics Commission would allocate a total of \$10,000 to the Williams Township Airport Authority to help pay for the cost of paving the runway, taxiway and apron. Lake Williams Township Municipal Authority stated in the application that its funds would be derived from donations.

Before the application of Lake Williams Township Municipal Authority was reviewed, Mr. Ward Whitman, Secretary and member of the State Aeronautics Commission, submitted a written request to the State Aeronautics Commission asking to be excused from voting and participating in the application. The Aeronautics Commission excused Mr. Whitman from participating and voting on the application. The Commission granted the \$10,000 matching funds, on the condition that the lease be amended to add an additional five-year option upon reasonable terms so that the final approved lease would provide for initial five years plus two five-year renewal options, with each five-year option being of reasonable terms between the owner of the land and Williams Township Municipal Airport Authority.

On May 30, 1973, the Aeronautics Commission allocated a total of \$10,000 of matching funds for paying a portion of the paving for the airport provided the township airport authority: (1) regrade a new 3,000 foot runway, (2) amend the airport lease to provide for a second five-year renewal option so that the total lease would run for 15 years if all options were exercised.

The North Dakota National guard was contacted to perform some of the services as part of its training program. Tentative arrangements were reached, but because of a controversy developing, the National Guard deemed it advisable not to proceed with plans to improve the airport. In addition to the foregoing, tentative plans were made with a contractor for paving the airport.

You then ask for an opinion on the following questions:

- "1. Does Lake Williams Township Board of Supervisors, after receiving authorization by the township electors at a special meeting of the electors, called in accordance with law, have the legal authority to create a Lake Williams Township Municipal Airport Authority under Section 2-06-02 of the 1971 Supplement to the North Dakota Century Code and appoint five members as commissioners thereto?
- "2. Does the definition of the word 'Municipality' set out in Section 2-06-01 of the 1971 Supplement to the North Dakota Century Code, mean and include an 'organized township'?
- "3. In relation to conflict of interest state laws, is the North Dakota Aeronautics Commission acting as a body, involved in any possible conflict with Section 48-02-12; 58-05-12 and 12-10-06 of the N.D.C.C., when the Aeronautics Commission acted to allocate \$10,000.000 in state airport aid funds on a matching basis to Lake Williams Township Municipal Airport Authority, when it is considered that Mr.

Ward Whitman is a member of the Aeronautics Commission and a Commissioner of Lake Williams Township Municipal Airport Authority, which applied for such state aid airport funds, considering that Mr. Ward Whitman by letter to the Aeronautics Commission requested that he be excused from participating and voting on this matter, when it was considered by the Aeronautics Commission and the Aeronautics Commission is on record accepting his request?

- "4. In relation to conflict of interest state laws, does Sections 48-02-12; 58-05-12 or 12-10-06 adversely involve Mr. Ward Whitman, a Commissioner of the North Dakota Aeronautics Commission; a Commissioner of Lake Williams Township Municipal Airport Authority; and Clerk of Lake Williams Township and a lessor, along with Edith A. Whitman, of certain airport lands to the Lake Williams Township Municipal Airport Authority, based on the facts set forth in this request for an opinion?"

As to questions 1 and 2, because they are interrelated, we will answer and consider both at the same time.

The Airport Authority Act is contained in Chapter 2-06 of the North Dakota Century Code which was adopted in 1957. Under Section 2-06-01(1) as amended, it defines a municipality to mean "any county, city, town, park district or public body of this state."
(Underscoring ours)

Originally, this subsection also contained the term "village" which was deleted by the subsequent amendment. There appears to be no specific term used in the definition describing township as such. The term "town" is used, and it is suggested in your letter that the term "town" includes the governmental entity of a township. We recognize that the term "town" in some regions or localities may embrace the legal entity of a township and may even be used as a synonym for township. In our locality it does not appear customary to refer to townships as towns. Even under Section 40-01-01 dealing with municipalities prior to the 1955 amendment defined the term to include all cities, towns and villages. However, the subsequent amendment retained only the term "cities" which was in line with the new concept that the State of North Dakota would refer to its municipalities as cities. The distinction between villages, towns and cities was eliminated.

However, because the statutory definition of municipality also used the term "public body" it is not necessary at this time to ultimately determine whether the term "town" includes a township. The statutory definition of a municipality in Section 2-06-01 followed by the words "or public body" strongly suggests that any governmental body is to be included within the term "municipality" for purposes of the Airport Authorities Act. The term "public body" is not a work of art and is not a term used with regularity in the North Dakota statutes. It would appear that the term "public body" is used to distinguish between a private organization and a governmental organization. In examining the text, Words and Phrases, Volume 35, we find that the term "public body" includes villages, city incinerator authority, board of adjustment, county, milk commission, and party executive

committee. It has been judicially determined that a railroad company does not come within the term "public body". From the judicial expressions, it appears that the term "public body" is a synonym for a governmental body and by its very terms, excludes private corporations. In essence, the term means a governmental body of a public corporation, as distinguished from a private corporation.

Significantly, Sections 2-02-01 and 2-02-06 authorize townships, along with other governmental bodies, to acquire real property for constructing, equipping, maintaining and operating airports. These sections came into being in 1931 and we must assume that the Legislature in enacting the Airport Authorities Act in 1959, was aware of the provisions of Sections 2-02-01 and 2-02-06.

While it is not conclusive, Section 2-06-15 refers to cities, villages or park districts which already have an airport levy, but town or township is left out. We are unable to provide any explanation at this time for such omission.

In response to questions 1 and 2, it is our opinion that under the definition of a municipality, in Section 2-06-01(1) a township comes within such definition specifically as a public body.

As to the authority of the township to create a township municipality airport authority, we are aware that Title 58 does not specifically grant such authority, nor is it one of the powers granted to electors under Section 58-03-07 which may be exercised at an annual township meeting. In this respect, it is noted that Section 58-03-02 provides that "no township shall possess or exercise any corporate powers except those enumerated in this chapter, those especially given by law, and those necessary to the exercise of the powers enumerated or granted". The Airport Authority Act constitutes powers "specifically given by law". A special meeting under Section 58-04-02 is authorized for the purposes of filling vacancies and transacting lawful township business whenever the supervisors or the township clerk or any two of them, together with at least twelve freeholders of the township file a written statement with the township clerk, a written statement that a special meeting is necessary or whenever a special meeting is required by any other provision of law.

It is therefore our opinion that a special meeting (election) of the electors under the given circumstances was lawful and proper. Once having determined that the township electors by a special meeting may create a township municipal airport authority and having determined that a township comes within the term "municipality" it necessarily follows that the powers granted under Chapter 2-06 would apply to townships if the airport authority was otherwise properly created pursuant to the provisions of Chapter 2-06, of which there appears to be no serious question.

As to question number 3, the various positions and interests held by Mr. Ward Whitman is of substantial concern. However, as to his personal involvement in this matter, we are limited to examining such personal involvement strictly in its legal context. Basically, common law has never sanctioned self-dealings. This is probably so as to avoid fraud or possible fraud.

The basic statute involved is Section 12-10-06 which as amended provides as follows:

12-10-06. PERSONAL INTEREST IN CONTRACT BY PUBLIC OFFICER - PUNISHMENT - EXCEPTION. Every public officer authorized to sell or lease any property, or make any contract in his official capacity, who contrary to law voluntarily becomes interested individually in such sale, lease, or contract, directly or indirectly, is guilty of a misdemeanor. Provided, however, that contracts of purchase of employment, by a political subdivision may be entered into with an officer of such political subdivision if such contracts are unanimously approved by the other members of the governing body of the political subdivision by a finding unanimously adopted by such other members and entered in the official minutes of the governing body, to be necessary for the reason that the services or property obtained are not otherwise available at equal cost. The provisions of this section shall not apply to sales, lease, or contracts entered into between school boards and school board members or school officers."

It should be noted that the special provisions of this section, prior to the amendment, applied only to those governmental bodies having a population of less than 10,000. The amended version, however, is no longer predicated on the population factor, but still requires the unanimous approval of the other members of the governing body and the finding that the services or property obtained are not otherwise available at equal costs.

Section 58-05-12 pertains specifically to township officers and provides as follows:

"58-05-12. OFFICERS NOT TO BE INTERESTED IN CONTRACTS OF TOWNSHIP. Except as otherwise provided by law, no township officer shall become a party to or be interested, directly or indirectly, in any contract made by the board of which he is a member. Every contract or payment voted for or made contrary to the provisions of this section is void. Any violation of this section shall constitute malfeasance in office which will subject the officer so offending to removal from office."

It should be noted that the opening qualifying phrase is "except as otherwise provided by law". Section 12-10-06 is a general provision and in effect is "as otherwise provided by law". Even without the exception, the actual transaction must be examined to determine whether the action taken here is both adverse to the township's interest and whether or not it is pecuniary in nature. The North Dakota Supreme Court in *Thompson v. Lone Tree Township*, 78 N.D. 785, 52 N.W.2d. 840, held that making a temporary loan without interest to a township supervisor, in an emergency, with no hope or expectation of profit, does not violate Section 58-05-12. It is thus implied that mere self-dealing under the statutory provision which embraces the common law concept does not in every instance constitute violation. The nature of the transaction must be examined to determine whether or not a violation exists. In making this observation, we are not in any manner suggesting that self-dealing be an accepted practice.

Section 48-02-12 provides as follows:

"48-02-12. OFFICERS MUST NOT BE INTERESTED IN CONTRACT. No governing board, nor any member, employee, or appointee thereof, shall be pecuniarily interested or concerned directly or indirectly in any public contract, either verbal or written, that may be entered into by any such board or officer."

This language is substantially similar to Section 58-05-12 except it does not contain the qualifying phrase "except as otherwise provided by law". The provisions of Chapter 48-02 apply to state agencies, agencies, departments, and bureaus and political subdivisions of the state, as well as to city, park district, village or school district. There may be a question whether the provisions of Chapter 48-02 apply if the amount of improvements or expenditures are below a figure of \$25,000. The provisions otherwise would apply to the altering, repairing or constructing of any building, belonging or appertaining governmental body, or making improvements connected therewith or pertaining thereto. However, in this instance we are not required to decide if a certain figure of expenditure determines whether or not its provisions apply. We assume that the provisions of Section 48-02-12 apply regardless of the amount expended, but have reservations as to its application here, because Mr. Whitman is only providing the land upon which the improvements are made. We, however, are still mindful that the decision in the Thompson v. Lone Tree Township case, supra, would be applicable to this section because of the similar provisions. It would further appear that Section 12-10-06 would have some application.

The position of Mr. Ward Whitman on the Aeronautics Commission as secretary and member, and his position as Clerk of Williams Township and as a commissioner of the township airport authority, is in conflict only to the extent that he is a member of the Aeronautics Commission. The technical conflict does not exist as clerk of the township because as such, he does not exercise a vote but is primarily a recorder or the keeper of minutes and performs such other duties which may be imposed or delegated to him by the township supervisors. Naturally, as clerk of the township, he would be favorably inclined to any transaction which may be of benefit to Williams Township. However, in this instance he made the relationship known and actually asked to be excused from voting on the request and application for matching funds. The request to be excused from voting was granted.

By applying the provisions of Section 12-10-06, it would appear that a conflict of interest would not rule out this transaction if the proper findings were made by the remaining members of the board, that the service or property is not otherwise available at equal cost and unanimous approval by the other members of the board. Even at that, it is necessary to examine the transaction. The interest, if any, that Mr. Whitman may have personally, arises out of the fact that he and his wife own the property which was leased by the township airport authority.

As to the relationship between the State Aeronautics Commission and the Williams Township Municipal Airport Authority, under the facts

and circumstances in this instance as stated in your letter and as supported by exhibits, would suggest that the transactions are not in violation of law.

As to question number 3, it is our opinion that the transaction, taken as a whole, meets the minimum standards and requirements provided by law.

As to question number 4, a technical conflict of interest or self-dealing exists between Mr. Whitman and the Williams township Municipal Airport Authority on the basis that he has a voting right as a member of the airport authority and has an ownership interest in the land to be leased. However, in looking at the lease in which he is making certain land available to the airport authority for purposes of constructing, maintaining and operating an airport for the sum of \$1.00, it becomes a question whether he is in reality giving something of greater value to the airport authority than what he may receive. In this respect, the ruling of the Supreme Court in *Thompson v. Lone Tree Township*, supra, and the concepts recognized therein, would have application here.

Assuming that the lease is for an initial five-year period for the consideration of \$1.00, and is renewable for two five-year periods, as stated in your letter, it is questionable that Mr. Ward Whitman is receiving any financial gain as a result of such transaction.

The question of whether an airport is needed is not before us. We must assume that the electors of the township, in approving the proposition whether an airport authority should be established, were aware that by voting to establish an airport authority, it essentially meant that an airport would be established by the airport authority once it was created. We must therefore conclude that this question was resolved by the electors of the township.

We are not in a position to determine if one or the other electors of the township or residents within the approximate vicinity will receive any greater or lesser benefits from the airport if it is once established.

Moreover, we must assume that the determination by the Commission to expend \$10,000.00 in public moneys to assist in the construction of a paved runway, taxiway, and parking apron at a rural location considered such criteria as air traffic volume at or near such location; and that the expenditure of such funds at such location rather than at an existing or new airport facility elsewhere in North Dakota best served the public interest. Frankly, were we in a position to pass on such policy questions, based on the file before us, our opinion would be negative.

These are judgments which must be based upon different criteria and material and are not at this point legal questions.

The question presented to us is primarily whether or not a conflict of interest exists as prohibited by law. Section 58-15-12, supra, pertains to township officers. In this specific instance, we are concerned with the airport authority commission of which Mr. Whitman is a commissioner, and the transactions with Mr. Whitman and his wife

as private parties. The township is not a party to the lease. The parties to the airport lease are the Lake Williams Township Municipal Authority and Ward Whitman and Edith A. Whitman, husband and wife. On this basis, Section 58-05-12 would not apply, but rather the provisions of Section 12-10-06, which is a general provision, would have application.

The lease for the consideration of \$1.00 making available approximately 15 acres of land to the airport authority in itself, without taking into account any other material on the surface, appears to be assisting the airport authority. The lease is not based upon a condition or provision that certain improvements will be made on the land. The lease permits improvements, but does not require improvements.

However, there may be a possibility that if certain improvements are made, as set forth in the letter, that after the lease expires or is no longer renewed, the improvements made will inure to the land owner. We do not have the expertise to exercise or make a reliable judgment on such matters as the life period of certain pavement or the deterioration of pavement resulting from useage or exposure to the elements. For that matter, we do not have any facts which could be used in making this determination at this time.

As to the use of the airport, because of location or accessibility to certain persons because of location, we must assume that the electors of the township decided that an airport was necessary and that location was secondary. For that matter, no matter where an airport is located, some person will always have easier access or closer access to the airport than some other person. This in itself does not become a legal question for disposition with the limited facts made available, nor is it specifically controlling unless there were some evidence that land or property was otherwise available on an equal basis.

The Fargo Forum news story which was enclosed as Exhibit G discloses that Mr. Whitman may be using the airport in his spraying operations and that the improved airport will be of greater service to him than the airport he now is operating. We do not believe that such criteria is in itself controlling. The material submitted to us for examination and the facts recited in your letter do not indicate that deception or fraud was practiced. These factors may have application, but as of now, the facts presented do not warrant a legal finding based thereon.

As to the conflict of interest or rather the self-dealing transaction in entering into and executing the lease in question, we must direct our attention to the question whether or not such action was in accordance with Section 12-10-06 of the North Dakota Century Code, as amended. We are not provided with facts relating to the specific action taken by the airport authority in deciding whether or not to enter into the lease in question. If Mr. Whitman as a member of the Airport Authority, abstained from voting and the remaining commissioners made a unanimous finding that the property would not otherwise be available at equal cost, that the lease is necessary as set out in Section 12-10-06, the statutory provisions would have been satisfied. If, however, Mr. Whitman did not abstain from voting and

if the unanimous finding was not made by the remaining commissioners, then Section 12-10-06 will not have been satisfied, and the transaction would not be in accordance with law. A statutory conflict of interest which is prohibited would exist.

I trust this answers your inquiry.

Sincerely yours,

ALLEN I. OLSON

Attorney General