

**OPINION
73-84**

May 1, 1973 (OPINION)

Mr. William A. Robbins
City Attorney
Cavalier, ND 58220

Dear Mr. Robbins:

This is in response to your letter of 26 April 1973 requesting an opinion of this office with regard to contracting for a new swimming pool for your city.

Your questions are stated as:

1. Is it proper for the City * * * '(name of city)' to execute a contract in May of 1973 for the construction of a municipal swimming pool to be financed by a Bureau of Outdoor Recreational Grant of one-half the total cost, an ABM Impact Grant of 45.5 percent of the remaining balance due, and the remaining balance to be paid by the City of Cavalier out of the profits of the Municipal Utilities plant already on deposit, when the expenditure for said swimming pool was not contained in the City * * * '(name of city)' Municipal Budget for the fiscal year commencing July 1, 1972, and ending June 30, 1973?

No tax levies will be made for the construction of the pool and no payments will be made prior to the Municipal Budget for the fiscal year commencing July 1, 1973, and ending June 30, 1974, which budget shall contain the proposed expenditures.

2. If it is improper for the City * * * '(name of city)' to execute a contract for construction of a municipal swimming pool under the terms and conditions as set forth in question 1, may the City * * * '(name of city)' proceed under the emergency provisions of Section 40-40-18 of the North Dakota Century Code?

Under the emergency provision the City would spend fund from the past profits on deposit from the Municipal Utilities plant and would not borrow funds nor would they take funds from any other appropriated fund.

- . Does the expenditure of funds transferred from the Municipal Utilities plant in conformance with the North Dakota Century Code have to be budgeted in the annual budget for the city * * * '(name of city)' before they can be expended on city projects?"

You give us a brief outline of the facts establishing same and the conclusion by the City and State Health Department that the present swimming pool of the city is totally inoperable and would not be placed in operation during the summer of 1973. You also describe the

facts establishing the necessity of the swimming pool in your city, and the conclusion of the city that it is the best interests of the community to construct a new swimming pool. You also briefly outline the applications for Bureau of Outdoor Recreation and AMB Impact Grants, indicate that the grants have been made or authorized, and indicate that apparently the terms of the grants are that if the contract is not let prior to July 1, 1973, the funds will be lost and the city would have to reapply for them at a later date without any guarantee that they would be awarded. You also point out and quote the state statutory provision for the transfer from the Municipal Utilities fund that would limit same to 20 percent of the gross receipts of the Municipal Utilities fund "for the fiscal year of the municipality during which the transfer or transfers are made," (subsection 2 of section 40-33-12 of the 1971 Supplement to the North Dakota Century Code).

You point out that the question has arisen by reason that one of the Council members mentioned that because the unexpected grants and assistance were not anticipated and not included in the Municipal Budget and Tax Levy under Skating Rink and Swimming Pool and Recreation in the Municipal Budget, that the execution of the contract prior to the 1973-1974 budget would be an expenditure made or a liability incurred beyond appropriation as contained in section 40-40-15 of the North Dakota Century Code.

As you indicate, that section provides:

"40-40-15. EXPENDITURES MADE OR LIABILITIES INCURRED BEYOND APPROPRIATION - JOINT AND SEVERAL LIABILITY OF MEMBERS OF GOVERNING BODY. Except as otherwise provided in sections 40-40-17 and 40-40-18, no municipal expenditure shall be made nor liability incurred, and no bill shall be paid for any purpose in excess of the appropriation made therefor in the final budget. Expenditures made, liabilities incurred, or warrants issued in excess of the appropriations shall be a joint and several liability of the members of the governing body who authorized the making, incurring, or issuing thereof or who were present when they were authorized and did not vote against authorizing the same."

You also quote a portion of the decision in Lang v. City of Cavalier, 59 N.D. 75, 228 N.W. 819, where the court considers this statute.

You do not give us a detailed time schedule on the program you outline. From the information you do give, we would assume it would run approximately as follows. Contracts will be let within a reasonable time after the bid opening which is currently scheduled for May 18, 1973. We would thus tentatively assume that the contracts will be entered into during the current fiscal year. Relevant federal funds if any received directly by the city will be placed in effect in the so called city "general fund," though "earmarked" for this specific project, presumably during the latter part of this fiscal year or during the early part of the city's next fiscal year. Presumably, the transfer from the municipal utilities fund to the so called "general fund" will be made in the latter part of the current city fiscal year. Apparently the amounts to become due under the contracts from the city will not be due in the current

fiscal year but will be due after the current fiscal year in the next fiscal year. (We are expressing no conclusion if the contrary is the case.) We further assume that the relevant items will be listed in the budget and necessary appropriations made during the beginning of the next fiscal year, and that subsequent to the making of such appropriations warrants will be drawn for payment of the amounts becoming due under the contract. As the cash for such warrants will be on hand from any federal grants paid directly to the city, and from the prior transfer from the municipal utilities fund, it will thus be possible to fund the warrants immediately upon issuance, without waiting for the proceeds from the taxes levied to meet the remainder of the items of appropriation included in the budget. While, theoretically, such payments may be made prior to completion of levies and therefor out of "interim" fund, as they are in effect funded in advance, they would not cause the year's expenditures to exceed the general fund budget. There could possibly be some legal problems if between the time of execution of the contracts and the making of the appropriations some of the members of the city governing body changed their minds as to the desirability or necessity of the swimming pool, or members of the governing body were replaced; however, your letter does not indicate that this is contemplated or is the basis of the problem.

On such factual basis, we must necessarily conclude that at no time would the expenditures to be made for this project or the liabilities to be incurred be in excess of the appropriation made therefor in the appropriate final budget. As to the liability under contracts made during the current fiscal year, we must, of course, look to the appropriation made in the next fiscal year's budget (assuming the correctness of our conclusions as to the details of the time schedule). Also, of course, as we understand your presentation of the facts, expenditures also would be made from the next fiscal year's budget, though conceivably while the fiscal operations are still being conducted on the "interim fund" basis. On such basis, we answer your first question in the affirmative. As your second question is predicated on a negative answer to the first question, it necessarily becomes moot. Your third question, on the basis of the factual situation outlined only, is answered in the affirmative.

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

Sincerely yours,

ALLEN I. OLSON

Attorney General