

Superseded by N.D.A.G. 82-4

**OPINION
79-42**

February 21, 1979 (OPINION)

Mr. John Olson
Burleigh County State's Attorney
P. O. Box 1901
Bismarck, North Dakota 58501

Dear Mr. Olson:

This is in response to your letter of February 13, 1979, in which you requested our opinion as to certain contemplated methods of acquiring land needed for the construction of a county jail or combined law enforcement facility in south Bismarck.

In your letter you state that the Burleigh County Commission is considering the purchase of certain properties in south Bismarck, appraised at approximately \$500,000, for the construction of a new county jail, with possible other city/county facilities to be included there at a future date. You state that "Burleigh County neither has sufficient assets nor anticipated revenues that would accommodate such a land acquisition at this time." You explain that you have learned that some cities and school districts have in the past condemned desired real property through the power of eminent domain given in North Dakota Century Code Chapter 32-15, and then proceeded to pay off the judgment of damages for the value of the land by the procedure authorized in Section 21-03-06 (7a), which allows a political subdivision to issue bonds to pay any final judgment against it. You point out that under the applicable statutory scheme there is then no requirement that an election be held on the question of the issuance of the bonds.

After drawing our attention to N.D.C.C. Sections 11-11-16, 11-11-18 and 11-11-19, you then ask "whether or not the county can proceed to acquire the land through a condemnation action, and fund the same through the issuance of bonds pursuant to those provisions enacted for the payment of judgments in Chapter 21-03, N.D.C.C., without an election?" If our answer to your first question is affirmative, you then ask whether the county emergency fund may be used to pay the judgment, pursuant to Section 57-15-28, that would obtain against the county as a result of the condemnation action.

As you note in your letter, the contemplated procedure raises questions of propriety as well as legality, as the effect of the use of eminent domain procedure is to avoid the necessity for a public election.

These questions appear to be ones of first impression upon which our written opinion has never before been sought. While there have been numerous inquiries as to the necessity for county bond issues, and votes upon those issues, for the purposes of construction or purchase of county buildings, it does not appear that previous inquiries have concerned only the purchase of land, and purchases under the procedure of condemnation outlined in your letter. For the reasons explained below we conclude that by the enactment of Section 21-03-06(7a) the Legislative Assembly did not intend to authorize the payment of judgments resulting from eminent domain proceedings by the issuance of bonds under the provisions of Section 21-03-07(2).

The sections to which you initially refer, Sections 21-03-06(2) and 21-03-07(7a), were originally adopted in Chapter 196 of the 1927 Session Laws of North Dakota, in substantially the same language as used in their modern counterparts. Unfortunately, no extrinsic aids to construction of these sections exist today in the records of the Legislative Assembly which would assist us in determining the intentions of the Assembly. We must therefore rely upon the traditional canons of construction, see N.D.C.C. Sections 1-02-38 and 1-02-39, and decisions of our courts.

Section 21-03-06 specifies the purposes for which a county, city, public school district, township, park district, or any "municipality" (a generic term, defined in Section 21-03-01(1)) to include all of the foregoing political

subdivisions) may borrow money by the issuance of general obligation bonds. In many instances in this section the Legislative Assembly has specifically provided that the acquisition of real estate is a purpose for which bonds may be issued. This section provides, in pertinent part, as follows:

21-03-06. PURPOSES AND SPECIFIC LIMITATIONS OF BOND ISSUES. - Municipalities are empowered to borrow money, subject to the general limitations of amounts prescribed by sections 21-03-04 and 21-03-05, and subject, in certain cases, to the further limitations prescribed by the section, and to issue bonds thereof for the purposes enumerated in the section. Such bonds may be issued:

1. By any county:
 - a. To provide county buildings, but all outstanding unpaid bonds for this purpose shall not exceed in amount at any one time five percent of the value of taxable property in such county.
...
 - d. To provide funds for the construction of solid waste disposal facilities, for the acquisition of real estate for that purpose, for facilities and equipment for the collection of solid wastes, and for facilities and equipment to dispose of waste products.
2. By any city:
 - a. For the erection, purchase, construction, enlargement, or repair of municipal or public buildings for the following purposes: city halls, fire protection buildings, waterworks buildings, police stations, city markets, public baths, hospitals, libraries, museums, auditoriums, armories, gymnasiums, and music halls; and to purchase and acquire sites for such buildings, and for the equipment and furnishing thereof.
...
 - c. For the construction and extension of water plants or the purchase of existing plants; the construction and improvement of watermains, sewers, and drains; or for the joint construction and establishment of a water and sewer system; or for the erection, planning, construction, and establishment of a sewage disposal plant or system; or for the erection, construction, and enlargement of garbage disposal plants and to purchase sites and grounds, either within or without the limits of the city, for the disposal of sewage, garbage and other refuse; or for the leasing or purchase of lands, either within or without the limits of the city, for the purpose of providing airports or landing fields or for the construction of buildings thereon or the procuring of equipment therefor; and other like municipal purposes.
...
 - f. To provide for acquiring, laying out, and approving parks, parkways, park buildings, public drives, boulevards, highways, streets, state highways, and cemeteries, and to acquire land for these purposes.
...

4. By any public school district, or the school district of the city of Fargo, to purchase, erect, enlarge, and improve school buildings and teacherages, to acquire sites therefor and for playgrounds, to furnish and equip the same with heat, light, and ventilation or other necessary apparatus, to pay advance rentals to the state school construction fund, and also to purchase school bus equipment which shall meet the standards set up by the state superintendent of public instruction and the highway commissioner.

...

6. By any park district which constitutes a distinct municipality, to provide for acquiring, laying out, and improving parks, parkways, boulevards, and pleasure drives, and to acquire land for these purposes, but such indebtedness shall not at any time exceed one percent of the value of the taxable property in such park district.

7. By any municipality as herein defined:

- a. For the purpose of paying any final judgment obtained against the municipality within the state of North Dakota in case the governing body does not deem it advisable to pay such judgment out of current revenues. In case the bonds authorized by this subsection cannot be sold in accordance with this chapter, they may be issued to the judgment creditor in payment of such judgment.

...

8. By any recreation service district:

- a. For the construction and extension of water plants or the purchase of existing plants; the construction and improvement of water mains, sewers, and drains; or for the joint construction and establishment of a water and sewer system; or for the erection, planning, construction, and establishment of a sewage disposal plant or system; or for the erection, construction, and enlargement of garbage disposal plants and to purchase sites and grounds, either within or without the limits of the recreation service district, for the disposal of sewage, garbage, and other refuse; and other like recreation service district purposes.
- b. To provide for acquiring, laying out, and improving parks, parkways, park buildings, public drives, boulevards, highways, streets, state highways, and to acquire land for these purposes.

...

It is apparent from an examination of the purposes for which the above-numbered political subdivisions may issue general obligation bonds that many of these political subdivisions have been given the specific authority to issue bonds for the acquisition of real property. Because the Legislative Assembly has specifically provided in so many instances in this section that bonds may be issued to purchase real estate, it would not be persuasive to say that the acquisition of real estate was meant to be included in subsection 7a. Why, it may be asked for the purposes of argument, if the Legislative Assembly intended that bonds be used as an acceptable method of paying for the acquisition of real estate by condemnation, did the Legislative Assembly go to such lengths to authorize bonding for acquisition of real property both in the extensive provisions outlined above and also by the procedure of paying condemnation judgments. We believe that the answer

can only be that judgments in eminent domain proceedings were not intended by the Legislative Assembly to come within the provisions of subsection 7a.

An even more compelling reason for this conclusion exists in the limiting language of Section 21-03-07, which provides in pertinent part as follows:

21-03-07. ELECTION REQUIRED - EXCEPTIONS. - No municipality, and no governing board thereof, except school districts, shall issue bonds without being first authorized to do so by a vote equal to sixty-six and two-thirds percent, in the case of municipalities having a population of less than five thousand, or a vote of sixty percent in the case of municipalities having a population of five thousand or more, of all the qualified voters of such municipality voting upon the question of such issue except:

...

2. The governing body may issue bonds of the municipality for the purpose and within the limitations specified by section 21-03-06, subsection 2, subdivision g, and section 21-03-06, subsection 7, without an election.

...

Again, it may be asked why, if it had been intended to include bonding for the acquisition of real estate in the exemption provided in subsection 2 of Section 21-03-07, by way of the use of subsection 7a of Section 21-03-06, did the Legislative Assembly provide in so many instances for the authority to issue bonds for acquisition of real estate, outlined in those subsections of Section 21-03-06 appearing above, that are not exempt from the requirement of an election. Why did the Legislative Assembly not include those subsections or subdivisions listed above in Section 21-03-06 in the list of exempt purposes in Section 21-03-07(2). If the Assembly intended, for example, to allow bonds for the construction of acquiring and laying out of parks, public drives and streets and acquiring land for these purposes to be exempt from the requirements of a public election, it could simply have listed subsection 2f of Section 21-03-06 in the list of exemptions provided for in Section 21-03-07(2). While one such omission or failure to so list may not compel this conclusion, the failure to list any of the nine separate authorities for political subdivisions to acquire real property is, we believe, a strong indication that judgments in eminent domain were not contemplated to come within the provisions of subsection 7a, but rather that this subsection was meant to include tort damages and the like for which the political subdivision could otherwise be unprepared to pay by any other means.

The conclusion reached above is strengthened by the language of N.D.C.C. Sections 11-11-16, 11-11-18 and 11-11-19, which you refer to in your letter, and as statutes dealing specifically with county acquisition of land for construction of jail facilities, must be deemed highly relevant to our inquiry. These sections provide:

11-11-16. BOARD HAS POWER TO ERECT, REPAIR, AND MAINTAIN BUILDINGS FROM CURRENT REVENUE. - The board of county commissioners may provide for the purchase, erection, repair, and maintenance of the courthouse, hospitals, jails, and other necessary buildings within and for the county. It may purchase the sites for such county buildings if necessary and may make contracts on behalf of the county for the building, repairing, and maintaining thereof if the expenditures therefor are not greater than can be paid out of the revenue of the county for the current year. The board shall have the entire supervision of the construction of such buildings.

11-11-18. BOARD TO SUBMIT EXTRAORDINARY OUTLAY TO VOTE. - The board of county commissioners shall submit to the electors of the county at any regular or special election any proposal for an extraordinary outlay of money by the county when the proposed expenditure is greater in amount than can be provided for by the annual tax levies. If the board considers the courthouse, jail, or other public buildings of the county inadequate for the needs of the county or deems it necessary to build a county hospital, and if it is thought that it is not for the best interests of the county to issue bonds to aid in the

construction of such buildings or that the construction of such buildings by any other procedure is not for the best interests of the county, it shall submit to the electors of the county, at any regular or special election, the proposal for the construction of a courthouse, jail, or other public building by establishing a building fund to aid in the construction thereof. The requirements of this section shall not apply to lease-purchase agreements authorized by section 24-05-04.

11-11-19. WHEN COMMISSIONER MAY PURCHASE LAND WITHOUT ELECTION. - If, in the opinion of a majority of the members of the board of county commissioners, the land adjoining the courthouse is, or may become, necessary for the enlargement of the courthouse or the jail, or for the purpose of beautifying county buildings, or to prevent the erection of other buildings so near to the courthouse and jail that the transaction of public business will be inconvenienced, the board, by a majority vote of its members, may purchase such land without submitting the question to a vote of the electors of the county. The money required for the purchase of the additional land shall be raised in the manner in which money is raised for general county purposes.

These sections, when read together, specifically authorize the county commissioners to purchase land for the erection of county buildings, including a jail, without an election, in only two instances: when the proposed expenditure is not greater in amount than may be provided by annual tax revenues, and when a majority of the county commissioners wish to acquire land adjoining the courthouse for expansion of the existing buildings or for scenic purposes, etc. Section 11-11-18 is especially instructive in that it provides if bonding is not to be used (and therefore, under our interpretation above, an election would not be had on the issuance of the bonds), an election must be had on the issue of construction itself. Were Sections 21-03-06(7a) and 21-03-07(2) to be construed to allow the use of the county's bonding authority without an election, the language in Section 11-11-18 requiring a vote on the issue of construction if bonding is not to be used would be rendered meaningless and is a result which we may not lightly presume to have been intended. Unless the proposed project comes within the two exceptions stated above, there is little question from the language used in Section 11-11-18 but that the Legislative Assembly intended to establish a norm of an election in all cases. While we are aware that such a construction of these statutes may work a hardship in terms of time and expense upon the county in this instance, we are also mindful that the Supreme Court has said, in reference to the issuance of bonds by a political subdivision, that where two meanings may be given to any statute that meaning which will best protect the public against imposition is the meaning to be adopted, even though it may work a hardship in individual cases. *Stern v. City of Fargo*, 18 N.D. 284, 122 N.W. 403 (1909).

For the foregoing reasons, we must conclude that the Legislative Assembly did not intend to authorize the payment of judgments in eminent domain by the use of general obligation bonds by enacting the provisions of Sections 21-03-06(7a) and 21-03-07(2). We do not by this conclusion, however, mean to imply that political subdivisions lack totally the authority to pay for judgments in condemnation by the use of general obligation bonds. Where such authority may have otherwise been granted under other sections of law, it is considered to be unaffected by our opinion in this matter. Because we have answered your first question in the negative, it is considered unnecessary to respond to your second question.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON
Attorney General