LETTER OPINION
80-39

January 31, 1980 (OPINION)

Ms. Cynthia A. Rothe
Cass County State's Attorney
P. O. Box 2806
Fargo, North Dakota 58620

Dear Ms. Rothe:

This is in response to your letter of November 27, 1979, in which you asked several questions regarding the procedure for financing the construction of an addition to and the remodeling of the present Cass County courthouse following the special election in Cass County last November sixth at which the voters approved a three-mill levy for six years for that purpose.

Rather than paraphrase your letter, we quote it in full as follows:

> On November 6, 1979, the Cass County Board of Commissioners was authorized by the voters of Cass County to levy a three-mill tax for six years for the purpose of constructing an addition to and remodeling the present courthouse. The question as it appeared on the ballot was:
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> > Shall the Board of Cass County Commissioners levy a tax of three mills on the taxable valuation of the county for the years 1980-1981-1982-1983-1984 and 1985 for the purpose of building an addition to the present courthouse and remodeling of the existing courthouse to provide needed additional space for county offices?
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> The history behind the November sixth special election is that the North Dakota Supreme Court recently gave the East Central Judicial District two additional district court judges chambered in Fargo. The Cass County Courthouse now has four district court judges and two courtrooms. In addition, various county offices, such as the Treasurer and Auditor, store files in the hallways of the courthouse. The presiding judge has appeared before the Board of County Commissioners and advised them of the urgency of the need for additional space. He has not ordered the Board of County Commissioners to provide additional space, but presumably he could do so under the inherent power of the judiciary.
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> The November sixth ballot proposal was based on North Dakota Century Code section 11-11-18 which allows the Board of County Commissioners to submit an extraordinary outlay to a vote of the people. The Board of County Commissioners, it would seem, now has a mandatory obligation to proceed with construction of an addition to and remodeling of the Cass County Courthouse. My question is: How can the Board of County Commissioners finance the construction and remodeling project? Can the County borrow in anticipation of proceeds from the mill levy or

must they wait until sufficient revenue has accumulated in the building fund? How would the following statutes apply to this situation: North Dakota Century Code sections 21-01-04, 21-03-06, 57-47-02, and 21-02-02?

If the presiding judge were to mandate the Board of County Commissioners supply courtrooms and necessary operating space for county offices, in what manner could the county legally proceed to comply? In that circumstance, what are the limitations as to the amount of indebtedness the county could incur?

We note from your letter quoted above that the November 6, 1979, ballot proposal was based on North Dakota Century Code section 11-11-18 which allows the Board of County Commissioners to submit the question of an extraordinary outlay to a vote of the people. We note also that your letter as set out above quotes the question as it appeared on the November sixth ballot used in the Cass County special election that day. It is therefore necessary to examine the provisions of section 11-11-18 and other sections, particularly sections 11-11-20, 11-11-21, and 11-11-24, related to the question of an extraordinary outlay that is authorized in section 11-11-18. Sections 11-11-18, 11-11-20, 11-11-21, and 11-11-24 read as follows:

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.

11-11-20. NOTICE OF ELECTION ON QUESTION OF EXTRAORDINARY EXPENDITURE. Notice of the election on the proposal to make an extraordinary expenditure of county funds shall be published in the official newspaper of the county for four successive weeks. The notice shall set forth the whole question to be submitted, including the amount of money to be raised, the amount of the tax desired to be levied, or the rate per annum and the years in which the tax is to be levied, the precise purpose for which the money is to be expended, the time when the question will be voted upon, and the form in which the question will be submitted. If the county does not have an official newspaper, the publication shall be made by posting the notice in at least one of the most public places in each election precinct in the

county. A copy of the question shall be posted at each voting place during the day of election.

11-11-21. PROPOSITION TO TAX MUST ACCOMPANY QUESTION SUBMITTED. When the question of extraordinary expenditure submitted to the electors of the county involves the establishment of a building fund for the construction of buildings or the borrowing or expenditure of money, the question must be accompanied by a proposition to levy a tax to provide for the payment thereof in addition to the usual taxes required to be levied. A vote adopting the proposition shall not be valid unless it adopts the amount of tax to be levied to meet the appropriation or liability incurred.

11-11-24. LIMITATION ON TAX LEVY FOR EXTRAORDINARY EXPENDITURE. The rate of tax levied by the board of county commissioners for an extraordinary outlay of money in no case shall exceed three mills on the dollar of the assessed valuation of the county in any one year. When the object is to establish a building fund to aid in the erection of public buildings, the rate shall be such as to raise the fund within six years, and the total sum to be so raised, including the then existing indebtedness of the county, shall not exceed five percent of its valuation according to the last assessment. A special tax levied under the provisions of this chapter, after becoming delinquent, shall draw the same rate of interest as ordinary taxes.

Your letter quoted above sets out the language of the question that appeared on the ballot used at the November sixth special election. We note that it does not include any reference to either of the two following items:

1. " . . . establishing a building fund to aid in the construction" of this courthouse project - see section 11-11-18 and see section 11-11-21.

2. The amount of money to be raised or the amount of tax desired to be levied. See section 11-11-20.

As to the first of the above two items, we do not know what information was included in the notice of election that presumably was published as required by section 11-11-20. If it is determined that the purposes of the special election included the establishment of a building fund for the construction of this courthouse project, then it would seem to be quite clear that the special election is invalidated by the last sentence of section 11-11-21, quoted above, because the ballot did not disclose "the amount of tax to be levied". See Kerlin v. Devils Lake, 25 N.D. 207, 141 N.W. 756 (1913), where the Court, in discussing the general rule that courts will not invalidate an election for mere irregularities in the election procedures, quoted (25 N.D. at 220, 141 N.W. 760) from one of its prior decisions as follows:

> It is elementary that mere irregularities in conducting an election which is fairly conducted, and which do not defeat or tend to defeat an expression of the popular will at the polls,

> will not so operate as to vitiate an election. To this rule there is an important exception. Where the statute in terms declares or necessarily implies that any particular act or omission shall defeat an election, the same is construed as a mandatory statute, and every such statute is required to be enforceable strictly in accordance with its terms.

Also see Eddy v. Krekow, 54 N.D. 220 at 225, 209 N.W. 225 at 227 (1926), where the Court said in reference to Section 3283, C.L. 1913, now section 11-11-21:

> Section 3283 provides that, when the question submitted involves the establishment of a building fund for the construction of buildings, the proposition must be accompanied by a proposal to levy a tax in addition to the usual taxes and that to be valid the vote must adopt the amount of tax to be levied. (Underlining added.)

Even though a notice of election may be sufficient in stating the purposes and other requirements of notice for an election, the ballot itself may be so indefinite or defective in stating a purpose that it invalidates an election insofar as voter approval of the particular purpose is concerned. See Kerlin v. Devils Lake, 25 N.D. 207 at 233-238, 141 N.W. 756 at 765-768 (1913). It is noted, however, that the ballot provisions declared invalid in that case for not stating definitely the amount of bonds authorized to be issued would now presumably be sufficient in view of sections 21-03-09(1) and 21-03-13.

As already observed above, we do not know from the information we have whether or not it was intended that the question of authorizing an extraordinary outlay or expenditure submitted at the November sixth election was intended to include the establishment of a building fund for the construction project, although your letter indicates that that was intended. If that was intended, then, as explained above, it certainly does not appear that that was accomplished by the election.

The second of the two items to which no reference was made in the ballot, as noted above, is:

> 2. The amount of money to be raised or the amount of tax desired to be levied. See section 11-11-20.

Section 11-11-20, already quoted, provides in part that the notice of election on the question of an extraordinary expenditure "shall set forth the whole question to be submitted, including the amount of money to be raised, the amount of tax desired to be levied, or the rate per annum and the years in which the tax is to be levied. . ." Clearly, this provision intends to prescribe what the question as stated on the ballot and in the notice of election shall include but, unfortunately, it is not clear from this language whether or not all dollar amounts can be omitted from the question on the ballot if the mill rate to be levied each year is included in the question on the ballot, as was the case with the question on the November sixth ballot.

Apparently only one Supreme Court decision has made reference to this provision of section 11-11-20; in Eddy v. Krekow, 54 N.D. 220 at 224, 209 N.W. 225 at 227 (1926), the Court said in reference to this provision in sections 3281 and 3282 of the Compiled Laws of 1913, now recodified into section 11-11-20, that:

> "Section 3281 provides for the submission to vote of any proposed expenditure greater in amount than can be provided for by the annual tax. Section 3282 governs the mode of submission."

It appears from this statement by the Court and an examination of Sections 3281 and 3282 to which it referred that the question as stated on the ballot for any extraordinary outlay must include the amount to be raised. We find also that the source note following section 11-11-20 in the Century Code shows the most recent sources to be Sections 3281 and 3282 of the Compiled Laws of 1913 and Section 11-1120 of the Revised Code of 1943. Section 11-11-20 is exactly the same as Section 11-1120 of the Revised Code of 1943. But the language in Section 3282 of the Compiled Laws of 1913 in which this language in section 11-11-20 has its source reads as follows:

> "The whole question, including the sum desired to be raised and the amount of the tax desired to be levied or the rate per annum and the years in which said tax is to be levied . . . ." (Underlining added.)

And the Revisor's note to Section 11-1120 of the Revised Code of 1943 states in part that:

> "The provisions here shown are revised for clarity and for separate statement without change in meaning."

In Northwestern Improvement Company v. Norris, 74 N.W.2d. 497 at 503 (N.D. 1956), in considering a change made in a statute by the 1943 Revised Code and the Revisor's note to the section stating that it was revised for clarity without change in meaning, the Court said:

> "We have adopted the rule that where a general statutory revision has been made resulting in the alteration of phraseology the change in phraseology will not be construed as altering the law unless it clearly appeared that there was a legislative intent so to do and in ascertaining such intention reference may be had to the prior statute."

On the basis of the foregoing, it appears from section 11-11-20 that if the question for an extraordinary expenditure as stated on the ballot does not include the amount desired to be raised, together with either the amount of tax to be levied or the mill rate of tax per year, the courts, if called upon to consider the matter, might very well hold the ballot to be so deficient that it would invalidate the election.

Aside, however, from all of the comments set out above, if it could be determined with certainty that the question on the November 6th ballot approved by the voters is sufficient to provide or authorize a tax levy of not more than three mills for each of the six years, we

then would offer the comments in the following paragraphs as a response to the questions set out in your letter.

As to your question asking how the Board of County Commissioners can now finance the courthouse construction and remodeling project, it would seem clear that the county could not borrow money by the sale of county bonds because of the provisions of chapter 21-03 relating to the issuance of bonds by municipalities. For the purposes of that chapter, subsection 1 of section 21-03-01 defines "municipality" as including a county; the provisions of chapter 21-03 therefore apply to a county. Subject to numerous exceptions specified in section 21-03-07, that section provides in 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:
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> . . .

We have examined all of the exceptions in the eight subsections of section 21-03-07, particularly subsections 1, 3, and 4 which include counties, and are forced to the conclusion that the Cass County courthouse project under consideration here does not fall within any of those exceptions. It necessarily follows that the above quoted portion of section 21-03-07 would apply and, therefore, that bonds could not be issued by Cass County or its Board of Commissioners pursuant to section 21-03-06 (which section is referred to in your letter) because it is our understanding that the voters of Cass County have never authorized issuance of bonds for this project in an election as required by section 21-03-07.

As to your questions in which you ask how sections 21-01-04 and 21-02-02 would apply for purposes of financing the courthouse project, we note that section 21-01-04 authorizes a taxing district, including a county, to issue warrants in payment of current expenses that are in excess of cash on hand but provides that such warrants can be issued only if the taxing district is unable to sell its certificate of indebtedness and it limits the amount of such warrants to specified percentages of uncollected and unencumbered taxes levied for the fiscal year of issue and for the four preceding years and provides for paying the warrants out of those taxes when collected. section 21-02-02 authorizes a county to borrow by selling certificates of indebtedness that will be paid out of collections of taxes already levied but not yet collected and it limits the amount to be borrowed as follows:

> . . .The aggregate amount of such borrowings at any time shall not exceed the amount of uncollected taxes which have been levied during the year in which the borrowing is made, plus uncollected taxes remaining upon the tax lists of the four preceding years, exclusive of levies for the purpose of

retiring bond issues and the interest thereon. . .

It is therefore evident that the county could not finance the courthouse project by issuance of warrants under section 21-01-04 or certificate of indebtedness under section 21-02-02 because they permit the county to borrow only against uncollected taxes already levied and not against taxes to be levied and collected in the future.

With respect to your question of whether section 57-47-02 could be used by the county in financing the courthouse project, that section authorizes a board of county commissioners to borrow from the Bank of North Dakota when the taxes authorized to be levied in any one year for general or special county purposes are insufficient to carry on the primary governmental functions or to pay mandatory obligations imposed by law upon the county. Section 57-47-04 authorizes the county board to levy a tax of not more than three mills in any one year to repay the loan, which loan must be evidenced by certificates of indebtedness in the manner and form prescribed by law (that is, N.D.C.C. chapter 21-02). As explained in the enclosed copy of the opinion of October 22, 1979, from this office to Slope County State's Attorney Robert A. Keogh, this tax levy authorized by N.D.C.C. chapter 57-47 cannot be spread against the taxable property in the county until after the loan is obtained from the Bank of North Dakota and the amount of the levy has been included in the county budget and appropriated for the purpose of repaying the loan.

Additional comments are included in the following paragraphs for your consideration.

It appears to us from the information available that the cost of this courthouse construction and remodeling project would be an amount that is larger than can be paid for from money that "can be provided for by the annual tax levies" (see section 11-11-18) and any other available county funds on hand; otherwise the proposal for an extraordinary outlay presumably would not have been submitted to the Cass County voters as provided in section 11-11-18. Our understanding of the clause "when the proposed expenditure is greater in amount than can be provided for by the annual tax levies" as used in section 11-11-18 is that it has reference to the amount that can be provided from the county tax levies for one year that can be made available for the proposed expenditures; if the proposed expenditure can be paid for out of money available from the county tax levies for the current year together with any other available funds on hand and has been properly budgeted for, then the question of making the proposed expenditure does not have to be submitted under section 11-11-18 to the county voters. See Schoonover v. Morton County, 267 N.W.2d. 819 at 824(5) (N.D. 1978), and Eddy v. Krekow, 54 N.D. 220, 209 N.W. 225 (1926).

But assuming, as we believe we must, that the cost of this courthouse project would be greater than can be paid for out of funds on hand plus any funds available from the county's tax levies for one year, we believe consideration must be given to the question of whether the county could at this time enter into one or more contracts for completion of the courthouse construction and remodeling project. It would appear that the county would not have the authority to do so.

This is because, first, the amount or amounts that such contracts would obligate the county to pay would be an "indebtedness" of the county within the meaning of Section 184 of the State Constitution and would be a "liability incurred" by the county within the meaning of section 11-23-06 of the North Dakota Century Code and, second, it does not appear to us that an appropriation has yet been made by the county as required by section 11-23-06 for the amount of any liability that the county would incur under the contracts. This is discussed further immediately after the following quotation of Sections 184 and 11-23-06.

Section 184 of the Constitution is as follows:

> Section 184. Any city, county, township, town, school district or any other political subdivision incurring indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due, and all laws or ordinances providing for the payment of the interest or principal of any debt shall be irrepealable until such debt be paid.

section 11-23-06 is as follows:

> 11-23-06. EXPENDITURE CANNOT BE MADE IN EXCESS OF APPROPRIATION. No county expenditure shall be made or liability incurred, nor shall a bill be paid for any purpose, in excess of the appropriation therefor, except as provided in sections 11-23-07 and 11-23-08.

If the question as stated on the November sixth ballot were found to be sufficient enough to avoid invalidation of the election, then it would seem that the voters' approval of the question does not by itself levy a tax but only authorizes the board of county commissioners to do so. Under this view, Section 184 of the Constitution would prevent the county from entering into contracts for completion of the courthouse project until the necessary tax levies were made by the board of county commissioners to pay the resulting indebtedness because the indebtedness would be larger than could be paid for out of money available from any other available funds on hand; but the levy could not be made by the county board of commissioners for any one of the six years until it was included in the county budget for that year and appropriated as required by sections 11-23-06, 11-23-02(7) and (10) and 11-23-05 of the county budget law. It follows that the whole project could not be contracted for now because the county board could not make the necessary levies at this time so as to satisfy the requirement of Section 184 of the Constitution. While perhaps not feasible, the alternative presumably would be to plan for the construction of the project on an annual piecemeal basis by letting contracts in any one year for not more than the amount that was included in the county budget for that year for the project.

Your final questions are repeated here as follows:

> If the presiding judge were to mandate the Board of County Commissioners to supply courtrooms and necessary operating space for county offices, in what manner could the County

legally proceed to comply? In that circumstance, what are the limitations as to the amount of indebtedness the County could incur?

Apparently the only statutory provisions relating to the county's obligation to provide courtroom facilities and other requirements of the courts are those set out in sections 11-10-20 and 11-11-12 N.D.C.C., which are as follows:

> 11-10-20. BOARD OF COUNTY COMMISSIONERS TO PROVIDE OFFICES, COURTROOM, JAIL - WHERE PUBLIC RECORDS KEPT - AUTHORIZATION FOR CENTRAL FILING OF DOCUMENTS OF REGISTER OF DEEDS, CLERK OF DISTRICT COURT, AND COUNTY JUDGE. The board of county commissioners shall provide a courtroom and jail, and shall provide offices in the courthouse of the county for the sheriff, county treasurer, register of deeds, auditor, clerk of the district court, state's attorney, county judge, county superintendent of schools, and any other officer who has charge of public records. If there is no courthouse in the county or if the courthouse erected has not sufficient capacity, such offices shall be furnished by the county in a suitable building at the county seat for all elected officials, and at any place within the county for appointive or administrative officials, at the lowest rent to be obtained, provided that this section shall not apply where county officials may serve more than one county as may be otherwise authorized by law. The board of county commissioners may provide by resolution for the filing in a single location of documents maintained by the register of deeds, the clerk of the district court, and the county judge. The resolution shall state in which office the filing is to be done, the persons who are to have custody of and access to the central files, and shall list the documents which are to be centrally filed.
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> 11-11-12. BOARD OF COUNTY COMMISSIONERS TO PROVIDE COURTS WITH SUPPLIES AND ATTENDANTS. The board of county commissioners shall provide the courts which are held within the county with attendants, fuel, lights, and stationery suitable for the transaction of business. If the board neglects to perform its duty, the court may order the sheriff to do so, and the expense incurred by him in carrying the order into effect, when certified by the court, shall be a county charge.

Of the two statutes quoted above, only section 11-10-20 includes any provision for providing courtroom space and it makes it the duty of the board of county commissioners to provide such space in the courthouse or by renting space.

section 11-11-12 and the substance of the first two sentences of section 11-10-20, however, were originally one section but were divided into the two sections in the Revised Code of 1943 "for clarity without change in meaning", according to the 1943 Code Revisor's notes to both sections. We find no court decision relating to the effect of this 1943 Code revision that divided the one prior section (Section 3293, C.L. 1913) into what is now sections 11-10-20 and 11-11-12 but we do note that the Court in State v. Tracy, 34 N.D. 498 at 502, 158 N.W. 1069 (1916), said as to Section 3293, C.L. 1913,

in which sections 11-10-20 and 11-11-12 have their source, that:

> And it is made the duty of the county commissioners of each county to provide a courtroom in case no courthouse has been erected, or where the one erected has insufficient capacity, and if the board neglects to do so, the court may order the sheriff to do so at the expense of the county. Comp. Laws 1913, Section 3293.
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> In Falconer v. Hughes, 96 P. 19 (1908), the California Appellate Court held under a statute that included provisions very similar to those in sections 11-10-20 and 11-11-12 that the judge could not hire a person to make repairs to the courtroom but could only require the sheriff to do it or have it done. The Court said:
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> The power of the court or judge is measured by the section. . . .As we said in Ex parte Widber, supra: 'This power vested in the judge or court is not an unlimited power, and therefore not a dangerous power. This section does not open wide the doors of the treasury and place the keys of the treasury vaults in the hands of the judiciary, with an invitation to enter and partake ad libitum as petitioner would insist; but the power is measured by the section, and expenditures made in excess of the limitation of the statute would be made without authority of law.'

Although not directly in point, the following North Dakota cases tend to indicate that the power of a court under sections 11-10-20 and 11-11-12 is limited: Wood v. Bangs, 1 Dak. 179, 46 N.W. 586 (1875); Cleary v. County of Eddy, 2 N.D. 397, 51 N.W. 586 (1892); and McCann v. Carlson, 26 N.D. 191 at 195, 144 N.W. 92 at 94 (1913).

It would seem clear that a court would not have unlimited power to order facilities for its own use without regard to the amount of cost to the county, otherwise the cost could be so great as to result in an amount of indebtedness charged to the county that would violate Section 184 of the Constitution, quoted earlier in this reply. As indicated in the California case of Falconer v. Hughes, quoted above, the amount by which the county could be obligated in this manner is likely limited by the amount available in the budget adopted by the county as provided in chapter 11-23, N.D.C.C.

While courts in other states have recognized an inherent power in a court to secure adequate quarters for the performance of its judicial functions when county officials fail in their duty to provide them, there is a great reluctance on the part of appellate courts to get involved in the matter if there is any indication that the county officials responsible for providing the facilities are attempting to meet those responsibilities. See State v LaParte Superior Court No. 2, 230 N.E.2d. 92 (Ind. 1967), and McIntyre v. County Commissioners of the County of Bristol, 254 N.E.2d. 242 (Mass. 1969).

We hope this response will be of assistance to you.

Sincerely,

ALLEN I. OLSON

Attorney General