

Office of the Attorney General  
State of North Dakota

Opinion No. 87-20

Dated Issued: October 15, 1987

Requested by: Lyle Witham  
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--QUESTIONS PRESENTED--

I.

Whether a board of county commissioners may levy an annual tax under N.D.C.C. §§ 57-15-06.6 and 57-15-06.7(19.1) for the purpose of housing prisoners in neighboring county correction centers.

II.

Whether a contract for jail services pursuant to N.D.C.C. § 12-44.1-02(2) qualifies as a "lease" for which a special mill levy may be assessed pursuant to N.D.C.C. § 57-15-59.

III.

Whether the board of county commissioners is the "governing body" which may, upon two-thirds vote, enter into "leases" for correction centers under N.D.C.C. § 57-15-59.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that a board of county commissioners may levy an annual tax under N.D.C.C. §§ 57-15-06.6 and 57-15-06.7(19.1) for the purpose of housing prisoners in neighboring county correction centers.

II.

It is my further opinion that a contract for jail services pursuant to N.D.C.C. § 12-44.1-02(2) does not qualify as a "lease" for which a special mill levy may be assessed pursuant to N.D.C.C. § 57-15-59.

III.

It is my further opinion that the board of county commissioners is the "governing body" which may, upon two-thirds vote, enter into "leases" for correction centers under N.D.C.C. § 57-15-59.

--ANALYSES--

I.

N.D.C.C. §§ 57-15-06.6 and 57-15-06.7(19.1) authorize a board of county commissioners to levy a tax not exceeding five mills for the purpose of constructing, equipping, operating, and maintaining regional or county correction centers. N.D.C.C. § 57-15-06.6 provides:

57-15-06.6. LEVY AUTHORIZED FOR REGIONAL OR COUNTY CORRECTION CENTERS. The board of county commissioners of each county may levy an annual tax not exceeding the limitation in subsection 19.1 of section 57-15-06.7 for the purpose of constructing, equipping, operating, and maintaining regional or county correction centers.

N.D.C.C. § 57-15-06.7(19.1) provides:

A county levying a tax for regional or county corrections centers according to section 57-15-06.6 may levy a tax not exceeding five mills.

N.D.C.C. § 12-44.1-02 requires a city or county to provide a jail or jail services at its own expense. That section provides:

12-44.1-02. ESTABLISHING JAILS--JAILS CONTRACTS--REGIONAL CORRECTIONS CENTERS. For the confinement of lawfully committed persons, the governing body of a county or city shall do or shall participate in the doing of, one of the following:

1. Establishing and maintaining a jail at county or city expense.

2. Contracting for jail services and use of jail facilities with another county or city maintaining a jail, with a regional corrections center, or with the state or federal government.

3. Establishing and maintaining, pursuant to chapter 54-40 and this chapter, a regional corrections center in conjunction with other counties and cities.

A county or city may additionally contract with a county or city of another state for the confinement of lawfully committed county or city inmates from that state in a North Dakota jail or juvenile detention center, or for the confinement of lawfully committed North Dakota inmates in a county or city facility of such other state. A

city or county may contract for juvenile detention services with a privately operated juvenile detention center. Contracts with private agencies providing juvenile detention services may be entered into for up to seven years.

When providing a jail or jail services, a county may have available three sources of tax revenue. The first of these is from the county general fund which would be subject to the 23 mill limitation imposed by N.D.C.C. § 11-11-16. Secondly, a county may levy up to five mills pursuant to N.D.C.C. §§ 57-15-06.6 and 57-15-06.7(19.1). Finally, up to ten mills may be levied to finance a lease for correction facilities under the provisions of N.D.C.C. § 57-15-59.

N.D.C.C. §§ 57-15-06.6 and 57-15-06.7(19.1) were adopted in the 1981 Legislative Assembly as House Bill No. 1328. At the time of the passage of that bill, it was a common practice for counties with normally small inmate population to contract with neighboring counties for jail services. This contracting provided a benefit to both counties. The county with the small inmate population reduced its expenditures which would otherwise be imposed for the maintenance of a corrections center and staff to operate the center. The county which received the inmates under the contract benefited in that moneys from the contract helped, on a cost-sharing basis, operate and maintain the facility.

The legislative history to House Bill No. 1328 discloses that many counties, especially in the western portion of the state, were met with a substantial increase in incarceration costs due to both the oil and coal development impact and the adoption of N.D.C.C. ch. 12-44.1 which, along with rules and regulations issued by this office, increased correctional facility standards. Because of these impacts, House Bill No. 1328 was adopted to provide an additional source of funding, over and above the 23 mill limit imposed by N.D.C.C. § 11-11-16, to assist the counties in the state to meet the correctional needs of those counties due to the increased population during the oil and coal development and the standards imposed by law.

Although comments were made during legislative hearings concerning use of the funds for construction of new facilities, testimony was also received pertaining to the increased cost imposed upon counties in contracting with other counties for providing jail services. In addition, an important factor considered in the hearings concerned cost sharing of incarcerated prisoners and implementation of cost effective methods to control the costs of correction facilities.

Adopted as section 3 of House Bill No. 1328, the 1981 Legislature set forth the purpose of that act. That section provides:

SECTION 3. PURPOSE. It is the purpose of This Act to promote development of regional or county corrections systems that:

1. Are flexible and adaptable to meet future and changing needs.
2. Protect society while providing safe, humane, and constitutional corrections facilities at the county and local level.
3. Are cost-effective in their implementation and effective in controlling the growing costs of corrections facilities.
4. Provide offenders opportunities for becoming productive members of society through community-oriented corrections services and programs.
5. Provide the court system with increased sentencing alternatives and provide legal equality in sentencing offenders.
6. Respond to the immediate and long-term correctional facility and operational needs at the county and local level.
7. Alleviate the correctional burden at the state level.
8. Enable the criminal justice system and the legislative assembly to assess the effectiveness and benefits of regional and county corrections centers.

Based upon the specifically-stated purposes of the Act and the legislative history, it is my opinion that funds derived from the levy of up to five mills pursuant to N.D.C.C. §§ 57-15-06.6 and 57-15-06.7(19.1) may be utilized by a county to contract for jail services even though that county is not operating its own jail or other correction facility.

There is no question that if a county constructed, maintained, or operated its own correction facility, the board of county commissioners of that county could levy up to five mills for payment of such costs. In addition, if the county and a city or another county entered into a joint powers agreement pursuant to N.D.C.C. § 54-40-08 for the purpose of establishing a regional correctional center, these funds could also be utilized by that county.

In light of the specific purposes set forth in section 3 of House Bill No. 1328, it would not appear to be within the legislative intent to say that mill levies imposed pursuant to N.D.C.C. §§ 57-15-06.6 and 57-15-06.7(19.1) could not be used to contract for jail services in lieu of the county operating its own correctional facility. The contracting for jail services will promote the

development of both regional and county correctional systems by providing flexibility to a county to meet correctional facility needs in a cost-effective manner. In addition, contracting for jail services will provide the court system within that county with increased sentencing alternatives, provide legal equality in sentencing offenders, provide offenders with opportunities for becoming productive members of society through community oriented correction services and programs, and provide a facility which meets statutory and constitutional standards. Contracting for jail services permits the establishment and maintenance of a better facility on a much more cost effective basis for all participating counties.

A county could, of course, participate in a joint powers agreement pursuant to N.D.C.C. ch. 54-40 and establish a regional corrections center with a city or another county. A mill levy could then be assessed to construct, equip, operate, and maintain that regional corrections center. The participating county would then be permitted to utilize the services of that corrections center. The main distinction between the regional corrections center and a contracting for jail services is that under the joint powers agreement participating counties or cities will have maintained some control over the operation of that center. Should only a contract be involved, the county which does not maintain the center will be entitled to the jail services in the same manner as if it had participated in the joint powers agreement but that county would not have retained control over the operations of that center. To say that the mill levy authorized by N.D.C.C. §§ 57-15-06.6 and 57-15-06.7(19.1) could be used to obtain jail services in a regional corrections center pursuant to a joint powers agreement but could not be used to obtain those services without participating in the regional corrections center agreement is both unreasonable and a frustration of the clear intent of the Legislature in the enactment of House Bill No. 1328.

## II.

N.D.C.C. § 57-15-59 provides:

57-15-59. COUNTIES' AND CITIES' AUTHORITY TO ENTER LEASES FOR CORRECTION AND LAW ENFORCEMENT FACILITIES AND DEDICATE MILL LEVIES. Notwithstanding any other provision of law, counties and cities, including home rule counties and cities, may upon a two-thirds vote of the governing body enter into leases for correction centers, jails, and other law enforcement facilities for a term of one year or more but not exceeding twenty years. At the time of entering into such a lease, the governing body shall dedicate the necessary annual mill levies to fund the lease payments, and such dedicated mill levies shall be irrevocable for the length of the lease. The governing body may levy and dedicate a levy of up to ten mills for

such purposes, and this levy is in addition to any levy limitations established by law or by a home rule charter. If a governing body enters into a lease with annual payments from revenue from a levy under this section, payments due under the lease are a general obligation of the county or city and backed by the full faith and credit of the county or city. A certified copy of the lease and resolution dedicating a levy under this section must be filed with the county auditor, who shall annually levy the mills set forth in the resolution for the entire term of the lease, unless the governing body provides the county auditor with a certified copy of a resolution providing that the county or city has funds available for all or part of the next year's lease payment and that no part or only a portion of the mills originally dedicated to the lease payment need to be levied for that year.

N.D.C.C. § 12-44.1-02(2) authorizes a county or city to contract for jail services and the use of jail facilities with another county or city, with a regional corrections center, or with the state or federal government. Your question raises the issue as to whether or not a "lease" under N.D.C.C. § 57-15-59 is a "contract" within the provisions of N.D.C.C. § 12-44.1-02(2) which would permit the governing body of a county or city to levy up to ten mills for payment of the lease.

Although a lease is considered to be a contract for the use of property under the laws of this state (see N.D.C.C. § 47-16-01 pertaining to the leasing of real property), it is my opinion that the provisions pertaining to a "lease" under N.D.C.C. § 57-15-59 are not as broad as the general contracting power envisioned by N.D.C.C. § 12-44.1-02(2).

N.D.C.C. § 57-15-59 was adopted by the 1987 Legislative Assembly as Senate Bill No. 2440. The legislative history of that Act discloses that it was to have application to lease-purchase financing of buildings. Testimony presented at the hearings on this Act disclosed that bond counsel for Cass County developed Senate Bill No. 2440 to dedicate taxes for repayment of the lease. This bill was enacted by the Legislature to provide an alternative financing procedure for a city or county, upon two-thirds vote of its governing body, to obtain facilities which it could not otherwise obtain through bonding or the extraordinary mill levy procedure. The legislative committees were informed that this lease financing could provide a quicker and cheaper method to obtain buildings and equipment than is possible with a privately negotiated bond sale.

A contract to provide jail services pursuant to N.D.C.C. § 12-44.1-02(2) is a different type of agreement than a lease as authorized by N.D.C.C. § 57-15-59. Under the lease, the county would have possession and control over the facility and would operate and maintain that facility in providing jail services. Under the

contract entered into pursuant to N.D.C.C. § 12-44.1-02(2), the county not operating the correctional center would merely deliver a prisoner or inmate to that facility and would have no control over its operation other than as defined in the contract. The daily care and supervision of the inmates would be under the control of the entity which operated the facility and staff.

In addition, N.D.C.C. § 57-15-59 and its legislative history speaks to the lease of "facilities." The contract contemplated N.D.C.C. § 12-44.1-02(2) is much broader than the facility leases of N.D.C.C. § 57-15-59 in that it authorizes the contracting for "jail services and use of jail facilities." The contract under N.D.C.C. § 12-44.1-02(2) covers not only the physical facilities, but also the personal property, staff, and services provided by the correction center.

Although a lease is a contract, the provisions of N.D.C.C. § 57-15-59 do not contemplate a leasing of jail services as authorized by N.D.C.C. § 12-44.1-02(2).

### III.

N.D.C.C. § 57-15-59 authorizes the "governing body" upon a two-thirds vote, to enter into leases for correctional centers, jails, and other law enforcement facilities and to levy up to ten mills for payment of said lease.

The term "governing body" as used in N.D.C.C. title 57 is defined in N.D.C.C. § 57-02-01(7). That section provides:

57-02-01. DEFINITIONS. As used in this title, unless the context or subject matter otherwise requires:

....

7. "Governing body" means a board of county commissioners, city council, board of city commissioners, school board, or board of education, or the similarly constituted and acting board of any other municipality.

Based upon this definition, the board of county commissioners will be the "governing body" authorized to enter into leases authorized by N.D.C.C. § 57-15-59 upon a two-thirds vote of that body.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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