

LETTER OPINION
2006-L-16

May 9, 2006

Mr. Stuart A. Larson
Traill County State's Attorney
PO Box 847
Hillsboro, ND 58045-0845

Dear Mr. Larson:

Thank you for your letter asking whether a county job development authority may take an equity position in a private company. For the reasons indicated below, it is my opinion that a county job development authority lacks express or implied statutory authority to take an equity position in a private company.

ANALYSIS

You indicate that a county job development authority (JDA) loaned money to a private company which is unable to pay off the loan. You ask whether the JDA may convert the unpaid loan to an equity position in the company. "Like political subdivisions and state agencies, a job development authority (JDA) created under N.D.C.C. ch. 11-11.1 is a creature of state statute and therefore possesses only those powers expressly granted to it by the Legislature or those necessarily implied from the powers expressly granted."¹

The purpose of a county JDA is to "encourage and assist in the development of employment and promotion of tourism within the county."² County JDAs have a number of powers including the power to invest any funds held by the authority; loan, grant, or convey any funds or other property held by the authority for any purpose necessary or convenient to carry into effect the objectives of the JDA; and use existing uncommitted funds held by the authority to guarantee loans or make other financial commitments to enhance economic development.³

¹ N.D.A.G. 2004-L-08 (quoting N.D.A.G. 96-L-205); accord N.D.A.G. 2000-F-01.

² N.D.C.C. § 11-11.1-03.

³ N.D.C.C. § 11-11.1-03(8), (10), and (11).

Unlike the North Dakota Development Fund,⁴ a county JDA has no explicit statutory authority to take equity positions in private companies.⁵ Because taking an equity position in a private company is not an express power of a county JDA,⁶ it must be determined whether the power is necessarily implied from those powers expressly granted or otherwise necessary to carry out the purposes of the JDA.⁷

"In cases where the North Dakota Supreme Court has found an incidental or implied power to exist, there appears to be a direct correlation between the express and incidental or implied power . . . [and] the express power could not be fully exercised without the implied power"⁸ For example, when asked whether a JDA's member could vote by proxy, this office stated, "[t]he JDA could easily 'encourage and assist in the development of employment and promotion of tourism within the county' without the power to vote by proxy; a JDA is not dependent upon the ability to vote by proxy to fulfill its purpose."⁹

Similarly, there is no necessarily direct correlation between any of the county JDA's express powers and any implied power to take equity positions in a private company. The JDA can still fulfill its duty to encourage and assist in the development of employment and promotion of tourism in the county without the power to take equity positions in private companies. A county JDA is not dependent on the ability to take equity positions in private companies to fulfill its purpose.

Based on the foregoing, it is my opinion that a county JDA lacks express or implied statutory authority to take an equity position in a private company. Because of this

⁴ See N.D.C.C. § 10-30.5-02(1) (North Dakota Development Fund has "authority to take equity positions in, to provide loans to, or to use other innovative financing mechanisms to provide capital for new or expanding businesses in this state, or relocating businesses to this state"). Had the Legislature intended a county JDA to have such a power, it could have easily specified it, as it did in N.D.C.C. § 10-30.5-02(1).

⁵ Cf. N.D.A.G. Letter to Nelson (Feb. 19, 1991) ("state may take an equity position in North Dakota businesses or subscribe to or become the owner of capital stock in North Dakota businesses . . . through an industry, business, or enterprise in which the state is engaged . . . for a public purpose").

⁶ Cf. N.D.A.G. 2003-L-19 (city JDA, as an alter ego of the city, may only make the investments allowed a city under N.D.C.C. § 21-06-07 and the statute does not permit taking an equity position in a limited liability company); N.D.A.G. 2000-F-01 ("no state law authorizes either a city job development authority or a county job development authority to issue equity securities on behalf of a private company which would be sold to the general public in this state").

⁷ See N.D.A.G. 2004-L-08.

⁸ Id.

⁹ Id.

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determination, it is not necessary to analyze whether a county JDA would be allowed by N.D. Const. art. X, § 18¹⁰ to purchase capital stock in an association or corporation.¹¹

Sincerely,

Wayne Stenehjem
Attorney General

jjf/vkk

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.¹²

¹⁰ N.D. Const. art. X, § 18 provides, in part, that “[t]he state, any county or city may make internal improvements and may engage in any industry, enterprise or business, . . . but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.” (Emphasis supplied.) See N.D.A.G. 93-F-02 (“Article X, Section 18 of the North Dakota Constitution does not prohibit the State of North Dakota from purchasing capital stock in an association or corporation if it does so through an industry, business or enterprise.”).

¹¹ N.D.A.G. 93-L-129 (“Thus, if there is statutory authority for a county to engage in economic development activities, such as a job development authority under N.D.C.C. ch. 11-11.1, then the county is engaging in an enterprise and is in compliance with the Article X, Section 18 of the North Dakota Constitution. 1992 N.D. Op. Att’y Gen. 57. However, while engaging in that enterprise, the county must act in accordance with its specific statutory authority or a statute from which the authority can be necessarily implied.”).

¹² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).