

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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OFFICIAL OPINION NO. 67-68 pg. 16

County Commissioners. County Historical Museums-Construction and Maintenance with County Funds.

You have requested an official opinion based upon the following factual situation:

"The Brookings County Historical Association, a non-profit corporation, has acquired a site and is proposing to build a building to house a collection of historical objects. It is their intention to build the building by local subscription. The County Commissioners anticipate that they will be requested to make a levy under either Ch. 28, Session Laws of 1966, or 12.2310 1960 Supp., for the purpose of assisting in the cost of building, equipping the same and/or providing maintenance."

Based upon this factual situation, you have asked the following questions:

"1. Can Brookings County use funds derived from a levy made under these statutes or any other statutes to assist in the cost of constructing such a building, equipping the same or to pay any of the expense of maintenance, such as salary of a caretaker, heat, light and general operating expenses, as long as the building IS owned and operated by the Brookings County Historical Association?"

"2. Could Brookings County use funds derived from a levy made under these statutes or any other statutes to assume the entire cost of maintenance and operation if the Historical Association were to lease the facility to the County?"

You have advised the County Commissioners that you do not believe that county funds may be used either under SDC 1960 Supp. 12.2310 or Ch. 28, Session Laws of 1966, or any other statute to contribute to the cost of erecting a building or equipping the same so long as it is and will be owned by the Historical Association.

As our Supreme Court said in *Bailey v Lawrence County*, 5 SD 393, 59 NW 219, 49 AM. St. Rep. 881:

"Counties are involuntary political subdivisions of the state, created for governmental purposes and are organized without regard to the consent or dissent of individuals. . . "

A county is vested with only such powers as are expressly granted, or which may be reasonably implied from the powers expressly granted.

Town of Dell Rapids v. Erving, 7 SD 310, 64 NW 149, 29 LIRA 222;

State v. Davis, 11 SD 111, 75 NW 897, 74 Am. St. Rep. 780;

Meek v. Meade County, 12 SD 162 80 NW 182;

Pierson v. Johnson, 59 SD 163, 238 NW 644;

Pomerane v. Washabaugh County, 61 SD 422, 249 NW 734;

South Dakota Employee Protection Association v. Poage, 65 SD 198, 272 NW 806;

State ex rel' Bell v. Board of County Commissioners, 68 SD 237, 300 NW

832;

State ex rel Jacobsen v. Hansen, 75 SD 476, 68 NW 2d 480.

As Judge Corson stated in *Town of Dell Rapids v. Erving*, supra, in discussing involuntary quasi corporations such as counties:

"They are not bodies corporate and politic with the general power of corporation but are mere political subdivisions of the state, having the power expressly granted to them, and such implied powers as are necessary to enable them to perform their duties, and no more. They are denominated in the books, and known to the law, as quasi corporations rather than as corporations proper. They possess some corporate functions and attributes, but are primarily political subdivisions,—agencies in the administration of civil governments,—and their corporate functions are granted to enable them more readily to perform their public duties."

The Legislature exercises supreme power over the counties except insofar as the Legislature is restricted by the Constitution, by express terms therein or by necessary implication.

Schomer v. Scott, 65 SD 353, 274 NW 556:

Williams v. Book, 75 SD 173, NW 2d 290.

An examination of SDC 1960 Supp. 12.2310 will show that the Legislature has authorized the County Commissioners at its discretion, to acquire without cost to the county, historical sites, and objects of historical interest and may provide for the preservation, display and maintenance of such objects and writing either in the courthouse or elsewhere in said

county in a room or rooms for such display. The County Commissioners are further limited, to budgeting not more than five cents per inhabitant of said county, as determined by the last official census, for such preservation and display of such historical objects.

Certainly, there can be no question that under this statute no public funds could be expended for the purpose of constructing the historical museum, or provide maintenance and supply expenses of such museum. It should be noted that if the Board of County Commissioners does obtain certain objects of historical interest, that such statute would authorize such to be displayed and preserved in such private museum, and within the limitation, expend such budgeted funds for the necessary maintenance.

Chapter 28, Laws of 1966, provides that the County Commissioners may levy annual tax not to exceed % of one mill on a dollar, but the moneys raised by such tax may be used only "for the purchase, erection, renovation, improvement, remodeling, alteration, addition to and repairing of county historical museums..."

Chapter 28 was placed by the Legislature in SDC 12.23. An examination of such chapter and the amendments thereto will disclose that it is entitled, "COUNTY BUILDINGS AND MONUMENTS." An examination of the individual section comprising such chapter will disclose that the monuments and buildings therein authorized are property owned by the county, with the exception of the construction permitted jointly by the county and the municipal corporation which is the county seat of such county as provided in SDC 12.2304.

It is my opinion that the "County Historical Museum" referred to in Chapter 28, Laws of 1966 must be limited to County Historical Museums either owned outright by the county or under its control. (See the opinion of my predecessor reported in 1949-50 AGR 213 in regard to a jointly constructed building). Certainly, your advice to your county board in regard to Question No. 1, in most of its aspects was proper. The answer to such question is "NO". However, this answer must be tempered with the realization that the moneys budgeted in pursuance to SDC 1960 Supp. 12.2310 may be used for the expenses of "maintenance" of any county owned historical objects on display in such privately owned museum. The extent and purposes of such "maintenance" must be left to the discretion of the county commissioners. Whether such should extend to furnishing the salary for the caretaker, and paying the costs of heat, light and general operating expenses of the privately owned museum is a question that only the commissioners can answer. It is my opinion the extent to which such budgeted item may be so expended would depend almost entirely upon the number of county owned historical objects therein on display. If there are no county owned historical objects therein housed, none of this budgeted item could properly be furnished to such museum. If the entire collection therein housed was county owned, the commissioners in their honestly exercised discretion could furnish all of the maintenance necessary. They should consider the extent of the county owned historical objects (received by the county without cost) in such privately displayed collection, and within their own honest and fair discretion determine the extent, if any, to which the county is to furnish maintenance for the "county owned" historical objects on display in such privately owned museum.

Question No. 2 involves a more difficult problem. It at first involves the right of the county to lease property for a county historical museum, in which case such property would be under its control, and the conclusion reached might be different from the conclusion reached when such museum was under the control of a private non-profit corporation.

I have never been called upon to render an opinion as to the validity of a county leasing privately owned property for county use, although I have rendered several opinions relating to the propriety of leasing publicly owned property to private entities. My predecessors in office, have been faced with the question of the leasing of property by counties, and they have expressed the opinion that the county commissioners may rent or lease property for a variety of purposes. See the following opinions:

1911-12 AGR 574—When space in the Courthouse is unavailable, the Commissioners may rent office space for the State's Attorney and the County Judge;

1919-20 AGR 90—May rent office space for the County Agent; 1919-20 AGR 106—May lease building to be used for county fair purposes;

1919-20 AGR 216—May rent polling places for an election;

1955-56 AGR 372—May rent road equipment to construct and maintain county roads;

1955-56 AGR 27—May lease real estate to be used for county fair;

1957-58 AGR 52—May rent office space for County Judge when such space is unavailable in the Courthouse;

1957-58 AGR 98—May rent photostatic copy equipment.

Upon analysis these decisions reveal that the right to lease such property is based upon the fact that a lawful county purpose was involved, in which case the county commissioners, if such seems to be to the advantage of the county and its citizens, may legally enter into a lease agreement in order to satisfy such lawful county purpose.

The housing of objects of historical interest is a lawful county purpose. I must find that there is nothing illegal for the commissioners to lease a building to house such county historical objects, if they find that it is for the best interest of the county, and its inhabitants to so act.

It is also my opinion that the five cents per inhabitant item that may be budgeted in pursuance to SDC 1960 Supp. 12.2310 may be used to maintain such building leased by the county as the county historical museum. Such moneys may be used to "preserve, display, and maintain" such historical objects. This of necessity must include the maintenance of the building in which such historical objects are placed upon public display.

Chapter 28, Laws of 1966 authorizes a levy of not to exceed % of one mill "to provide for the acquisition of sites, purchase, erection, renovation, improvement, remodeling, alteration, addition to and repairing of county historical museums." Can the proceeds of such annual levy be used to maintain the county historical museums?

Our Supreme Court in *State ex rel Jacobsen v. Hansen*, 75 SD 476, 68 NW 2d 480 was met with a similar problem in determining the extent to which a county could go under a relatively similar statute. Said our Court:

"The statute under consideration grants power to issue bonds for certain specified purposes. It grants power as we have stated to issue for the 'erection, equipment and maintenance' of a county hospital. The legislature has confined the authority conferred to a specific and clearly indicated purpose or purposes and defendant board has no authority to issue bonds and exceed the proceeds thereof for the accomplishment of a different purpose outside and beyond such limitations, namely, the purchase of a hospital already constructed."

Our Court has pointed out that the grants of power coming from the Legislature to the county cannot be extended beyond the clear import of the power granted. I must hold that maintenance of such county historical museum does not come within the clearly indicated purposes for which such tax could be levied and the proceeds thereby collected could not be used to accomplish a different purpose outside and beyond the limitations provided by the Legislature. Clearly the funds raised by taxation in pursuance to Chapter 28, Laws of 1966 cannot be used to rent or maintain such county historical museum.

I believe that I have answered Question No. 2, but to reiterate, while I find that the lease of such museum is proper, only the amount of moneys budgeted in pursuance to SDC 1960 Supp. 12.2310 could be used to maintain such leased historical museum, and no funds derived by the levy of the tax in pursuance to Chapter 28, Laws of 1966 could be used for such purpose.