

# City of Minot

## City Attorney's Office



### MEMORANDUM

**TO:** Mayor and City Council  
**FROM:** Kelly Hendershot  
**RE:** Community Facilities  
**DATE:**

In 2011, the citizens of Minot voted to temporarily reallocate the second penny (the “NAWS Penny”). Thirty percent of the NAWS Penny was approved to go towards community facilities. No definition of “community facility” existed from 2011 through 2014. In 2014, the City Council appointed an ad hoc committee to define “community facility.” The ad hoc committee drafted the following definition, which was approved on June 2, 2014 by the full City Council:

A community facility would fill a need by the community, and it should be owned and operated by a political subdivision. If non-profit groups are to be eligible, they should be limited to partnership projects with political subdivisions, not stand alone non-profit projects. Local control is the main concern on any project funded, and true benefit to the community.

A review of prior City Council decisions relating to community facilities and of the discussions at the ad hoc committee reveals that the reason for this requirements is to ensure the City does not violate any constitutional provisions relating to donating public funds to private organizations.

Article X, Section 18 of the North Dakota Constitution provides:

The 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.

In North Dakota Attorney General Opinion 98-F-30 (attached to this memorandum), the Attorney General considered whether the City of Minot could constitutionally donate a sum of money to the YMCA, to defray part of the costs of constructing a new building to house the YMCA’s offices and operations. There, the Attorney General stated that it would be a violation of the North Dakota Constitution (Article X, Section 18) for the City to donate money for construction of a new YMCA building, unless the donation were made in connection with an enterprise pursuant to the City’s home rule charter and an implementing ordinance detailed to ensure the donation has a public purpose and the public purpose is met.

The Attorney General provided that the limitations of Article X, Section 18 do not apply in three situations: (1) when money is used to make internal improvements; (2) when money is donated to the poor; and (3) when money is distributed to an authorized industry, enterprise, or business of the city.

The Attorney General opined that a donation to a private entity to house a private association does not constitute an “internal improvement.” Further, the Attorney General indicated that the donation to the poor exception was inapplicable because the project did not constitute a donation “for reasonable support of the poor.” In conjunction with that analysis, the Attorney General stated that “[s]imply asserting that a donation to a private entity is for the reasonable support of the poor is not a sufficient basis for which to make such a donation.” With that, the Attorney General determined that the City could not donate money to the YMCA under that exception.

As indicated above, the Attorney General did determine the City could donate money to the YMCA if the donation were pursuant to an authorized industry, enterprise, or business of the city. The Attorney General provided that an enterprise is an activity which does not violate the North Dakota Constitution or statutes and which is of some scope, complication or risk. In order for the City to engage in an enterprise, it must have an implementing ordinance that (1) authorizes the City to engage in the proposed enterprise; (2) provides assurance that the activity has a public purpose; (3) sufficiently details the manner of implementing the activity; and (4) provides for supervisory controls to ensure the public purpose is met.

Under the YMCA scenario, the Attorney General suggested two examples of appropriate enterprises: (1) if the City provided a physical fitness program for its citizens and then contracted with the YMCA for services relating to the physical fitness program; and (2) if the City developed a grant program to provide funds to organizations for promoting the health and welfare of Minot’s citizens with specific application criteria.

With regard to the community facility applications before the City Council at this time, it is important for the City Council to (1) consider the definition of “community facility” in conjunction with determining which projects to move forward; and (2) if the City Council determines that an eligible private non-profit application should be approved, that the City Council determine (a) determine what enterprise the City is engaging in with the private non-profit organization; and (b) determine the essential elements of the implementing ordinance: (i) the City is authorized to engage in the proposed enterprise; (ii) public purpose of the activity; (iii) details on implementation of the activity; and (iv) supervisory controls to ensure the public purpose is met.

Among other things, the definition of “community facility” specifically requires that any private non-profit organization applying for funding must be partnered with a political subdivision. It should be noted that the definition provided by the ad hoc committee and approved by the full City Council in 2014 is not incorporated into our city ordinance and is not binding. However, the City Council has previously denied applications since the approval of the definition, on the basis that a private non-profit organization applied for funding without a political subdivision partnership (e.g., DVCC 2015 application).

To be clear, the requirement for an enterprise is only if the City is donating public money to a private organization. This requirements does not apply to money provided to City projects or to projects pursued directly with other political subdivisions or state entities; in projects with other political subdivisions or state entities, the City can enter into joint powers agreements pursuant to section 54-40.3-01 of the North Dakota Century Code.