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March 24, 2004

Jay T. Squires
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300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402

Dear Mr. Squires:

Thank you for your correspondence of January 15, 2004 concerning the Northfield School District's proposal to construct and operate wind powered electrical generators in cooperation with Carlton College.

Facts and Background

You state that Independent School District No. 659 (the "District") is considering "partnering" with Carlton College in the construction and operation of two wind turbines. The two turbines would be constructed on property leased for these purposes. The turbines would be connected into the local electrical distribution grid.

The cost of the turbine project has been estimated at $3.5 million. The District's share of the cost would be funded either by the issuance of bonds, or through a municipal lease-purchase agreement.

The energy created by the turbines would be sold to Xcel under Power Purchase Agreements negotiated by Carlton and the District. It has not yet been determined whether the proceeds would be placed in special funds to directly offset energy costs of the District, or whether they would be deposited in the District's general fund.

In addition to a projected reduction in net energy expenditures by the District, the District believes that the project would create educational opportunities for students and would benefit the community by providing an "alternate renewable power source" contributing to the local power grid. Based upon these facts, you ask for the opinion of this Office on whether the District has authority to construct and operate a wind turbine.

Law and Analysis

First, as you note in your letter, any expenditures of public resources must primarily serve a public purpose. *See, e.g. Visina v. Freeman*, 252 Minn. 277, 89 N.W.2d 635 (1958) where the Court stated:

> It is well settled in this state that the state or its municipal subdivisions or agencies may expend public money only for a public purpose. What is a "public purpose" that will justify the expenditure of public money is not capable of a precise definition, but the courts generally construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.

Id. at 184, 89 N.W.2d at 643.

While the satisfaction of the public purpose requirement is, to a certain extent, a question of fact,[1] it is likely that a project designed to generate revenue for a political subdivision while providing educational opportunities for public school students would be found to satisfy this requirement.

Second, in addition to satisfying the public purpose requirement, an action by a unit of local government must also be authorized by statute or home rule charter. As creations of the legislature, political subdivisions such as school districts may only exercise such powers as are expressly delegated to them by statute, or those that may be implied as necessary and reasonable to carry out such express powers. *See, e.g., Country Joe, Inc.* We find no express authority for a school district to construct and operate a generation facility to produce electricity for sale. *Cf.* Minn. Stat. § 412.321, 455.01 *et. seq.* authorizing cities to own and operate light and power plants for generation of electricity for sale to private customers. Thus, any authority of the district to undertake the described project must be derived from implied powers.

Minn. Stat. § 123B.02, subd. 1 (2002) provides:

> The board must have the general charge of the business of the district, the school houses, and of the interests of the schools thereof. The board's authority to govern, manage, and control the district; to carry out its duties and responsibilities; and to conduct the business of the district includes implied powers in addition to any specific powers granted by the legislature.

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[1] *See, e.g., Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391 (Minn. Ct. App. 2001) (case remanded for comparative findings on public versus private purposes furthered by project).

Subdivision 2 of that section provides in part:

> It is the duty and the function of the district to furnish school facilities to every child of school age residing in any part of the district.

See also Minn. Stat. § 123B.51 (2002) which authorizes the construction and operation of necessary school sites and buildings. The District's authority for maintenance and operation of such buildings certainly includes the authority and responsibility to provide necessary utility services to them. It may be further inferred that, in appropriate circumstances, the district may determine to provide such services for itself in whole or part, rather than contracting therefore. *See, e.g., Borgelt v. City of Minneapolis*, 271 Minn. 249, 135 N.W.2d 438 (1965) where the court concluded that city authority to own and operate an asphalt mixing plant to supply its own needs, could be reasonably inferred from its express powers to pave streets, alleys and highways. In fact, generation of electricity through wind power by school districts appears to have been contemplated by the legislature since, for example, Minn. Stat. § 216C.41, subd. 1(c)(2)(iv) defines a "qualified wind energy conversion facility" to include one owned by a school district.

Third, when a local government goes beyond supplying its own needs and enters into the commercial marketplace, the courts have, however, generally not been willing to justify such activity under a doctrine of implied powers. In *Borgelt*, for example, the court, while permitting the city to produce asphalt for its own use, noted that it could not attempt to sell its asphalt to others absent specific statutory authority to do so. *Id.* at 257-58, 135 N.W.2d at 444. Similarly, the court in *John Wright & Assoc. v. City of Red Wing*, 254 Minn. 1, 93 N.W.2d 60 (1958) held that a city had no implied authority to operate a commercial public movie theater in an auditorium which had been given to the city as a gift. There the court said:

> We find no authority, however, to the effect that a municipality . . . may itself engage in a private business on municipal property, even though such property has been acquired by devise or gift. A municipal corporation or its agency is invested with full power to do everything necessarily incident to the proper discharge of its public functions. *In the absence of express legislative authority, it may not engage in any private business enterprise or occupation such as is usually pursued by private individuals.*

Id. at 6, 93 N.W.2d at 663-64 (Emphasis added).

Fourth, the fact that an activity will generate funds for the governmental unit or to defray the costs associated with a government function is not in itself sufficient to justify its undertaking absent other statutory authority. *See, e.g., Country Joe* where the court declined to infer city authority to impose road "connection charges" upon new developments from its express powers to construct and improve roads and to regulate land use.

Finally, we do not agree that the case of *Northland Racquetball, Inc. v. Bemidji State University*, 1995 W.L. 81413 (unpublished) provides support for the District's proposal. That case, in which the court upheld the authority of the University to permit members of the public, for a modest fee, use a campus recreational center, differs from the instant proposal in several respects. The recreation center was the sort of facility normally found on a college campus, was constructed for, and predominantly used by, students, and was available to the public only during limited hours. Furthermore, the court found the action to be within the broadly defined express power of the State University Board to operate "revenue-producing" facilities. *See* Minn. Stat. § 136.31, subd. 1 (1992), *See now* Minn. Stat. § 136F.90, subd. 1 (2002).

As described in your letter, the district's proposed project, while affording certain educational opportunities to students, would primarily entail generation of electricity for sale to a private utility company in exchange for money to be used for the District purposes. While school districts are authorized to impose charges for certain specific items and services associated directly with its educational activities,[2] we are unaware of any authority for districts to engage in profit-making enterprises generally. Consequently, under the legal principles discussed above, it is our view that the District lacks the authority to undertake the described project.

Very truly yours,

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[2] *See, e.g.*, Minn. Stat. §§ 123B.29, 123B.36, 123B.37 (2002).