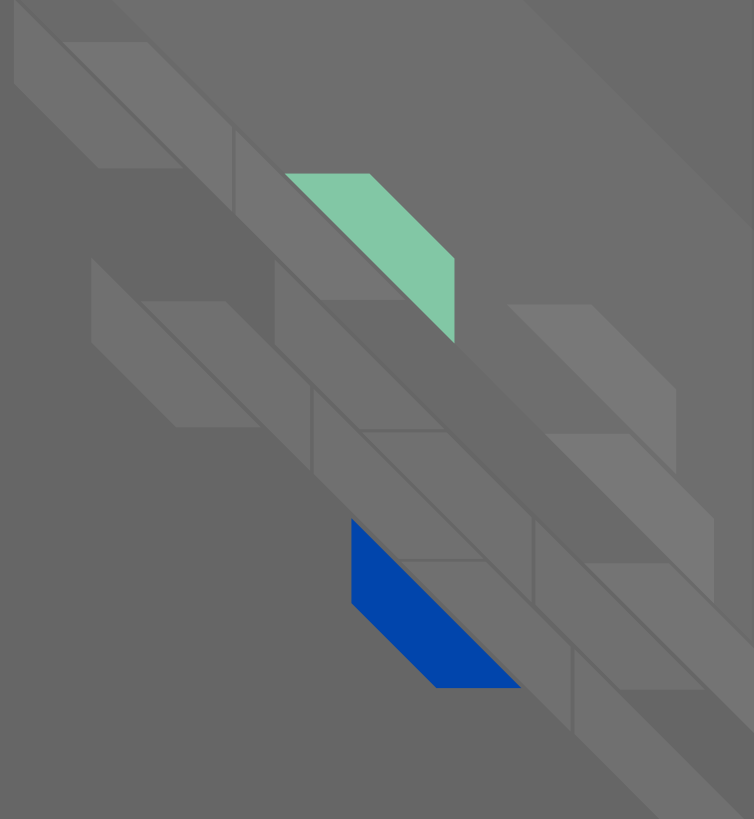




ND's Anti-Gifting Clause

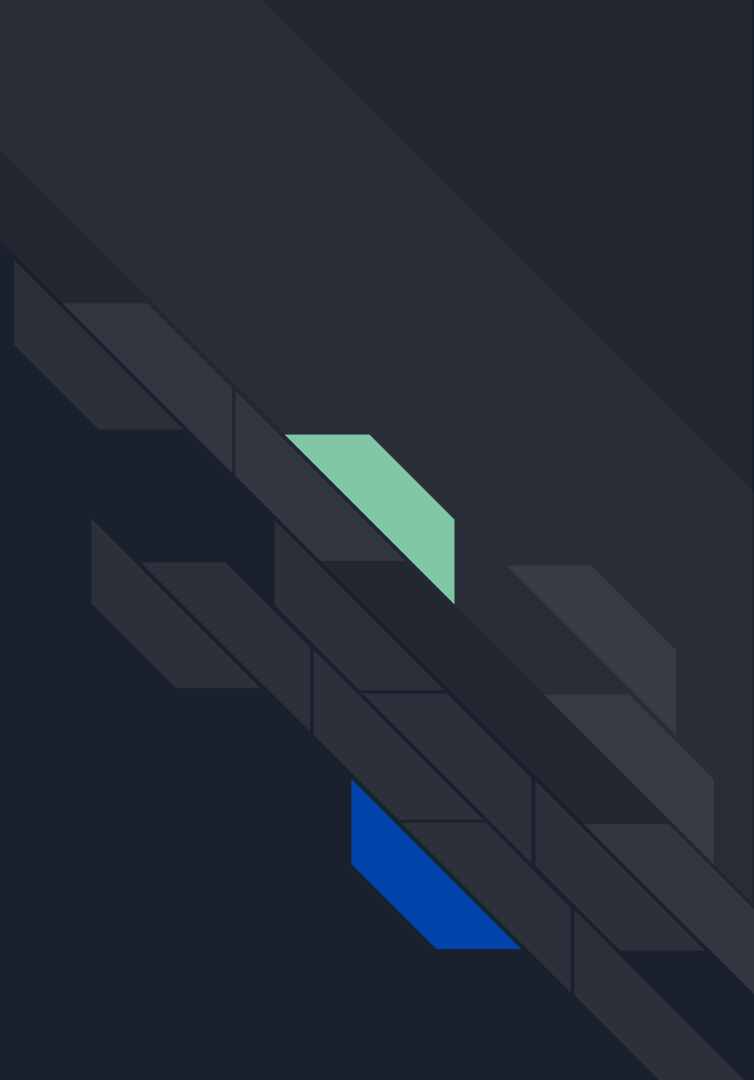
Amy L. De Kok
NDSBA Legal Counsel
January 2023 Brunch & Learn

What is the Anti-Gifting Clause?



Article X, Section 18 of ND Constitution:

“The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, 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...”





What does this actually mean?

- Limits how the state and its political subdivisions may use public funds
- Limits how/whether the state and its political subdivisions may dispose of public property
- May use for economic development that serves a public purpose (but must have statutory authority to take proposed action)
- “reasonable support of poor” – authorizes welfare programs (e.g., WIC, free-reduced lunches, housing programs, etc.)
- Incorporates restrictions of the due process clause of the federal constitution and requires the use of public funds derived from taxation to be for a public purpose (incidental private benefit is ok)



What are public funds?

- Defined in NDCC 21-04-01(5)
- "Public funds" includes all funds derived from taxation, fees, penalties, sale of bonds, or from any other source, which belong to and are the property of a public corporation or of the state, and all sinking funds of such public corporation or of the state, and all funds from whatever source derived and for whatever purpose to be expended of which a public corporation or the state have legal custody. The term includes funds of which any board, bureau, commission, or individual, created or authorized by law, is authorized to have control as the legal custodian for any purpose whatsoever whether such funds were derived from general or special taxation or the assessment of persons or corporations for a specific purpose. The term does not include funds of students or student organizations deposited in a student financial institution approved by and under the control of the school board.



What are public funds?

- Regarding public funds, the North Dakota Supreme Court has held:

The people and the legislature, through the constitution and laws of this State, have delineated the parameters of the appropriate expenditure of public funds, and any expenditure in violation of those provisions by definition creates a loss to the government.

School Board Statutory Powers

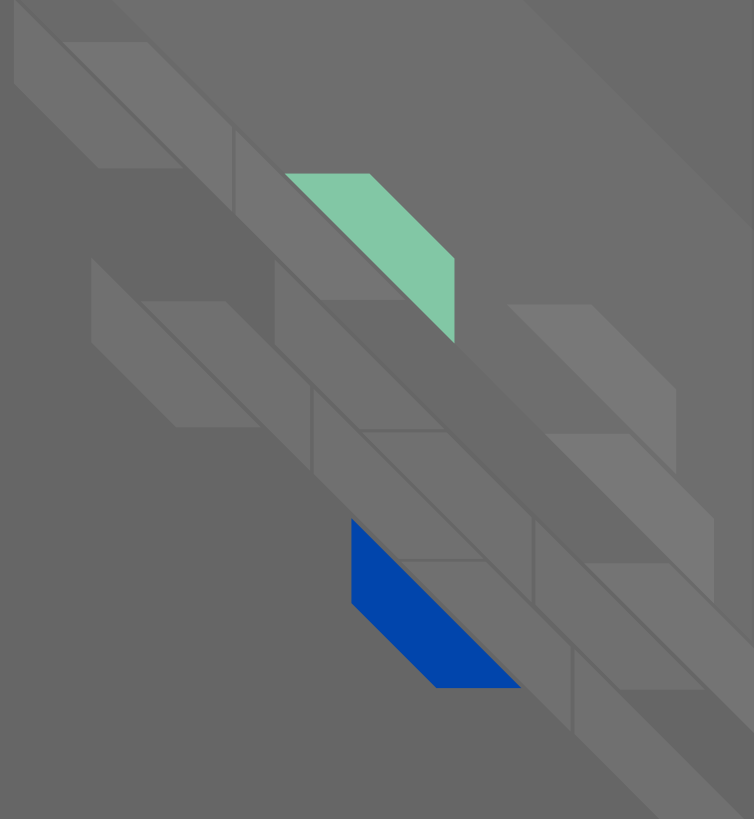
- School boards only have the powers expressly conferred upon them by the legislature or such as may be necessarily implied from the powers expressly granted
- NDCC 15.1-09-33 (School Board Powers)
 - Purchase, sell, exchange and improve real property
 - Employ, contract with and compensate school personnel
 - Purchase, sell, exchange, improve, and lease for up to one year equipment, furniture, supplies, and textbooks
- Other statutory provisions (e.g., NDCC Title 21)

School Board Statutory Powers

NDCC 21-06-12. Use of public funds or property for nonprofit education foundations - Public purposes.

Any school district **may provide use of public property or in-kind services** of personnel to participate in the creation and administration of nonprofit public school education foundations, subject to an annual audit, **to receive, manage, invest, and distribute funds or property provided to the foundation by private or nonschool district governmental entities**, if such foundations are established to enhance the mission of the school district **by providing facilities or services for recognition of staff and students that are not normally available through the funding of the school district, to administer funds received for education scholarships or endowments established by other entities, to encourage elementary, secondary, and postsecondary education**, and to assist in raising, adding, investing, and distributing funds and earnings according to guidelines established by the foundation. The records of a foundation are not subject to audit under section 54-10-14.

Disposing of School District Property





Selling/Disposing of Property

- The North Dakota Supreme Court has held that a transaction involving the sale of state-owned property for less than what could be obtained for the property at a public sale violates Article X, Section 18 of the North Dakota Constitution.
- The same would be true concerning a sale for less than fair market value by a school district.



Relevant School Board Policies

→ IAD (Disposal of School Real Estate)

- Requires appraisal to determine FMV
- May advertise for bids or sell outright at public sale
- If no bids received, may sell by private sale
- Cannot be sold for less than FMV



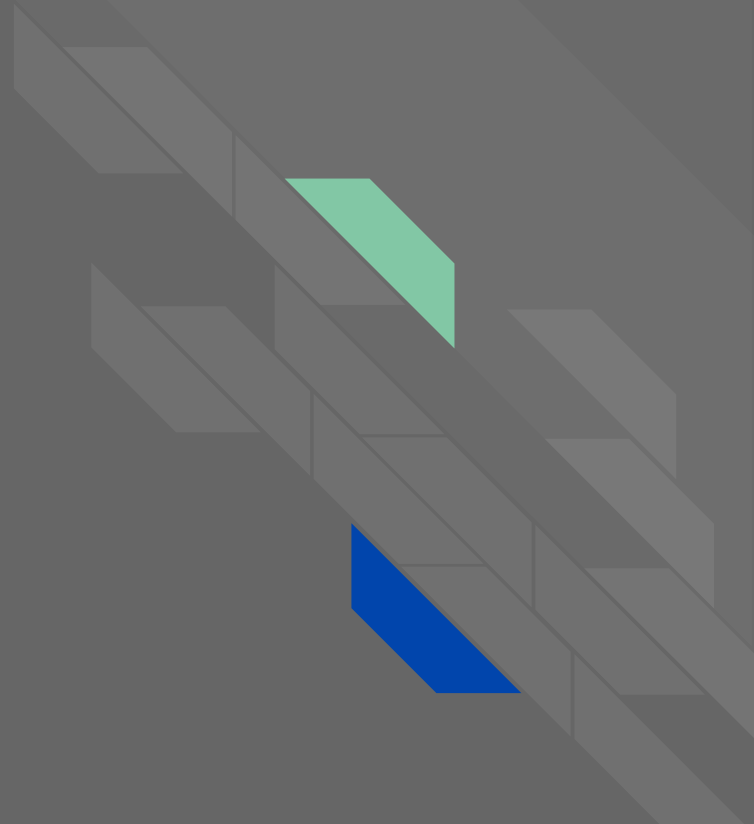
Relevant School Board Policies

- ICCB (Disposal of School Equipment and Supplies)
 - Find other use within school district
 - Items with no resale value – may be offered to charitable or civic organizations
 - Items with resale value – sold through sealed bids, public auction or other public sale

What about loans or donations to another political subdivision?

- Not prohibited by Article X, Section 18 because political subdivision is not an individual, association or corporation
- BUT, only have powers conferred by legislature
- Must have statutory authority
- E.g., NDCC 15.1-12-19 (sale or removal of school buildings)

Employee Meals





Employee Meals and the Like

- Anti-gifting clause v. taxable wages
 - Two separate issues – must analyze both!
- “Free” school lunch or “Working lunch” - violation of anti-gifting clause?
- If provided with public funds, must treat as wages (but, are they taxable??)
- Should track similar to student lunches
- What if its in your negotiated agreement??

Meal Breaks are Required, But...

- NDAC chapter 46-02-07
- A minimum thirty-minute meal period must be provided in each shift exceeding five hours when there are two or more employees on duty.
- Employees may waive their right to a meal period upon agreement with the employer.
- Employees do not have to be paid for meal periods if they are completely relieved of their duties and the meal period is ordinarily thirty minutes in length.
- The employee is not completely relieved if required to perform any duties during the meal period (i.e., “working lunch”).
- Collective bargaining agreements will prevail.
- BUT DOES NOT provide exception to anti-gifting clause!

So, what can you do?

- Occasional, infrequent – e.g., parent-teacher conferences
- Ask for donations from outside organizations, PTO, parents, etc.
- Maybe school foundation??
- Seek out guidance from legal counsel, auditor, etc.

