



STATE OF INDIANA
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ATTORNEY GENERAL

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December 3, 2001

OFFICIAL OPINION 2001-7

Soil Conservation Board
Attn: Stephanie Roth
Indiana Government Center South
Indianapolis, IN 46204

RE: Use of proceeds of fundraising activities by a Soil and Water
Conservation District

Dear Ms. Roth:

This letter responds to the request of the Soil Conservation Board for an advisory opinion on the following questions:

1. May a Soil and Water Conservation District create a charitable trust for the purpose of providing scholarships, educational loans and grants to its county residents who demonstrate an interest in environmental or agricultural issues?
2. May a Soil and Water Conservation District create a charitable trust from public funds?
3. Do funds received by a Soil and Water Conservation District from the sale of trees and/or other proceeds to the public constitute public or private funds?

We conclude that a Soil and Water Conservation District may neither create a charitable trust, nor fund or endow scholarships. Based on the facts presented, we further conclude that the funds raised by PCSWCD tree sales are "public funds".

BACKGROUND AND FACTS

In its audit of the years January 1, 1998 – December 31, 1999, the State Board of Accounts learned that Porter County Soil and Water Conservation District (hereinafter “PCSWCD”) had created the Porter County Soil and Water Conservation Trust (the “Trust”) using PCSWCD money and had transferred PCSWCD funds to the Trust in apparent violation of its statutory authority. The Board of Accounts issued a critical report pursuant to IND. CODE § 5-11-5-1(a), and PCSWCD responded in writing.

PCSWCD did “not dispute that it created the trust and funded a charitable trust.” *Letter, PCSWCD to State Board of Accounts, November 10, 2000* (hereinafter, “November 10 Letter”). PCSWCD contended that its actions were appropriate and legal because “all monies used to fund the charitable trust are traceable to the proceeds from previous tree sales, and as such, no ‘public funds’ acquired from the State were used to fund the trust.” *Id.*

The history of the PCSWCD’s tree sales is best explained by PCSWCD itself:

It all started with the purchase of 500 white pine trees from Hensler Nursery in 1988. Our District Administrator, Alice Deardorff convinced John Hensler to give us credit until the trees were sold.

This earth day tree sale has grown into a 30,000 plus yearly tree sale with many civic and commercial organizations participating.

This self-supporting activity generates funds which have been dedicated to youth and adult educational and natural resources/AG activities including our scholarship program.

After much thought and deliberation on the part of your Porter County Soil and Water Conservation District, the District decided in August of 1999 to use these Earth Day tree sale monies to form a charitable trust known as the Porter County Soil and Water Conservation Trust.

We have applied for and received our non-profit status and our 501.c.3 Foundation status.

This not only assures the continuence [sic] of our district activities but also gives us the opportunity to apply to other foundations to expand our programs.

At this time we also express our appreciation to you for your support and participation.

*Letter to the Citizens of Porter County from the Porter County SWCD Board and Staff,
March 2, 2000.*

ANALYSIS

The questions addressed here have been raised by the Soil Conservation Board (the "Board") established at IND. CODE § 14-32-2-1 within the Department of Natural Resources. The Board is authorized to "offer appropriate assistance to the supervisors of soil and water conservation districts [hereinafter "Districts"] to carry out district powers and programs", IND. CODE § 14-32-2-12(3) and to "keep the supervisors of [D]istricts informed of the activities and experience of all other districts and facilitate cooperation and an interchange of advice and experience among districts." IND. CODE § 14-32-2-12(4). The Board also appoints District supervisors based upon nominations submitted by District supervisors, IND. CODE § 14-32-4-10, and is authorized "upon notice and a hearing, [to] remove a [District] supervisor for neglect of duty or malfeasance in office, but for no other reason." IND. CODE § 14-32-4-15. Furthermore, we have been advised that the Board provides surety bonding to District supervisors under IND. CODE § 14-32-2-12(1) and IND. CODE § 14-32-4-22(1).

The General Assembly has enacted very specific enabling legislation regarding Districts:

(a) A district constitutes a governmental subdivision of the state and a public body corporate and politic exercising public powers.

(b) A district may do the following:

(1) Carry out soil erosion and water runoff preventive and control measures within the district, including engineering operations, methods of cultivation, the growing of vegetation . . .

(2) Construct, improve, operate, and maintain the structures that are necessary or convenient for the performance of any of the operations authorized in this article.

(3) Cooperate or enter into agreements with, and within the limits of appropriations made available to the district by law to furnish financial or other aid to, a federal, state, or other agency or an occupier of land within the district in the carrying on of conservation operations within the district, subject to the conditions that the supervisors consider necessary to advance the purpose of this article.

(4) Obtain options upon and acquire, by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, real or personal property or interests in personal property.

(5) Maintain, administer, and improve property, and expend the income in carrying out this article.

(6) Sell, lease, or otherwise dispose of property or interests in property in furtherance of this article

(7) Make available to land occupiers within the district, on terms that the district prescribes:

- (A) agricultural and engineering equipment; and
- (B) fertilizer;
- (C) seeds;
- (D) seedlings;
- (E) other material or equipment; and
- (F) services from the district;

that will assist in conserving the soil and water resources of the land occupiers.

(8) Develop or participate in the development of comprehensive plans for the proper management of soil and water resources within the district ...

(9) Publish plans and information developed under subdivision (8) and bring the plans and information to the attention of land occupiers within the District.

(10) Take over, with the consent of the United States or the state, by purchase, lease, or otherwise, and administer any soil and water conservation, erosion control, water quality protection, or flood prevention project of the entity located within the district's boundaries.

(11) Manage, as agent of the United States or the state, any soil and water conservation, erosion control, water quality protection, flood prevention, or outdoor recreation project within the district's boundaries.

(12) Act as agent for the United States or the state in connection with the acquisition, construction, operation, or administration of any soil and water conservation, erosion control, water quality protection, flood prevention, or outdoor recreation project within the district's boundaries.

(13) Accept donations, gifts, and contributions in money, services, materials or otherwise from the United States and use or expend the services, materials, or other contributions in carrying on the district's operations.

(14) Sue and be sued in the name of the district.

(15) Have perpetual succession unless terminated as provided in this article

(16) Make and execute contracts and other instruments necessary or convenient to the exercise of the district's powers.

(17) Adopt rules and regulations consistent with this article to carry into effect the purposes and powers of this article.

(18) Require an occupier of land not owned or controlled by the state [to do certain things prior to receiving benefits from the District]

(19) Cooperate with the state in the following

- (A) Conducting surveys, investigations, and research relating to the character of soil erosion and water losses and the preventive and control measures needed;
- (B) Publishing the results of the surveys, investigations, or research;
- (C) Disseminating information concerning the preventive and control measures

(20) Cooperate with the state in conducting, within the district, soil and water conservation, erosion control, water quality protection, and flood prevention demonstration projects ...

(21) Serve as the management agency for:

(A) the erosion and sediment part of 33 U.S.C. 1288 ...; and

(B) other erosion and sediment reduction programs that affect water quality in each county.

IND. CODE § 14-32-5-1. In addition, a District

may accept voluntary contributions from any source if the following conditions are met:

(A) The donations are offered for the sole and exclusive purpose of promoting soil and water conservation within the district.

(B) The district satisfactorily guarantees to the donors the faithful use of the donations for that purpose.

IND. CODE § 14-32-5-5.

We begin our analysis with the fact that the District is a governmental body created by statute¹, and that all powers or duties conferred upon it are statutory:

[M]unicipal corporations are subordinate branches of the domestic government of the state and possess only those powers expressly granted to them by the Legislature, those necessarily or fairly implied in or incident to powers expressly granted, and those indispensable to the declared objects and purposes of the corporation.

Local Union No. 26, National brothers of Operative Potters v. City of Kokomo, 211 Ind. 72, 79, 5 N.E.2d 624, 627 (1937). See also *City of Elkhart v. Lipschitz*, 164 Ind. 671, 74 N.E. 528 (1905).

¹ “Governmental subdivision” and “public body corporate and politic” do not have a generally applicable statutory definition. IND. CODE § 36-1-2-10 defines terms relating in general to local government, with “Municipal corporation” meaning a “unit, school corporation, library district, local housing authority . . . special service district, or other separate local governmental entity that may sue and be sued. . . .” (emphasis added). A “municipal corporation” is NOT necessarily a “city”, a “town”, a “municipality” or a “unit”. A prior Attorney General has opined that a “Soil and Water Conservation District is . . . not an agency of the State itself” for the purpose of Workmen’s Compensation coverage. 1975 OP. ATT’Y GEN. No. 20, p. 70. However, the Indiana tort claims act, IND. CODE § 34-4-16.5, defines “State agency” to include not only governmental subdivisions in general but soil and water conservation districts in particular. The precise characterization of a District is not critical for the purposes of this advisory letter, because a state agency, like a municipal corporation, “derives its power and authority solely from the statute, and unless a grant of power and authority can be found in the statute, it must be concluded that there is none.” *General Telephone Co. of Indiana v. Public Service Commission of Indiana*, 154 N.E.2d 372 (1958).

Thus, when the Legislature has intended that a governmental body have the power to fund scholarships, that power is specifically authorized by statute. *See, e.g.*, IND. CODE § 20-12-1-1(8) (“the [boards of trustees of the four state universities] shall have the power and duty . . . to award financial aid to students and groups of students out of the available resources of the institution through scholarships, fellowships, loans . . . as the governing board may find to be reasonably related to the educational purposes and objectives of the institution and in the best interest of the institution and the state.”). When the Legislature has intended that a governmental body create a nonprofit entity to receive proceeds from an agency’s activities, that power is specifically authorized by statute. *See, e.g.*, IND. CODE § 15-1.5-10.5-10(b) (“The nonprofit entity established under this section may receive the proceeds from the operation of the [Center for Agricultural Science and Heritage]”).

However admirable the desire of PCSWCD to fund scholarships for district residents, unless IND. CODE §14-32-5-1 specifically authorizes a District to fund scholarships, the District has no power or authority to do so. Unless IND. CODE §14-32-5-1 authorizes a District to form a private trust, the District has no power or authority to do so. Unless Ind. Code § 14-32-5-1 specifically authorizes a District to transfer funds from its account(s) to a Trust, the District has no power or authority to do so. Clearly, IND. CODE §14-32-5-1 authorizes none of these activities.

Nor does IND. CODE §14-32-5-1 grant a District broad powers from which the authority for these activities may be implied. To the extent that Indiana courts have held that an agency or governmental subdivision may lawfully engage in activities not specifically authorized by statute, they have done so based on broad grants of power in the enabling legislation. *Indiana State Fair Board v. Hockey Corporation of America*, 429 N.E.2d 1121 (1982) is illustrative. Both the trial court and the court of appeals held that the State Fair Board did not have the authority to directly operate a public skating facility and a retail sales and skate rental shop at the Indiana State Fairgrounds’ Coliseum. The enabling statute provided, among other things, that “the board shall have power to enlarge the scope and field of its activities from time to time as it may deem to the advantage of agriculture . . .” IND. CODE 15-1-1-7 (repealed, 1990). The Court of Appeals found that the skating activities were not “in furtherance of agriculture.” *Indiana State Fair Board v. Hockey Corporation of America*, 165 Ind. App. 544, 558, 333 N.E.2d 104, 113 (1975).

The Indiana Supreme Court reversed:

The legislature gave broad powers to the Fair Board to conduct activities which will benefit the Indiana State Fairgrounds and thereby directly benefit agriculture and its allied industries. . . . *These events were not related to agriculture but the proceeds from such were deposited in the accounts of the State Fair Board. The broad scope of powers was given to*

the Fair Board so it could constantly review its activities to the advantage of agriculture.

429 N.E. 2d at 1124 (emphasis added). *See also State Board of Accounts v. Indiana University Foundation*, 647 N.E.2d 342, 348 (Ind. App. 1995), recognizing the “broad authority and discretion” given to state university Trustees under the private gift statutes, found at IND. CODE § 20-12-4 *et. seq.* in administering private gifts, bequests and devises to state-supported universities.

Thus, we conclude that a District is not empowered or authorized to create a charitable trust. We further conclude that IND. CODE §14-32-5-1 does not authorize a District to fund scholarships or make educational loans or grants, either directly or through the mechanism of a charitable trust.

You have also asked whether the proceeds of the sale of trees to the public constitutes public or private funds. We note that prior to transferring funds to form and subsequently fund the Trust, the proceeds of the tree sales had been deposited in PCSWCD’s checking or investment accounts.

In its response to the State Board of Accounts, PCSWCD stated:

When the trust was created in 1999, it was partially funded from proceeds from the 1998 tree sale. The remainder of the funding came from excess profits from previous tree sales, all of which were clearly segregated from the General Fund. Therefore, all monies used to fund the charitable trust are traceable to the proceeds from previous tree sales, and as such, no “public funds” acquired from the State were use to fund the trust.

November 10 Letter. PCSWCD relies upon *Indiana University Foundation, supra*, for the proposition that because the funds were not acquired from the State, they were not public funds.

As discussed in *Indiana University Foundation*, the term “public funds” is not among the terms defined in IND. CODE § 5-11-1-16(c) relating to the accounting for public funds by the State Board of Accounts. The term is defined, however, in three other code sections. For the purpose of investment, “public funds” means “all fees and funds of whatever kind or character coming into the possession of any public officer by virtue of that office.” IND. CODE § 5-13-4-20 (emphasis added). For the purposes of public purchasing, it means “money (1) derived from *the revenue sources* of the governmental body; and (2) deposited into the general or special fund of the governmental body.” IND. CODE § 5-22-2-23(a) (emphasis added). And, for the purposes of public works, ““Public funds’ means *any funds* for which a state officer is accountable by virtue of the state officer’s public office, whether or not impressed with a public interest.” IND. CODE § 4-13.6-1-12 (emphasis added). One common thread

among all these definitions is that the term “public funds” is quite broad, and is NOT limited to money coming from state appropriations.

Moreover, *Indiana University Foundation* does not stand for the proposition that only funds “acquired from the state” are public funds. In determining that private donations received by Indiana University Foundation, a 501(c)(3) tax exempt entity, were not “public funds” for the purposes of the State Board of Accounts statute, the Indiana Court of Appeals placed particular emphasis on the legislative encouragement of private gifts to public universities and the dual capacity in which university Trustees serve:

While the Trustees are a body politic created by statute to govern Indiana University, “[t]he legislature contemplated that there would be private funds placed in trust with the trustees for certain specific purposes and for the benefit of those connected with the University and the University’s activities.” . . . That same principal applies to funds held by the Foundation when it acts under delegated authority as “some other private trustee for the same purposes, namely educational purposes at Indiana University.”

Indiana University Foundation at 349, quoting *Sendak v. Trustees of Indiana University*, 254 Ind. 390, 393, 260 N.E.2d 601, 603 (1970). Based on prior court decisions and the existence of the private gift statute found in IND. CODE § 20-12-4-1, the *Indiana University Foundation* court concluded that the legislature “did not intend to consider gifts received [by state universities] pursuant to the private gift statutes as ‘public funds’ under the State Board of Accounts statute.” *Id.* at 352.

The facts presented by PCSWCD are quite different than those upon which *Indiana University Foundation* is based. First, the proceeds of tree sales prior to 1999 could not have originated as private donations to the Trust or fundraising activities by the Trust because the Trust did not exist until 1999. Furthermore, promotional materials we have reviewed make no reference to sponsorship or fundraising by the Trust. Clearly, the money at issue resulted from PCSWCD’s own activities and has been characterized by PCSWCD itself as “excess profits” from an activity it directly undertook. Having sold trees and paid the related expenses, the balance was “deposited . . . in one or more depositories in the name of the . . . political subdivision by the officer having control of the funds” as required by IND. CODE § 5-13-6-1. Whether the District characterized the money carried on its books as part of its “General Funds” or “District Funds” is irrelevant. Both categories are comprised of “public funds” – “all fees and funds of whatever kind or character coming into the possession of any public officer by virtue of that office.”

To the extent that the proceeds can be characterized by gifts, grants or donations to the District, prior Opinions of the Attorney General confirm that these too would be “public funds”. *See, e.g.,* 1963 OP. IND. ATT’Y GEN. # 36, p. 184 (gifts to the Indiana

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War Memorials Commission); 1956 OP. IND. ATT'Y GEN. # 10, p. 39 (gifts to the Wilbur Wright Birthplace Commission).

CONCLUSION

We conclude that a Soil and Water Conservation District may neither create a charitable trust, nor fund or endow scholarships. Based on the facts presented, we further conclude that the funds raised by PCSWCD tree sales are "public funds".

Sincerely,

Stephen Carter
Attorney General

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