STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93028

STATE OF NEBRASKA
OFFICIAL
APR 9 1993
DEPT. OF JUSTICE

DATE: April 7, 1993

SUBJECT: Financing for Construction of County Jail.

REQUESTED BY: Joseph M. Smith
Madison County Attorney

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion on several questions relating to the construction of a new jail facility for Madison County. Of the six questions you have presented, we can respond only to the last three questions pertaining to the financing of construction of a county jail facility. As we advised in Op. Att'y Gen. No. 88024 (March 17, 1988), this office is authorized to render opinions to county attorneys under Neb. Rev. Stat. § 84-205(2) (Cum. Supp. 1992) "in all criminal matters and in matters relating to the public revenue." As the first three questions posed in your request do not fit within these categories, we must respectfully decline to render a formal opinion on these issues. Consistent with our prior opinion, however, we are willing to review any research or opinion you may have regarding these questions, and to discuss the same with you informally.

Your initial question is whether the County Board may act under either Neb. Rev. Stat. § 23-120(2) (Cum. Supp. 1992), or Neb. Rev. Stat. § 23-120(3)(b) (Cum. Supp. 1992), or both, to issue bonds of the county for construction of a county jail.

Section 23-120(1) provides, in pertinent part:

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> The county board shall acquire, purchase, construct, renovate, remodel, furnish, equip, add to, improve, or provide a suitable courthouse, jail, and other county buildings and a site or sites therefor and for such purposes borrow money and issue bonds of the county to pay for the same.

Subsection (2) of § 23-120 provides:

> No levy exceeding (a) two million dollars in counties in excess of two hundred fifty thousand inhabitants, (b) one million dollars in counties having in excess of one hundred fifty thousand inhabitants and not in excess of two hundred fifty thousand inhabitants, (c) three hundred thousand dollars in counties having in excess of thirty thousand inhabitants and not in excess of one hundred fifty thousand inhabitants, or (d) one hundred fifty thousand dollars in all other counties shall be made within a one-year period for any of the purposes specified in subsection (1) of this section without first submitting the proposition to a vote of the people of the county at a general election or a special election ordered by the board for that purpose and obtaining the approval of a majority of the legal voters thereon.

Subsection (3) of § 23-120 sets forth two situations authorizing a county board to levy up to a certain amount on each one hundred dollars of taxable property in the county for any of the purposes specified in § 23-120(1). Subsection (3)(a) authorizes "a levy of not to exceed seventeen and five-tenths cents on each one hundred dollars upon the taxable value of all the taxable property in the county" when the county board is requested to do so "by petition signed by at least a majority of the legal voters in the county based on the average vote of the two preceding general elections." Subsection (3)(b) provides, in pertinent part:

> If a county on the day it first initiates a project for any of the purposes specified in subsection (1) of this section had no bonded indebtedness payable from its general fund levy, the county board may make an annual levy of not to exceed five and two-tenths cents on each one hundred dollars upon the taxable value of all the taxable property of the county for a project or projects for any of the purposes specified in subsection (1) of this section without the filing of a petition described in subdivision (3)(a) of this section.

In a prior opinion construing § 23-120, we concluded that a county with a population between 30,000 and 150,000 inhabitants, which had no bonded indebtedness, was not bound by the $50,000

annual limit previously contained in the statute for counties falling within this population range, and that the county could levy a tax up to the levy limit authorized for counties with no bonded indebtedness, even if this amount exceeded $50,000. 1979-80 Rep. Att'y Gen. 89 (Opinion No. 59, dated March 15, 1979). While § 23-120 has been amended in certain respects since the issuance of this opinion, we do not believe that the amendments enacted since that time alter the basic conclusion previously reached by this office. Accordingly, it is our opinion that the levy authorized under subsection (3)(b) of § 23-120 for counties with no bonded indebtedness may be made (for a period not to exceed ten years) even if the amount raised annually by such levy is greater than the applicable amount contained in subsection 23-120(2).

Your specific question is whether a county may levy the maximum amount authorized under subsection (2) of § 23-120 without holding an election, and, in addition, make the levy authorized under subsection (3)(b) if it has no bonded indebtedness payable from the general fund tax levy. While it is not clear, it is our view that the proper interpretation of these provisions is that subsection (2) is to be viewed as a general provision allowing a county to levy a tax on property to raise up to a maximum amount for construction and maintenance of county buildings without obtaining voter approval. Subsection (3) sets forth two exceptions under which a county may, if the conditions established are satisfied, levy a tax on property up to a specified amount for such purposes, even if the amount so raised exceeds the applicable limit in § 23-120, without voter approval. Therefore, we believe that, if a county meeting the criteria in subsection (3)(b) makes a levy for a project pursuant to this provision, and the amount so raised exceeds the applicable limit in subsection (2), it may not also make an additional levy to raise further funds up to the maximum amount allowed under subsection (2).

You next ask if amounts raised pursuant to either provision of § 23-120 may be spent for the construction of a county jail facility "without first calling an election to issue the bonds?" Section 23-120(1) authorizes the county board to "acquire, purchase, construct, renovate, remodel, furnish, equip, add to, improve, or provide a suitable courthouse, jail, and other county buildings and a site or sites therefor and for such purposes borrow money and issue the bonds of the county to pay for the same." To the extent that a county acts within the confines of the funding provisions of subsections (2) or (3) of § 23-120, involving the imposition of a levy not requiring voter approval, no "election" would be necessary to authorize issuance of bonds.

Your final question concerns what effect would the provisions of Neb. Rev. Stat. §§ 77-3437 to -3441 (Cum. Supp. 1992), imposing budget limitations on political subdivisions (other than school

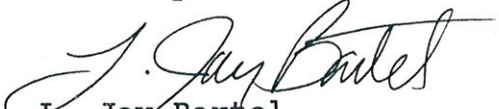
districts), have on bonds issued pursuant to § 23-120.

Section 77-3438 provides, in pertinent part: "(1) Except as provided in sections 77-3438,01, 77-3439, and 77-3440, no governing body shall adopt a budget statement pursuant to section 13-506. . . in which the anticipated aggregate receipts from property taxes for any fiscal year exceed the anticipated aggregate receipts from property taxes for the prior fiscal year. . . ." Section 77-3437(3) provides the definition of "[g]overning body" shall be that found in § 13-503, with the exception of school boards or boards of education of school districts. Pursuant to § 13-503, the term "governing body" includes, in the case of a county, the county board. Sections 77-3439 and 77-3440 establish procedures permitting a governing body to increase the anticipated receipts from property taxes, either by an affirmative vote of seventy-five percent of the governing body or by the majority of electors voting in a special election.

While receipts from taxes levied on property normally would fall within the budget limitations imposed pursuant to §§ 77-3437 to 77-3441, the term "[p]roperty taxes" is defined in § 77-3437(5) as "all revenue budgeted to be received from the levy of taxes on property,. . ., <u>but shall not include (a) property taxes budgeted to be collected for retirement of bonded indebtedness. . . .</u>" (Emphasis added). Thus, to the extent that any taxes levied on property pursuant to § 23-120 are for the retirement of bonded indebtedness, such amounts would be excluded from the receipts from property taxes limited by §§ 77-3437 to 77-3441 by virtue of the exclusionary language in § 77-3437(5).

Very truly yours,

DON STENBERG
Attorney General



L. Jay Bartel
Assistant Attorney General

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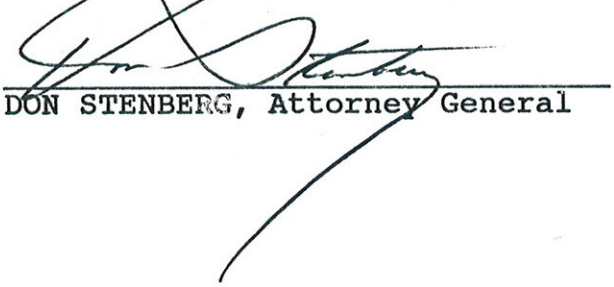

DON STENBERG, Attorney General