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STATE OF NEBRASKA
OFFICIAL
FEB 18 1992
DEPT. OF JUSTICE

DATE: February 7, 1992

SUBJECT: Amendment to County Fair Funding Procedure Under Neb.Rev.Stat. § 2-229 (Reissue 1987).

REQUESTED BY: Senator Stan Schellpeper
Nebraska State Legislature

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

You have requested our opinion regarding the interpretation of Neb.Rev.Stat. § 2-229 (Reissue 1987) pertaining to the respective responsibilities of the county fair board and the county board in determining the amount of funding to be provided for the support of the county fair. You state that "there seems to be some confusion from different county boards and county fair boards regarding which one of those two entities has the final authority to set the amount of taxes which may be necessary for county fair purposes, ..." Depending on our answer to this question, you indicate that you may introduce amendatory legislation "to clarify this issue."

Section 2-229 provides:

> During the month of November each year, the county fair board shall prepare and submit to the county board an estimate, itemized as far as possible, of the amount of money which shall be necessary to be collected by taxation for the support and management of the fair for the ensuing year. The county board shall levy such amount of taxes as may be necessary for county fair purposes, and such tax shall be levied and collected in like manner as general taxes for the county.

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"As a general rule, in the construction of statutes, the word 'shall' is considered mandatory, and inconsistent with the idea of discretion." State v. Stratton, 220 Neb. 854, 857, 374 N.W.2d 31, 34 (1985). "Generally, 'may' used in a statute will be given its ordinary permissive and discretionary meaning unless it would manifestly defeat the statutory object." Peterson v. Minden Beef Co., 231 Neb. 18, 20-21, 434 N.W.2d 681, 683 (1989).

Application of these principles to the interpretation of § 2-229 is somewhat problematic, in that the statute contains terminology both mandatory and discretionary in nature. The first sentence of the statute is wholly mandatory, providing "the county fair board shall prepare and submit to the county board an estimate . . . of the amount of money which shall be necessary to be collected by taxation for the support and management of the fair for the ensuing year." (Emphasis added.) The second sentence of the statute, however, combines terminology both mandatory and permissive in nature, providing that "[t]he county board shall levy such amount of taxes as may be necessary for county fair purposes, and such tax shall be levied and collected in like manner as general taxes for the county." (Emphasis added).

While the question is not free from doubt, we believe the better view is to construe the statute as granting the county board discretion to levy the amount of taxes that it determines to be "necessary" for the support and management of the county fair, and that the county board is thus not bound to follow the "estimate" submitted by the county fair board of the amount that it deems "necessary" for such purpose. We are aware that the Nebraska Supreme Court, in construing the provisions of the Agricultural Extension Service Act (codified at Neb.Rev.Stat. §§ 2-1601 to 2-1607) (Reissue 1987)), held that § 2-1604 placed a mandatory duty on a county board to set aside in the general fund an amount equal to the county extension budget submitted by the extension service. State ex rel. Agricultural Extension Service v. Miller, 182 Neb. 285, 154 N.W.2d 469 (1967). The statute construed in Miller provided that "the county board shall annually set aside in the general fund of the county an amount equal to the county extension budget; . . . ." The statute further provided, however, "that such sum shall not exceed seventy-five hundred dollars, or an amount equal to a four-tenths mill levy on the dollar upon the assessed value of all the taxable property in such county, . . . , whichever is greater." Id. at 287, 154 N.W.2d at 470-71. We have also interpreted similar language in the statute providing for the formation of county agricultural societies to compel a county board to levy a tax to raise an amount as specified by statute for the support of the society. Report of Attorney General 1925-26, January 30, 1925, p. 105. See Neb.Rev.Stat. § 2-201 (Reissue 1987).

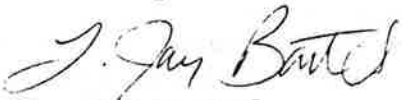
Apart from differences in the language of the statutes relating to the funding of agricultural extension services and county agricultural societies and the provisions of § 2-229, we note that, unlike the statutes pertaining to extension services and agricultural societies, § 2-229 imposes no maximum amount which may not be exceeded by virtue of the levy imposed to support these entities or activities. Thus, if § 2-229 were construed to mandate that the county board levy a tax sufficient to raise whatever amount the fair board deemed necessary, there would be no limitation on the amount the fair board could compel the county board to raise by taxation. We do not believe this is a reasonable construction of the statute, and, therefore, conclude that, by providing that the county board must levy an amount as "may" be necessary for county fair purposes, the Legislature intended to provide discretion to the county board to alter or amend the estimate provided by the county fair board to determine an appropriate level of support for the county fair.

Indeed, this result is similar to that reached in a prior opinion in which we concluded that the county board was authorized to alter the amount requested by the Noxious Weed Control Authority, rather than being compelled to levy taxes sufficient to raise the amount requested by the Authority. Report of Attorney General 1965-66, Opinion No. 201, June 30, 1966, p. 323. In reaching this conclusion, we noted the specific authority of the county board under § 23-908 of the County Budget Act to, "in its discretion, revise, alter, increase or decrease the items contained in the budget, . . .," and the absence of any specific amount of taxes or limitation as to the amount of taxes to be levied under the weed control authority statutes. Id. at 324.

We note, however, that the answer to your question is not entirely clear, and believe that an argument could certainly be made to support the interpretation that a county board must levy the amount specified by the county fair board as necessary for the support and management of the fair under § 2-229. Given this admitted lack of clarity, it would not be inappropriate for the Legislature to consider amendatory language to § 2-229 to clearly express its intent as to the respective powers and duties of the county fair board and the county board in determining the amount of funds to be provided for county fair purposes.

Sincerely,

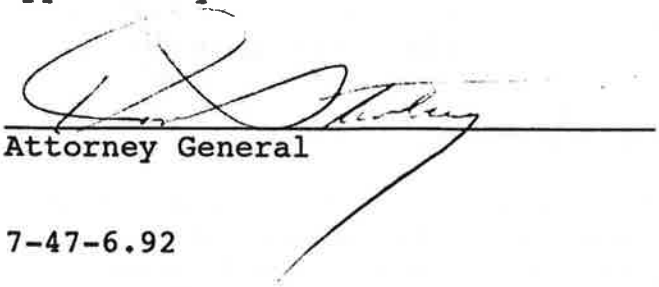
DON STENBERG
Attorney General



L. Jay Bartel
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved By:



Attorney General

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