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February 10, 2017

The Honorable Jeanne Larson
Chair, Tofte Town Board
P.O. Box 2293
Tofte, MN 55615

Dear Chair Larson,

The Office of the State Auditor (OSA) received concerns about several donations made by the Town of Tofte (Town), including donations made to the Birch Grove Community School, a charter school; the Tofte Historical Society, a local historical society; and W.E. Connect, formerly the Birch Grove Foundation, a community center. In response to these concerns, the OSA reviewed relevant documents requested and received from the Town.

Based on the OSA’s review, it appears that the Town lacked the authority to make donations to the charter school and to the local historical society. This letter will provide the Town with recommendations to comply with Minnesota law in the future.

General Background

The OSA reviewed specific donations made by the Town, which are summarized in Table 1 below.¹

TABLE 1

Town of Tofte Donations by Recipient and Year			
	Birch Grove Community School	Tofte Historical Society	W.E. Connect
2012	\$ 3,000	\$ -	\$ 2,122
2013	\$ 3,000	\$ 6,000	\$ -
2014	\$ 3,000	\$ 3,000	\$ -
2015	\$ 11,000	\$ -	\$ -
2016	\$ 23,000	\$ 3,000	\$ 13,500
	\$ 43,000	\$ 12,000	\$ 15,622

¹ The Town also reported proposed 2017 donations of \$23,000 to Birch Grove Community School, \$10,000 to the Tofte Historical Society, and \$13,500 to W.E. Connect.

The money used for Town donations comes from the Town's revenue, which, in turn, comes from various sources including but not limited to Property Taxes, Hotel/Motel Tax, Federal Grants Taconite Aid, transportation tax, highway user tax, gasoline tax, Town Road Allotment, Police and Fire Aid, Town Aid, other state grants and aids, IRRRB Grants, charges for services, investment earnings, and other financing sources. These revenues, no matter their source or origin, are considered public funds.

Expenditure of public funds requires that there be both authority and a public purpose.² Authority may be specifically stated in a statute or implied as necessary to do something that is expressly authorized.³ A public purpose has been defined by the Minnesota Supreme Court as "[s]uch 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."⁴

Donations to Birch Grove Community School

Birch Grove Community School (BGCS) is a non-profit, charter elementary school in Tofte, Minnesota.⁵ Its enrollment during the 2015-2016 school years was approximately 26 students, coming, in part, from the towns of Tofte, Lutsen, and Schroeder (collectively referred to as the "West End" of Cook County).⁶

BGCS is both a public school and a nonprofit organization governed by Minnesota Statutes chapters 124E and 317A.⁷ State funding for schools generally and BGCS specifically is calculated on a per pupil basis. Fluctuating enrollment can result in a decrease in state funding, which BGCS has experienced.

As noted above, the Town donated a total of \$43,000 to BGCS from 2012 – 2016. At the 2014 Annual Town Meeting, the Town Board passed a motion to "add \$8,000 to the 2015 levy for the

² See, e.g., Op. Att'y Gen. 59a-22 (Dec. 4, 1934); 59a-22 (Nov.23, 1966).

³ See, e.g., *Mangold Midwest Co. v. Village of Richfield*, 143 N.W. 2d 813, 820 (1966).

⁴ See *Visina v. Freeman*, 89 N.W. 2d 635 (1958) (emphasis added).

⁵ According to the Minnesota Secretary of State's website, BGCS first filed as a domestic nonprofit corporation in 2004.

⁶ These towns are located in the Cook County School District, Independent School District No. 166 (ISD 166). The nearest elementary school to BGCS is Sawtooth Mountain Elementary School in Grand Marais, Minnesota, approximately 30 miles away.

⁷ Minn. Stat. § 120A20, subd. 1; Minn. Stat. § 124E.03, subd. 1. Charter schools are distinguishable from other public schools and school districts. Minn. Stat. § 124E.03, subd. 1, states "[a] charter school is exempt from all statutes and rules applicable to a school, school board, or school district unless a statute or rule is made specifically applicable to a charter school or is included in this chapter." Under Minn. Stat. § 123A55, charter schools are identified as "charter districts" for purposes of receiving state funds but are distinguishable from school districts, including "common districts," "independent districts," and "special districts," which are designated "public corporations." In 2014, the Minnesota Court of Appeals in *Minnesota Transitions Charter Sch. V. Commissioner of the Dep't of Educ.*, 844 N.W.2d 223 (Minn. Ct. App. 2014) held that "under a plain reading of Minn. Stat. § 120A05, subd. 8, a charter school is not a 'school district' and is therefore not a 'district' as defined in that section."

Birch Grove Community School.”⁸ At the 2015 Annual Meeting, the Town Board again passed a motion to contribute \$20,000 to the BGCS “each year for the next five years.”⁹

First, the OSA knows of no specific authority given to the Town to expend public funds to support schools. Minnesota law expressly assigns such authority to some public bodies, such as school districts and school boards, but it does not assign similar authority to towns.¹⁰

Second, although there is general statutory authority for a town to transfer personal property (including money) to another *public corporation* under certain circumstances,¹¹ Minnesota courts have made it clear that charter schools are not public corporations.¹² Therefore, Minn. Stat. § 471.85 cannot be used as a basis for conveying funds from the Town to BGCS, because BGCS is not a public corporation.¹³

Finally, to make a donation to a private institution, a town generally needs statutory or constitutional authority: “Donations cannot be made to a mere private institution not under the control of the municipality, such as a private school or a public school in the absence of constitutional or statutory authority. Appropriations to charitable or nonprofit associations, without consideration, cannot be made.”¹⁴ Similarly, the Minnesota Attorney General has long held that absent statutory authorization, public entities cannot donate public funds to private organizations.¹⁵ The OSA is not aware of any statutory or constitutional authority under which the Town could donate to BGCS.

⁸ See March 11, 2014, Annual Town Board meeting minutes.

⁹ See March 10, 2015, Annual Town Board meeting minutes. The minutes document two no votes on the motion.

¹⁰ Contrast Minn. Stat. chs. 365, 366, 367, 368, and 471 (Various provisions describe powers of towns) with Minn. Stat. §§ 123B.02, subd. 2 (Independent school district duty and function “to furnish school facilities to every child of school age residing in any part of the district.”), and 123B.09, subd. 8 (School board “must superintend and manage the schools of the district...”).

¹¹ Minn. Stat. § 471.85 (“[a]ny city, county, town, or school district may transfer its personal property for a nominal or without consideration to another public corporation for public use when duly authorized by its governing body.”). Emphasis added. The term “personal property” includes funds or money, according to Op. Atty. Gen. 1011 (Dec. 27, 1968).

¹² *Tipka v Lincoln Int’l Charter Sch.*, 864 N.W. 2d 371 (Minn. Ct. App. 2015).

¹³ Even prior to the Court’s clarification in 2015 that charter schools are not public corporations, Minn. Stat. § 471.85 would not appear on its own to provide authority for a town’s donation of funds to a charter school. The Attorney General has noted that Minn. Stat. § 471.85 “is not a license to transfer moneys between public bodies at will without regard for the purposes for which the particular moneys were originally obtained and without regard to other limitations of law on the transferor and transferee governing bodies. Further, the ‘public use’ to which the property is to be put must be one which is directly related to the public purposes of the transferring governing body.” Op. Atty. Gen. 1011 (Dec. 27, 1968) (emphasis added). Since, as previously discussed, there does not appear to be anything assigning the Town the purpose of supporting or providing schools, it seems unlikely that a town’s donation to a charter school are directly related to a town’s public purposes.

¹⁴ McQuillan, *The Law of Municipal Corporations*, § 39.31(3rd).

¹⁵ See e.g., Ops Att’y Gen. 422a-17 (January 17, 1938) (Red Cross), 59-A-3 (May 21, 1948) and (Sept. 28, 1933) (Boy Scouts). See also the OSA Statement of Position on Public Expenditures: Donations and Dues.

Donations to the Tofte Historical Society

The Town reported that it believes the THS is affiliated and approved by the Minnesota Historical Society.¹⁶

Minn. Stat. § 138.053 creates a two prong test for a town to make a donation to a historical society: (1) the society must be the historical society of the town's county, and (2) it must be affiliated with and approved by the Minnesota Historical Society.¹⁷ Cook County has a historical society located in Grand Marais, Minnesota. The THS is a local historical society in Tofte, Minnesota. While the THS is affiliated with the Minnesota Historical Society, it is not the historical society of Cook County. Under Minn. Stat. § 138.053, the Town could donate to the Cook County historical society, but it does not have the authority under this statute to make donations to the THS.

There also does not appear to be authority in any other statute for the Town to give public funds to a local historical society. Cities have been given the authority to "appropriate money for the purpose of collecting, preserving, storing, housing, printing, publishing, distributing, and exhibiting data and material pertaining to the history of the city."¹⁸ Towns, however, have not been given similar authority. It appears there is no authority for towns to make contributions to local historical societies.

Donations to Birch Grove Foundation/W.E. Connect

The Birch Grove Foundation and Community Center was established in 1985 but recently became known as W.E. Connect, Inc. W.E. Connect offers fitness facilities, senior programs, senior lunches, and space for health and senior services.

At the 2015 Annual Town meeting, the Town Board passed a motion to make a donation of \$10,000 in 2015 and \$2,500 in 2016 to the Foundation.¹⁹

All of these activities and expenditures appear consistent with Minnesota law. There is specific statutory authority under Minn. Stat. § 471.935, for the Town to appropriate money to support the facilities, programs, and services of a public or private, not-for-profit senior citizen center or youth center. In addition, under Minn. Stat. § 365.10, subd.14, electors may approve the Town expending not more than \$10,000 per year on health, social, and recreation services that are in the public interest and good for the Town.

Recommendation

¹⁶ Article XIII of the THS' Articles of Incorporation state that the THS shall be associated with the Minnesota Historical Society.

¹⁷ Minn. Stat. § 138.053.

¹⁸ Minn. Stat. § 471.93.

¹⁹ See March 10, 2015, Annual Town Board meeting minutes. The motion mentions a "contract for services."

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Having found no authority for Town donations to a charter school or to a local, non-county historical society, the OSA recommends that the Town not make donations in the future to the BGCS or the THS.

If you have any questions about the issues raised in this letter, please feel free to contact me at 651-296-4717 or by email at Mark.Kerr@osa.state.mn.us.

Sincerely,

/s/ Mark F. Kerr

Mark F. Kerr
Special Investigations Director

Enclosure

cc:

The Honorable Sarah Somnis Town Board Supervisor
The Honorable Craig Horak, Town Board Supervisor
Ms. Barbara Gervais, Town Clerk
Ms. Nancy Iverson, Town Treasurer