

N.D.A.G. Letter to Dosch (Aug. 31, 1987)

August 31, 1987

Mr. Ronald M. Dosch
Devils Lake City Attorney
P.O. Box 1048
Devils Lake, ND 58301

Dear Mr. Dosch:

Thank you for your letter of May 19, 1987, requesting the assistance of this office in attempting to reconcile the provisions of N.D.C.C. §§ 40-05.1-06(10), 11-11-14(13). According to your letter, your request occurs as a result of a recent resolution passed by the Board of County Commissioners of Ramsey County. For that reason, my office contacted Ramsey County State's Attorney Lewis Jorgenson about the issues involved. His response has just recently been received, and I am now able to address the merits of the issue raised by your letter of May 19.

On May 5, 1987, a resolution was passed by the Ramsey County Board of County Commissioners concerning garbage and trash collection systems in the county. The resolution was passed pursuant to N.D.C.C. § 11-11-14(13). By resolution, the board of county commissioners has indicated that all "for hire" garbage and trash collection activities and systems not conducted pursuant to a franchise granted by the county are unlawful and constitute an infraction. We assume the use of the term "infraction" refers to that criminal offense provided for in N.D.C.C. § 12.1-32-01(7).

The resolution references and appears to be based upon N.D.C.C. § 11-11-14(13). That particular portion of the statute states as follows:

11-11-14. POWERS OF BOARD OF COUNTY COMMISSIONERS.

The board of county commissioners shall have the following powers:

. . . .

13. To establish a garbage and trash collection system encompassing all or any part of the territory of the county. The words "garbage and trash collection system" include the operation and maintenance of one or more sanitary landfill sites, or other types of processing sites for the disposal of trash and garbage. The board may operate such system in cooperation with any one or more political subdivisions of this or any other state in accordance with chapter 54-40. The board may borrow money by issuing certificates of indebtedness, repayable from fees or special assessments, or both, which may be charged to the proper parcels of land or to persons receiving the direct benefits

of the garbage and trash collection system, or repayable in such other manner as may be provided by law, in order to purchase the initial equipment and land necessary for operation of the system. If the board resolves to establish such a system, the expenses of establishing, operating, and maintaining it may be financed by fees charged to persons receiving direct benefits or by special assessment against the parcels of land properly charged therewith, or by both such fees and assessments. The assessment may be made, published, altered, appealed from, and confirmed under the procedures set forth in chapter 11-28.1.

The apparent conflict exists with respect to N.D.C.C. § 40-05.1-06(10). This statute authorizes home rule cities to engage in any utility, business, or enterprise permitted by the constitution or not prohibited by statute or to grant and regulate franchises therefor to a private person, firm, or corporation. As you noted in your letter, on March 13, 1987, this office advised you that N.D.C.C. § 40-05.1-06(10) authorizes a home rule city to engage in the garbage collection business for persons located outside the city limits if the city so desired. The conflict occurs when application of the resolution passed by the Ramsey County Board of County Commissioners prevents a home rule city such as Devils Lake from engaging in such a business despite the city's statutory authorization.

The position of Ramsey County, as provided to this office by the Ramsey County State's Attorney, is that N.D.C.C. § 11-11-14(13) empowers the county to provide trash collection services exclusively and further allows the county to prohibit other persons from engaging in this activity and to provide sanctions should the prohibition be ignored. However, N.D.C.C. § 11-11-14(13) does not authorize to the county to establish exclusive franchises to those wishing to operate garbage and trash collection systems within the county. The subject of franchises is never discussed within the statute and there is certainly no discussion as to any criminal penalties which may occur should persons attempt to operate such a business in the county without the permission of the county commission.

Indeed, the third sentence of subsection 13 of this statute authorizes the board of county commissioners to operate a garbage and trash collection system in cooperation with one or more political subdivisions in accordance with N.D.C.C. ch. 54-40. If the argument is accepted that this subsection grants to the county the authority to establish exclusive franchises (to the exclusion of all other competitors including political subdivisions), there would never be a political subdivision which could cooperate with the county in the operation of a trash collection system. Obviously, the legislature did not have this particular argument in mind when it authorized the county to cooperate with other political subdivisions in operating trash collection systems.

Where the legislature has intended to grant the authority to a political subdivision to award franchises, it has been very specific in its command. Indeed, N.D.C.C. § 40-05.1-06(10) specifically allows a city to "grant and regulate franchises therefor to a private person, firm, or corporation." Furthermore, N.D.C.C. § 40-05-01(57) authorizes cities to grant

franchises and privileges to certain persons not to exceed a period of 20 years. On the other hand, N.D.C.C. § 11-11-14(13) does not contain similar unambiguous language as to franchise authority. Instead, the statute specifically allows a board of county commissioners to establish as part of a county operation a garbage and trash collection system encompassing all or part of the county. The statute further allows the board to operate that system in cooperation with one or more political subdivisions, to borrow money by issuing certificates of indebtedness, and to charge fees to persons receiving direct benefits by such an operation. To interpret N.D.C.C. § 11-11-14(13) to authorize the county to grant an exclusive trash collection franchise to one individual or entity to the exclusion of all others exceeds the statutory language and does not appear to be supported by other statutory provisions.

In summary, I do not see any conflict between N.D.C.C. §§ 11-11-14(13), 40-05.1-06(10). The resolution passed by the Ramsey County Board of County Commissioners establishing an exclusive franchise to an entity for garbage and trash collection systems is not supported by state law and appears to be unenforceable. Should county officials desire to acquire authority to grant exclusive franchises, further legislative action would be required.

Sincerely,

Nicholas J. Spaeth

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cc: Lewis Jorgenson, Ramsey County State's Attorney