

N.D.A.G. Letter to Satrom (June 19)

June 19, 1991

Honorable Joseph A. Satrom
State Senator
216 West Avenue B
Bismarck, ND 58501

Dear Senator Satrom:

Thank you for your April 10, 1991, letter requesting an opinion on questions raised by a constituent concerning use of City of Bismarck sales tax and lodging and restaurant tax revenues.

In 1987 the city entered into a Lease Purchase Agreement (the "Agreement") to fund certain public improvements, including expansion of the Bismarck Civic Center and Library and a water main project (these improvements will be referred to collectively in this letter as the "Civic Center Project"). A lawsuit challenging the Agreement was filed by a group of taxpayers shortly thereafter. The North Dakota Supreme Court rejected this challenge and held that the financing arrangement was authorized by law and that the debt limit provision of section 16 of article X of the North Dakota Constitution did not apply because the financing arrangement was not a general obligation of the city. Haugland v. City of Bismarck, 429 N.W.2d 449 (N.D. 1988).

The questions posed in your letter concern the effect of a 1988 amendment to the city's home rule charter which provides that the proceeds of the city's sales tax may be dedicated to capital improvements (other than utility capital improvements) only "as approved by a 60% majority vote of the electorate." Your constituent asserts that this amendment applies to payments for the Civic Center Project pursuant to the Agreement made after the effective date of the amendment. City officials, however, believe that the amendment does not apply to these payments because such application would unconstitutionally impair the contract rights of the parties to that transaction in violation of the contract clause of the United States Constitution (article I, 10) and because such application is inconsistent with N.D.C.C § 40-05.1-13, relating to amendments to home rule charters. Your constituent argues that application of the home rule charter amendment would not impermissibly impair the city's contractual obligations under the Agreement because the Agreement does not constitute a general obligation of the city and the city is only liable for lease payments in the current fiscal year.

You ask in your first question whether the City of Bismarck may, without the approval of the electorate as required by the home rule charter amendment, continue to use sales tax revenues to make lease payments for the Civic Center Project under the Agreement.

The Agreement provides specifically that it does not constitute a general obligation of the city, that the city's taxing powers are not pledged for payment of the lease payments, that the city may terminate the Agreement by not appropriating moneys to make lease payments for the succeeding year, and that the city is liable only for lease payments for the current fiscal year for which it has appropriated moneys. Although the city also covenanted that it will not pledge its sales tax and lodging and restaurant tax revenues "toward any purpose other than payment of Lease Payments during the Agreement Term", sales tax and lodging and restaurant tax revenues are not pledged as security for those payments. The city is free to use any revenue source to make the payments, and sales tax and lodging and restaurant tax revenues may be used for other projects and expenses so long as these revenues are not pledged toward any other purpose during the term of the Agreement.

A law is in violation of the contract clause if it acts to substantially impair existing contract obligations and it is not reasonable and necessary to serve an important public purpose. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). In determining whether a state's exercise of its powers impermissibly impairs private contract rights in violation of the contract clause, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. Allied Structural Steel Company v. Spannaus, 438 U.S. 234 (1978).

Cases in which federal or state courts have found an impermissible impairment of contract generally involve an explicit security for the Agreement which is eliminated or other explicit contract provision which is destroyed or substantially impaired. For example, in U.S. Trust Company v. New Jersey, the Court found that repeal of a statutory covenant restricting use of revenues pledged as security for bonds "totally eliminated an important security provision and thus impaired the obligation of the State's contract." 431 U.S. at 19. In Davies v. City of Minneapolis, 316 N.W.2d 498 (Minn. 1982), one of the cases cited by city officials in support of their position, revenue from a city sales tax was pledged to be used to partially pay off the debt for the Metrodome. The Minnesota Supreme Court concluded that a proposal to repeal the tax would work an impairment by totally eliminating an important security provision in the bondholders' contract. 316 N.W.2d at 502.

Application of the home rule charter amendment to the Agreement will not eliminate a security provision, nor will it impair any explicit provision in the Agreement. Sales tax revenues are not pledged to be used to make the payments under the Agreement. Those revenues may be used for other purposes, so long as they are not pledged for other projects during the term of the Agreement. The city did not guarantee that sales tax revenues would be set aside to make the payments, and it did not promise that restrictions on the use of sales tax revenues would not be imposed subsequent to execution of the Agreement. The terms of the Agreement differ significantly from the terms in the contracts at issue in the cases in which courts have concluded that legislation impaired existing contract obligations.

It is my opinion that application of the amendment to the city's home rule charter requiring a 60% majority vote of the electorate before sales tax revenues may be used for capitol improvements does not constitute an impermissible impairment of contract. Therefore, it is unnecessary to consider whether an impairment is justified as being reasonable and necessary to serve an important public purpose. In any event, that determination would involve questions of fact relating to the intent and purpose of the home rule charter amendment. This office may only address questions of law.

It is also my opinion that application of the home rule charter amendment to the Agreement will not violate N.D.C.C. § 40-05.1-13, which provides, in part:

The adoption of any charter hereunder or any amendment thereof shall never be construed to destroy any property, action, claims for relief, claims, and demands of any nature or kind whatever vested in the city under and by virtue of any charter theretofore existing or otherwise accruing to the city, but all such claims for relief, claims, or demands vest in and inure to the city and to any persons asserting any such claims against the city as fully and completely as though the said charter or amendment had not been adopted hereunder.

The property right or claim of the certificate holders is to receive payments of principal and interest on their certificates when such payments have been appropriated by the city. The certificate holders do not have the right to demand that sales tax revenues be the source of the payments. The effect of the home rule charter amendment is to impose an additional obstacle in the process leading to appropriation of sales tax revenues to make the lease payments. This will not destroy the rights or claims of the certificate holders and therefore there is no violation of N.D.C.C. § 40-05.1-13.

Your second question concerns whether the city may save revenues collected under the city's lodging and restaurant tax with the intent to use the funds for future improvements to the Civic Center. This tax is imposed pursuant to the authority granted by N.D.C.C. § 40-57.3-01.1, which provides that all proceeds must be deposited in the city visitors' promotion capital construction fund. The moneys in the fund "must be used generally for the purchase, equipping, improving, construction, maintenance, repair, and acquisition of buildings or property consistent with visitor attraction or promotion." N.D.C.C. § 40-57.3-02.

There is nothing in chapter 40-57.3 that prohibits saving tax proceeds for future improvements of the kind authorized by N.D.C.C. § 40-57.3-02. Furthermore, the Agreement does not preclude this action. The city has agreed only that it will not pledge the lodging and restaurant tax revenues for any other purpose during the term of the Agreement. There is no reason the funds cannot be saved to be used for future construction projects so long as bonds backed by the revenues are not issued, or the city does not otherwise pledge the revenues, during the term of the Agreement.

I trust this discussion will be helpful to you.

Sincerely,

Nicholas J. Spaeth

krb

cc: Charlie Whitman