

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 93-F-10

Date issued: July 14, 1993
Requested by: Jon F. Kroke
McVillage City Attorney

- QUESTIONS PRESENTED -

I.

Whether a city may construct, operate, and maintain a cable television system.

II.

Whether a city may finance a cable television system through a loan from a local bank, securing the loan with the revenues derived from the operation of the cable television system and the assets of the system acquired with moneys received under the loan.

III.

Whether a city may use profits from a cable television system, over and above those dedicated to pay the costs of maintaining and operating the system and any obligation of the cable television system, for general government purposes.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a city may construct, operate, and maintain a cable television system.

II.

It is further my opinion that a city may finance a cable television system through a loan from a local bank, securing the loan with the revenues derived from the operation of the cable television system and the assets of the system acquired with moneys received under the loan.

III.

It is further my opinion that a city may use profits from a

ATTORNEY GENERAL'S OPINION 93-10
July 14, 1993

cable television system, over and above those dedicated to pay the costs of maintaining and operating the system and any obligation of the cable television system, for general government purposes.

- ANALYSES -

I.

The cable television industry is extensively regulated by the federal government. See 47 U.S.C. ? 521 et seq. Under 47 U.S.C. ? 533(e), a state or franchising authority, with some editorial restrictions, may maintain an ownership interest in a cable system. However, the authority for a state or its political subdivisions to maintain an ownership interest in a cable television system, must initially arise under state law. See Warner Cable Communications Inc. v. Borough of Schuylkill Haven, 784 F.Supp. 203 (E.D. Pa. 1992).

In North Dakota, there is no statute which specifically addresses a city's authority to own and operate a cable television system. However, N.D.C.C. ? 40-05-01(57) authorizes cities to "grant franchises or privileges to persons, associations, or corporations." This office previously concluded that this provision authorizes a city to grant itself a cable television franchise, thereby enabling the city to own and operate its own cable television system. Letter from Attorney General Nicholas J. Spaeth to City Attorney David M. Wheelihan (Oct. 22, 1985). N.D.C.C. ? 40-05-01(72) further provides that a city may "construct and maintain relay and booster towers for the improved reception of educational and entertainment television programs." The apparent purpose behind this provision is to allow a city to help its citizens better receive educational and entertainment television programs. The operation of a cable television system would further this objective.

Given the above, it is my opinion that a city may construct, operate, and maintain a cable television system.

II.

There are no state laws that specifically apply to the manner in which a city may finance a cable television system. Specific laws exist regarding the financing of municipal utilities, municipal steam heating authorities, municipal

ATTORNEY GENERAL'S OPINION 93-10
July 14, 1993

power agencies, municipal pipe line authorities, and municipal parking authorities. See N.D.C.C. chs. 40-33, 40-33.1, 40-33.2, 40-33.3, and 40-61, respectively. None of these chapters apply to the financing of a cable television system, however. The Municipal Industrial Development Act, N.D.C.C. ch. 40-57, would not apply to financing a cable television system operated by the city, because that chapter specifically prohibits any project under that chapter being by a municipality. N.D.C.C. ? 40-57-03. Further, the cable television system cannot be financed through the issuance of revenue bonds pursuant to N.D.C.C. ch. 40-35. See Letter from Attorney General Nicholas Spaeth to City Attorney David M. Wheelihan (Jan. 24, 1986); N.D.C.C. ? 40-35-02.

However, a city has the general authority to borrow money. N.D.C.C. ? 40-05-01(2). In construing this provision, the North Dakota Supreme Court has said:

In our view, N.D.C.C. ? 40-05-01(2) generally authorizes a municipal governing body to control municipal finances, pay its debts and expenses, contract debts and borrow money, and to control municipal property. Section 40-05-01(5) specifically authorizes the borrowing of money by issuing bonds in accordance with N.D.C.C. title 21. Subsection 5 does not provide the exclusive method of borrowing money, but specifies one method of exercising the borrowing authority granted in subsection 2, particularly when general taxing powers are obligated."

Haugland v. City of Bismarck, 429 N.W.2d 449, 453 (N.D. 1988).

When it is determined that a municipality has a particular power, and the manner and means of exercising that power is not prescribed by the Legislature, it is left to the discretion of municipal authorities to determine, within a range of reasonableness, the manner and means of exercising that power. Lang v. City of Cavalier, 228 N.W. 819, 822 (N.D. 1930); Haugland, at 453-454.

If a city finances a cable television system through a loan from a local bank, securing the loan with the revenues derived from the operation of the cable television system and the assets of the system acquired with moneys received under the loan, no general obligation of the city would be incurred.

ATTORNEY GENERAL'S OPINION 93-10
July 14, 1993

Only the system's assets would be at risk. See Lang v. City of Cavalier, 228 N.W.2d 819 (N.D. 1930).

Therefore, it is my opinion that a city may finance a cable television system through a loan from a local bank, securing the loan with the revenues derived from the operation of the cable television system and the assets of the system acquired with moneys received under the loan.

III.

When it is determined that a municipality has a particular power, and the manner and means of exercising that power is not prescribed by the Legislature, it is left to the discretion of municipal authorities to determine, within a range of reasonableness, the manner and means of exercising that power. See Lang, 228 N.W. at 822; Haugland, 429 N.W.2d at 453-454. It has already been determined that a city has the authority to construct, operate, and maintain a cable television system. A result of that operation may be that revenues exceed expenses. State law does not address the manner in which profits derived from the operation of a cable television system may be used. Therefore, as long as the necessary amount of revenue is used in accordance with the terms of the loan, the balance of the profits may be used by the city at its discretion, bearing in mind the potential need for reserves for replacement and any limitations on the use of other city revenues.

Therefore, it is my opinion that a city may use profits from a cable television system, over and above those dedicated to pay the costs of maintaining and operating the system and any obligation of the cable television system, for general government purposes.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

ATTORNEY GENERAL'S OPINION 93-10
July 14, 1993

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