

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 93-F-11

Date issued: August 11, 1993
Requested by: Michel W. Stefonowicz, Crosby City Attorney

- QUESTION PRESENTED -

Whether a home rule city which has not created a job development authority may give grants and make loans to private entities pursuant to an ordinance adopted under its home rule charter.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a home rule city which has not created a job development authority, may engage in the enterprise of giving grants and making loans to private entities pursuant to an ordinance adopted under its home rule charter provided the home rule charter authorizes the home rule city to engage in enterprises and the implementing ordinance, authorizing the city to engage in the proposed enterprise, provides assurance that the activity has a public purpose, details the manner of implementing the activity, and provides for supervisory controls to ensure the public purpose is met.

- ANALYSIS -

Four legal sources are relevant to the determination of whether a home rule city may give grants or make loans: the North Dakota Constitution, North Dakota statutes, the particular home rule city charter, and the particular home rule city ordinance. Article X, Section 18 of the North Dakota Constitution permits "making loans or giving credit . . . [or making donations to private entities] in connection with the city's engaging in any permissible industry, enterprise, or business, but not otherwise." Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964). A city that is not home rule may make loans or give credit or make donations to private entities if that particular activity is authorized by statute. Letter from Attorney General Heidi Heitkamp to Walter M. Lipp (April 12, 1993). That activity may be conducted through city job development authorities pursuant to N.D.C.C. ch. 40-57.4.

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Home rule cities are authorized by the North Dakota Constitution and statutes. N.D. Const. Art. VII, § 6 and N.D.C.C. ch 40-05.1. A home rule city may be authorized in its home rule charter to "engage in any utility, business, or enterprise permitted by the constitution or not prohibited by statute." N.D.C.C. § 40-05.1-06(10). If a home rule city wants to engage in an enterprise not authorized by statute, it must have such authorization in its charter, and the proposed enterprise must be implemented through an ordinance. N.D.C.C. §§ 40-05.1-06, 40-05.1-06(10).

The home rule charter considered here is almost identical to N.D.C.C. § 40-05.1-06(10). It provides that the city may "engage in any utility or enterprise permitted by the constitution or not prohibited by statute" No statute prohibits a home rule city from creating a utility, business, or enterprise through which a city could make grants or loans to private entities. Thus, under the home rule charter considered here, a city may engage in an enterprise whereby grants could be given and loans could be made to private entities if the charter is properly implemented through an ordinance.

The meaning of the term "enterprise" in the home rule charter must be consistent with its meaning in article X, section 18, of the constitutional provision. Words in a statute or constitutional provision should be given their common, ordinary meaning. N.D.C.C. § 1-02-02, McCarney v. Meier, 286 N.W.2d 780 (N.D. 1979). The meaning of those words can also be attained from North Dakota Supreme Court opinions, Attorney General opinions, and other statutes. N.D.C.C. § 1-02-39(4).

"Enterprise" is generally defined as "[a]n undertaking, esp. one of some scope, complication, and risk." The American Heritage Dictionary, 456 (2d coll. ed. 1991). Interpretations of the term "enterprise" by the North Dakota Supreme Court, the Legislature and the Attorney General are consistent with the ordinary definition. A city engages in an enterprise, as that term is used in Article X, Section 18 of the North Dakota Constitution, when it leases a sugar processing plant. Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964). Housing finance programs are enterprises. N.D.C.C. §§ 54-17-01, 54-17-07.1 through 54-17-07.9. Educational assistance is an enterprise. 1981 N.D. Op. Att'y Gen. 53, 54,

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N.D.C.C. chs. 15-62.2, 15-62.3. "The investment activities of the Land Board concerning the coal severance tax trust fund . . . constitute a lawful enterprise" 1992 N.D. Op. Att'y Gen. 57, 63, N.D.C.C. ?? 15-02-08, 15-03-04, 15-03-04.1, 15-03-14 through 15-03-18, and 21-10-06. Historical promotion and historical work of a county is an enterprise. Letter from Attorney General Olson to James E. Sperry (March 7, 1973), N.D.C.C. ch. 11-11. A city is engaging in an enterprise when it enters into an urban renewal project. 1982 N.D. Op. Att'y Gen. 74, 76, N.D.C.C. ch. 40-58.

Given the foregoing authorities, it is my opinion the term "enterprise" means any activity which does not violate the North Dakota Constitution or statutes and which is of some scope, complication, or risk. It is my further opinion that a home rule city with proper authority in its charter can engage in the enterprise of giving grants and making loans if that enterprise is properly implemented through an ordinance.

The remainder of this opinion addresses the requirements of an ordinance implementing the authority to engage in an enterprise and whether the language in section X of the ordinance meets those requirements.

A city may not engage in an enterprise unless it is for a public purpose. See Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965); Ferch v. Housing Authority of Cass County, 59 N.W.2d 849 (N.D. 1953); Green v. Frazier, 176 N.W. 11 (N.D. 1920); 1992 N.D. Op. Att'y Gen. 57. An ordinance permitting a home rule city to engage in a particular enterprise must provide for supervisory controls to ensure that the public purpose is met. See Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965).

Finally, the implementing ordinance must be sufficiently detailed so that the public is properly informed of the authority and limits of the enterprise, Litten v. City of Fargo, 294 N.W.2d 628, 634 (N.D. 1980). When a city is attempting to draft an ordinance to implement a provision in its home rule charter, it may be helpful to review other statutes on the same subject matter. If the statutes are sufficiently detailed to inform the public of the authority and limits of the enterprise, then the city may choose to pattern its ordinance after the statute. The particular terms of the ordinance need not be the same as those in the statute, however. See City of Fargo v. Fahrlander, 199 N.W.2d 30 (N.D.

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1972) (ordinance need not repeat exact language of similar state statute to be valid).

In conclusion, it is my opinion that although it has not created a job development authority, a home rule city may engage in the enterprise of giving grants and making loans to private entities if the home rule charter authorizes the home rule city to engage in enterprises and the implementing ordinance: (1) authorizes the city to engage in the proposed enterprise, (2) provides assurance that the activity has a public purpose, (3) sufficiently details the manner of implementing the activity, and (4) provides for supervisory controls to ensure the public purpose is met.

Sections I through IX of the ordinance implementing the charter considered here provides for and details matters regarding a city sales and use tax. Section X provides:

Section X: DEDICATION OF TAX PROCEEDS

All revenues raised and collected under this article, less administrative expenses shall be dedicated to jobs development, jobs retention, and capitol [sic] expenses for the City. All revenues shall be placed in a separate sales and use tax fund.

The City Council shall establish a six member board, to be known as the Sales Tax Board, to screen applications for grants or loans from this fund. The City Council shall retain veto power over any decision of the Sales Tax Board within 30 days of any funding approval by said Board.

This ordinance dedicates the sales and use tax revenues to jobs development, jobs retention, and the city's capital expenses. These are all public purposes. The 30-day veto authority of the city council can be used to ensure that these public purposes are met.

Section X of the ordinance does not contain sufficient detail to implement the language in the home rule charter. It does not inform the public of the authority and limits of the enterprise. In contrast, N.D.C.C. ch. 40-57.4 which provides the statutory scheme for a city's economic development authority provides sufficient detail. That chapter specifies that the board of directors of a city job development

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authority are appointed and indicates the qualifications necessary for appointment. The term of the directors and to what extent the directors will be reimbursed is also specified. N.D.C.C. ch. 40-57.4 also lists specifically the powers of the city job development authority, including the power to make loans and grants, to make and execute contracts, and to sue and be sued.

The ordinance considered here does not include these details. The ordinance merely provides that the Sales Tax Board will screen applications for grants or loans and give or deny funding approval which is subject to veto by the City Council. The specific powers of the Sales Tax Board, including any limits on the power to make grants and loans, are not enumerated. No mention is made of who will set the guidelines for the screening process, the terms, or any limitations on the grants or loans.

It is my opinion that the ordinance considered here is not sufficiently detailed to properly inform the public of its scope. It is my further opinion that, although the city's home rule charter includes the proper provisions and the implementing ordinance authorizes the proposed enterprise, provides assurance that there is a public purpose, and provides for supervisory controls to ensure the public purpose is met, the city may not give grants or make loans pursuant to this ordinance because this ordinance does not sufficiently detail the manner of implementing the activity.

- 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 question presented is decided by the courts.

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