

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-19

Date issued: December 20, 2000

Requested by: William A. Herauf, Dodge City Attorney

- QUESTION PRESENTED -

Whether a city without home rule authority may own or operate a retail business, in particular a convenience store and gasoline station.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a city without home rule authority may own a retail business pursuant to statutory authority and a finding of public purpose. It is my further opinion that a convenience store or gasoline station may be owned, operated, or promoted by a city under at least two different grants of statutory authority.

- ANALYSIS -

The North Dakota constitution permits cities to engage in business:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

N.D. Const. Art. X, § 18. Under this constitutional provision, a city may engage in commercial and industrial enterprises, including those in competition with private business, except for the liquor business, which is prohibited by the reference to former Article XX. Egbert v. City of Dunseith, 24 N.W.2d 907, 909 (N.D. 1946).

However, Article X, Section 18 of the North Dakota Constitution has never been found by the North Dakota Supreme Court to be a self-executing grant of authority. This issue was argued to the Supreme Court in Egbert, but the Court reached its decision on other

grounds. 24 N.W.2d at 908, 910-11. See also Letter from First Assistant Attorney General Paul M. Sand to Roy A. Neste (Sept. 4, 1969). The Supreme Court has noted that the clause granting cities authority to engage in any industry, enterprise or business is written positively, seeming to grant a legislative power, but stated to the contrary that "its purpose is to set forth an exception to the limitation that follows" which generally prohibits loaning, giving credit, or making donations. Northwestern Bell Tel. Co. v. Wentz, 103 N.W.2d 245, 253 (N.D. 1960). Further, in Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 238 (N.D. 1964), the Supreme Court stated that the city is specifically authorized and empowered to engage in any enterprise under the provisions of present Article X, Section 18. However, that statement was in the context of demonstrating that the statute in question was properly implementing constitutional authority for the city's actions, which negates any implication that Article X, Section 18 is self-executing. See Id.

This office has previously reviewed this issue, and stated in part:

Inasmuch as North Dakota political subdivisions only have that authority provided for by the Legislature, N.D. Const. art. VII, § 2; Roeders v. City of Washburn, 298 N.W.2d 779 (N.D. 1980), the initial determination, before reaching the constitutional issues raised by N.D. Const. art. X, § 18, must be whether there exists statutory authority for the contemplated donation by the city of Hillsboro. . . . Only where there exists such statutory authority for the action in question does the constitutionality of the statutorily authorized action become an issue.

Letter from Attorney General Nicholas Spaeth to Stuart A. Larson (Sept. 25, 1987). Until this issue is squarely before the Supreme Court, the grant of authority to engage in industry, enterprise or business under Article X, Section 18 of the North Dakota Constitution will not be viewed as a self-executing grant of authority, but instead will require separate statutory authority for the contemplated activity.

Therefore, before engaging in any industry, enterprise, or business, a city must review the powers conferred upon it by statute. Cities are agencies of the state and only have the powers expressly conferred upon them by statute or such as may be necessarily implied from the powers expressly granted. Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980). "In defining a city's powers the rule of strict construction applies and any doubt as to the existence or extent of the powers must be resolved against the city." Id. However, once a city's powers have been determined, the rule of strict construction no longer applies, and except where specifically prescribed by the

Legislature, the manner and means of exercising those powers are left to the discretion of the municipal authorities. Haugland v. City of Bismarck, 429 N.W.2d 449, 453-54 (N.D. 1988).

"Leaving the manner and means of exercising municipal powers to the discretion of municipal authorities implies a range of reasonableness in which a municipality's exercise of discretion will not be interfered with or upset by the judiciary." Haugland at 454. A city may provide the details necessary for full exercise of any power conferred by statute when the manner of exercising the power is not otherwise specified. N.D.C.C. § 40-06-07. After it is determined that a regulation is within the subject matter of a city's authority, a party challenging the ordinance must show how the city exceeded its authority. A&H Services v. City of Wahpeton, 514 N.W.2d 855, 857 (N.D. 1994). An ordinance is presumed valid and a court will not hold otherwise unless the ordinance is clearly arbitrary, unreasonable, and without relation to the public health, safety, morals, or welfare. Id. However, a city may not engage in an enterprise unless it is for a public purpose. Kelly v. Guy, 133 N.W.2d 853, 856 (N.D. 1965); Ferch v. Housing Authority of Cass County, 59 N.W.2d 849, 856-60 (N.D. 1953). Further, an ordinance permitting a city to engage in an enterprise should provide for supervisory controls which insure that the public purpose is met. Kelly at 857.

In your letter, you stated that the City of Dodge, North Dakota, is interested in operating a local convenience store and gasoline station, which is presently closed, so that these services will be provided to the citizens of Dodge. You further stated that you did not find specific permissive authority in either N.D.C.C. § 40-05-01 or § 40-05-02. I generally agree with your conclusion regarding these sections.¹ However, there are other provisions of law² which appear to grant the authority that Dodge seeks.

¹ Although N.D.C.C. § 40-05-01(8) does authorize a city to "acquire construct, maintain and operate . . . facilities for motor vehicles" See discussion below regarding similar although somewhat broader language found in N.D.C.C. ch. 40-35.

² One other possible source of authority might be N.D.C.C. ch. 40-57, concerning municipal industrial development financing. A project covered by this chapter includes "[a]ny other industry or business not prohibited by the constitution or laws of the state of North Dakota." N.D.C.C. § 40-57-02(6). However, this authority is limited by a prohibition against municipalities operating any project referred to in N.D.C.C. ch. 40-57 as a business or in any other manner, except if it is the lessor thereof. N.D.C.C. § 40-57-03. Pursuant to this chapter, the city of Wahpeton constructed a sugar processing plant and leased it to its operator. See Gripentrog. This chapter, however, would not appear to authorize the city's purchase and operation of the

The revenue bond law provides any municipality with the power to operate and maintain any "undertaking" for the use of public and private consumers and users within and without the territorial boundaries of the municipality. N.D.C.C. § 40-35-03(2). An undertaking, as defined in this chapter, includes the "operation of parking lots, trailer courts, and facilities for motor vehicles and house trailers." N.D.C.C. § 40-35-02(4). The city governing body therefore has statutory authority to determine the manner and means of exercising this power to provide for facilities for motor vehicles. The plain meaning of the word "facility" includes "[s]omething that facilitates an action or process." The American Heritage Dictionary, 484 (2d coll. ed. 1991). The city governing body may therefore determine that a convenience store or gasoline station promotes the operation of motor vehicles and serves a public purpose. If so, then the city may proceed under N.D.C.C. ch. 40-35.

A further source of authority may be N.D.C.C. ch. 40-60, concerning municipal parking. Pursuant to this chapter, municipalities are authorized to "operate and maintain parking facilities," and establish and collect charges for the use thereof by all public and private persons. N.D.C.C. § 40-60-02(4). For these purposes, the phrase "parking facilities" is defined to include "all off street lots, sites, parking meters and other control devices, garages, ramps, and other structures and accessories, . . . which are used or useful for the parking, delivery, fueling and servicing of automobiles and other motor vehicles, the collection of charges therefor, and the convenience of the patrons of the facilities." N.D.C.C. § 40-60-01 (emphasis supplied). As previously noted, it may be reasonable for the city governing body to determine that a gasoline station and convenience store will promote the fueling and service of automobiles and the convenience of the patrons of this facility. I would note that while N.D.C.C. § 40-60-02(4) permits a municipality to operate and maintain a facility for the fueling and servicing motor vehicles, ownership and operation of service facilities is not allowed if the municipality is acting under N.D.C.C. ch. 40-61, the municipal parking authority act. N.D.C.C. § 40-61-03(13) (prohibition against fueling or service is for projects "authorized by this chapter"). Therefore, while chapter 40-60 may be available to meet the purposes of the city of Dodge in this instance, chapter 40-61 is not.

There may be other statutory provisions which grant cities the authority to own and operate a convenience store in addition to those identified in this opinion. Other authority to encourage a convenience station may be considered, including a Jobs Development

business since the city would be acting in the capacity of an owner, rather than as a lessor.

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Authority. Therefore, it is my opinion that a city without home rule authority may own a retail business pursuant to statutory authority and a finding of public purpose. It is my further opinion that a convenience store or gasoline station may be owned, operated, or promoted by a city under at least two different grants of statutory authority.

- 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.

Heidi Heitkamp
Attorney General

Assisted by: Edward E. Erickson
Assistant Attorney General

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