

LETTER OPINION
2000-L-32

March 10, 2000

Mr. Charlie Whitman
Bismarck City Attorney
PO Box 5503
Bismarck, ND 58506-5503

Dear Mr. Whitman:

Thank you for your letter asking whether a home rule city is authorized to impose a law enforcement charge on all the licensed gaming operations within its boundaries or to otherwise generate revenue from those operations. The purpose of the proposed fees or additional revenue would be to offset the cost to the city of enforcing the state gaming laws.

Your letter describes prospective methods for assessing a gaming law enforcement charge such as dividing budgeted enforcement costs between gaming operators proportionally based on gross proceeds, or on the number of sites, tables, or jars that an entity operates within a city. The answer to your question depends in large part on the method used by the city to generate revenue from gaming operators.

I recently concluded that a home rule city could not charge "user fees" for police and fire protection and other general services to tax-exempt entities. 1999 N.D. Op. Att'y Gen. L-28 (Mar. 30 to Fabian Noack). In reaching this conclusion, I quoted from a prior opinion on the same subject:

Therefore, it is my opinion that a home rule city may not charge a fee . . . to tax exempt charitable or nonprofit entities for fire and police services where the services to be charged for are generally available to all entities within the city, tax exempt or non-tax exempt alike, and where only tax exempt entities would actually be charged, because the charge imposed would be a tax and the entities you propose to charge are tax exempt under the constitution of North Dakota. See N.D. Const. art. X, § 5.

1994 N.D. Op. Att'y Gen. L-123, L-126 (Apr. 15 to Charles Whitman).

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Gaming operators are nonprofit organizations. N.D.C.C. § 53-06.1-01. Imposing a law enforcement fee on gaming operators for gaming law enforcement is not significantly different from charging a fee for police and fire protection services against other types of tax-exempt entities. Therefore, a home rule city may not charge a fee specifically for gaming law enforcement services provided by the city.

Notwithstanding this conclusion, there are a number of other powers listed in N.D.C.C. § 40-05.1-06 which home rule cities may use to generate revenue for city purposes, including gaming law enforcement.

Subsection 16 of N.D.C.C. § 40-05.1-06 authorizes a home rule city to adopt a home rule charter and implementing ordinances under which the city imposes a sales tax. This subsection allows a home rule city to impose a sales tax for a specific purpose as well as for general revenue. 1995 N.D. Op. Att'y Gen. L-115 (May 17 to Carolyn Nelson). Thus, a home rule city is not precluded from imposing a city sales tax, or increasing an existing city sales tax, for the specific purpose of defraying the city's expenses in enforcing the state gaming laws. Such a tax could be limited to the sale of pull tabs, bingo cards, and other gaming devices, or the city could impose an "occupational sales tax" on the taxable gross receipts of each gaming organization. Depending on the language of the city home rule charter, an amendment to the charter may be needed to authorize an ordinance implementing the additional sales tax.

Subsection 2 of N.D.C.C. § 40-05.1-06 authorizes a home rule city to adopt a home rule charter and implementing ordinances under which the city may "levy and collect taxes, excises, fees, [and] charges" Based on the 1984 enactment of subsection 16 of N.D.C.C. § 40-05.1-06, which specifically authorized home rule cities to impose sales and use taxes, this office has concluded on several occasions that the general taxing authority in subsection 2 of N.D.C.C. § 40-05.1-06 does not authorize a home rule city to impose the taxes listed in subsection 16 of that section. 1996 N.D. Op. Att'y Gen. L-142 (Aug. 12 to Tony Grindberg); 1995 N.D. Op. Att'y Gen. L-97 (Apr. 17 to Michael Sturdevant) ("a home rule city must specify sales and use taxes in its charter and implementing ordinances to be able to impose them"); Letter from Attorney General Nicholas Spaeth to Kenneth Dalsted (Jan. 16, 1991); Letter from Attorney General Robert Wefald to Nevin Van de Street (Apr. 11, 1984); Letter from Attorney General Robert Wefald to Jay Fiedler (Mar. 7, 1984).

Although these opinions were specifically addressed to sales taxes, this conclusion applies equally to other excise taxes. See Letter to Dalsted, supra ("N.D.C.C. § 40-05.1-06(2) relates to the levy and collection of ad valorem taxes" and does not authorize excise taxes.

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Accordingly, it is my opinion that a home rule city may not impose an excise tax other than the sales and use tax authorized in N.D.C.C. § 40-05.1-06(16).

In addition to authorizing sales and use taxes, a number of subsections in N.D.C.C. § 40-05.1-06 authorize home rule cities to require licenses and provide for public health, safety, morals, and welfare. N.D.C.C. § 40-05.1-06(3), (7), (9), and (12). Based on these subsections, this office has previously concluded that home rule cities may require a separate local license to sell tobacco products and may increase the statutory fees for liquor licenses and speed limit violations. 1994 N.D. Op. Att'y Gen. 64 (Apr. 19 to Jon Fitzner) (tobacco licenses); 1982 N.D. Op. Att'y Gen. 202 (Sept. 13 to Robert Martinson) (liquor licenses); 1982 N.D. Op. Att'y Gen. 188 (Aug. 19 to Richard Olson). For similar reasons, N.D.C.C. § 40-05.1-06 appears to authorize home rule cities to require an additional local gaming license.

Generally, ordinances implementing powers which are listed in N.D.C.C. § 40-05.1-06 and included in a city home rule charter will supersede conflicting state laws. N.D.C.C. § 40-5.1-06. Under the opinions cited in the preceding paragraph regarding home rule authority, the remaining question is whether the authority to require an additional local gaming license is preempted by state laws regarding gaming. Home rule authority may be expressly preempted by state law or may be impliedly preempted in areas of statewide concern. See 2000 N.D. Op. Att'y Gen. 32 (Jan. 31 to Charlie Whitman) (qualifications of plumbing and electrical inspectors is a statewide concern); 1994 N.D. Op. Att'y Gen. at 66 (Apr. 19 to Fitzner at p. 3).

N.D.C.C. ch. 53-06.1 is silent on its application to home rule political subdivisions, so there is no express preemption. "Whether an ordinance implementing a home rule power concerns a statewide matter [and is impliedly preempted] is not always clear." 2000 N.D. Op. Att'y Gen. at 34 (Jan. 31 to Whitman at p. 3). For example, the type of games which are permitted in North Dakota is clearly a matter of statewide concern which may not be changed under home rule authority. N.D. Const. art. XI, § 25; 1985 N.D. Op. Att'y Gen. 46 (Apr. 30 to Howard Swanson). However, I do not believe state law preempts all exercises of home rule authority in the area of charitable gaming.

The pertinent state statutes require gaming operations to obtain a local permit or site authorization from the governing body of the city or county in which the games are conducted. N.D.C.C. § 53-06.1-03. The fee for a local permit may not exceed \$25 and the fee for a site authorization is \$100. Id. Governing bodies are prohibited from

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requiring an organization to "donate net proceeds" to the city or county as a condition for receiving a site authorization. Id. at (2) (a).¹

As with the statutes requiring a license to sell tobacco or liquor, it is my opinion that N.D.C.C. ch. 53-06.1 does not "purport to regulate every aspect" of the gaming industry. "A local licensing requirement is not inherently in conflict with a state license on the same trade or business." 1994 N.D. Op. Att'y Gen. at 67 (Apr. 19 to Fitzner at p. 4). In fact, enforcement of gaming laws by local officials is a large component of the regulatory scheme in N.D.C.C. ch. 53-06.1. In most respects, local licensing requirements for gaming operations supplement rather than conflict with the requirements in N.D.C.C. ch. 53-06.1. Accordingly, it is my opinion that a home rule city may require a local gaming license if its home rule charter includes the powers listed in N.D.C.C. § 40-51.1-1-06(3), (7), (9), and (12) and the license is implemented through an appropriate ordinance.

Sincerely,

Heidi Heitkamp
Attorney General

jcf/vkk

¹ A tax or license fee charged by a home rule city under the authority discussed in this letter is distinguishable from a "donation" and therefore is not prohibited under N.D.C.C. § 53-06.1-03(2) (a). In one case, the governing body may directly impose the tax or fee; in the other, the governing body has no such direct authority but imposes a condition on receiving a site authorization.