

**LETTER OPINION
2002-L-04**

January 8, 2002

Mr. Don Eppler
Lisbon City Attorney
PO Box 511
Lisbon, ND 58054

Dear Mr. Eppler:

Thank you for your letter concerning reimbursement of incarceration costs paid by a home rule city for persons sentenced in a municipal court to serve time in jail.

Your first question is whether a home rule city may seek reimbursement for incarceration costs paid by the city from persons sentenced in the municipal court to serve time in jail if the reimbursement is not required by the municipal court's sentence. In a letter opinion issued by this office in 1998, the Attorney General provided four criteria to use when determining whether a particular power may be exercised by a home rule city.

A home rule political subdivision may exercise powers not allowed under state law if: (1) the Legislature granted it that power [as a home rule political subdivision]; (2) the political subdivision included that power in its home rule charter; (3) the political subdivision properly implemented the power through an ordinance; and (4) the power concerns only local, rather than statewide, matters.

1998 N.D. Op. Att'y Gen. L-117,118.

When construing a city's powers, the Supreme Court follows a rule of strict construction, stating that any doubt as to the extent of the powers must be resolved against the city. See, Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D.1980).

The powers of home rule cities are outlined in chapter 40-05.1 of the Century Code. In Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D.1980), the Supreme Court indicated the lack of specific authority in chapter 40-05.1 to enact an ordinance created a

presumption that a city would be governed by the laws generally applicable to cities. The court stated:

It necessarily follows that in order to determine what broad powers are given to home rule cities, we must examine the various provisions of § 40-05.1-06. If the authority or power to enact an ordinance on a specific subject is not found in § 40-05.1-06 or in ch. 40-05.1, or some other comparable statute, then a strong presumption exists that the city will be governed by the laws generally applicable to cities...

Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D.1980)

The specific authority to recover costs of incarceration is not found in N.D.C.C. § 40-05.1-06 or ch. 40-05.1, N.D.C.C. Following the Litten case, we must apply the presumption that the laws generally applicable to cities will govern. The applicable statutes in this instance are N.D.C.C. §§ 40-18-12 and 12-44.1-12.1. Section 40-18-12, N.D.C.C., allows the governing body of a municipality to adopt an ordinance requiring a defendant who has been found guilty of violating a municipal ordinance to work for the municipality not more than eight hours per day and be allowed ten dollars per day against fines and costs. The statute does not provide for any offset or reimbursement for costs of incarceration. Section 12-44.1-12.1, N.D.C.C., allows a correctional facility to recover all or part of the expense for health care services it has provided to inmates, but does not provide for recovery of incarceration expenses such as room and board. Thus, there is no statutory authority for home rule cities to seek reimbursement for the costs of incarceration.

This finding is consistent with legislative history and past opinions issued by this office. A bill requiring inmates to pay for costs of room and board was introduced in the 57th Legislative Assembly, whereby inmates would have been required to pay the entire costs of their room and board. Even after amending the bill to limit the amount that could be charged, the bill failed to pass.

In 1983 the Ward County States Attorney questioned whether a judge could require an inmate to reimburse a county for the costs of incarceration or whether the county could seek reimbursement from the inmate in a civil action. This office, while recognizing an exception for reimbursement of medical costs pursuant to the jail rules, responded, "[s]uch inmate reimbursement for the costs of incarceration is not an authorized sentencing alternative as set forth in section 12.1-32-02, N.D.C.C." Letter from Attorney General Robert Wefald to Tom Slorby, (July 12, 1983). Section 12.1-32-02 has not changed since 1983 with respect to including imposition of costs of incarceration as a sentencing alternative.

While several other statutes provide for varying degrees of restitution or reimbursement¹, the Legislature has not authorized any procedure for the reimbursement of incarceration costs. While these statutes do not expressly preempt local regulation, their broad scope and purpose demonstrate a clear legislative intent to do so. See, 1994 N.D. Op. Att’y Gen. 64, 66. Therefore, it is my opinion that a home rule city may not seek reimbursement for incarceration fees paid by the home rule city from persons sentenced in the municipal court to serve time in jail.

Your second question asks whether a home rule city may seek reimbursement for jail fees paid by the city from persons sentenced in municipal court to serve time in jail if the defendant has agreed to do so pursuant to a written plea agreement incorporated into the municipal court’s sentence.

Resolution of this question does not necessarily require any analysis under the home rule statutes. As a general rule, a fine or penalty for a violation of a municipal ordinance is governed by N.D.C.C. §40-05-06, N.D.C.C. § 40-18-13, and the sentencing alternatives under N.D.C.C. § 12.1-32-02. These statutes do not provide, as part of any penalty or sentencing alternative for a violation of a municipal ordinance, that the municipal court may order the person found guilty of violating the ordinance to reimburse the municipality for the costs of incarceration imposed as part of a municipal court sentence.

However, in State v. Steinolfson, 483 N.W.2d 182 (N.D.1992) the court upheld a trial court’s order for restitution that was made pursuant to a plea agreement, even though the plea agreement required the defendant to pay more restitution than was required by statute. The court, citing State v. Phillips, 733 P.2d 1116 (Ariz.1987), recognized that with respect to plea agreements, the issue was not whether the court’s order was authorized by statute, but whether the agreement was part of a plea that was entered voluntarily and intelligently. State v. Steinolfson, 483 N.W.2d at 185.

¹ Section 40-05-06, N.D.C.C., limits fines and penalties for municipal ordinance violations and does not include any provisions for reimbursement for costs of incarceration. Section 40-18-13, N.D.C.C. allows a municipal judge may use the sentencing alternatives provided under N.D.C.C. § 12.1-32-02, but the authority is subject to the provisions of N.D.C.C. § 40-05-06. Section 12.1-32-02(1)(e) and (f) N.D.C.C. provide for restitution and N.D.C.C. § 12.1-32-08 provides for restitution proceedings and authorizes a court to order a defendant reimburse indigent defense costs and expenses as a condition of probation under N.D.C.C. § 12.1-32-07. Sections 12.1-32-02 and 12.1-32-08, N.D.C.C., do not include any provisions or provide any procedures for reimbursement of incarceration costs.

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Therefore, it is my opinion that a municipality may seek reimbursement for incarceration fees from a person sentenced to jail for a violation of a municipal ordinance if the person has agreed to do so pursuant to a plea agreement incorporated into a person's sentence, provided the agreement was part of a plea that was entered voluntarily and intelligently.

Sincerely,

Wayne Stenehjem
Attorney General

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