

**LETTER OPINION
2002-L-57**

October 14, 2002

Mr. Ronald A. Reichert
Medora City Attorney
PO Box K
Dickinson, ND 58602-8305

Dear Mr. Reichert:

Thank you for your letter requesting my opinion about whether an initiated ordinance rejecting the purchase of water under an existing contract is valid.

The City of Medora (City) contracted with the North Dakota State Water Commission (Commission) on March 23, 1983, to purchase a certain quantity of water under the Southwest Pipeline Project system. See Southwest Pipeline Project Water Service Contract (Contract) No. SWC-1736-18. See also, N.D.C.C. ch. 61-02 (authorizing the Commission to make water service contracts). The Southwest Pipeline Project was confirmed and approved by the 1983 N.D. Legislative Assembly. N.D.C.C. § 61-24.3-03. See also N.D.C.C. § 61-24.3-10 (authorizing construction and operation by the Commission). Confirmation and approval of the project effectuated the City contract with the Commission. See Contract Section V. The Contract was “confirmed and approved by the [1983] legislative assembly.” N.D.C.C. § 61-24.3-19. The City and the Commission agreed in 1996 that the operating duties of the Commission under the contract were to be transferred to the Southwest Water Authority. See Contract Amendment.

On January 15, 2002, the City Council passed a motion to amend the Contract to provide that the Southwest Pipeline Project be its sole source of water supply under the Contract rather than the agreed purchase of a minimum of 13,000,000 gallons of water annually.

An initiative petition proposing an ordinance “rejecting contracts with and water from the Southwest Water Pipeline” was filed January 18, 2002, and passed by a vote of the electors June 11, 2002, in accord with article 8 of the City’s Home Rule Charter. Under the Charter an initiated ordinance is effective 10 days after the vote. Id. No further action has been taken by the City or the Commission regarding the January 15, 2002, motion proposing an amendment of the Contract.

You ask whether the initiated ordinance is valid and what effect it has on the Contract. North Dakota Const. art. I, § 18 provides that “[n]o . . . law impairing the obligations of contracts shall ever be passed.” See also U.S. Const. Art. 1, § 10 (providing no state shall pass any “law impairing the obligations of contracts”). An ordinance is a law within such constitutional provisions. 5 E. McQuillin, The Law of Municipal Corporations § 19.36 (3d ed. 1996). “An ordinance cannot impair the obligation of a contract.” 5 E. McQuillin, The Law of Municipal Corporations, § 19.34 (3d. ed. 1996). Furthermore, article 7, § 5 of the City Home Rule Charter approved June 8, 1999, provides that “[a]ll contracts entered into by the city, or for its benefit, prior to the taking effect of this charter, shall continue in full force and effect.”

The facts in this situation are similar to those in City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898). The city entered into a long-term contract with the company to furnish water to the city and agreed not to construct its own water works so long as the contract remained in effect. While the contract was in effect the city passed an ordinance to construct its own water works. The city was enjoined in the lower courts from proceeding on the ground its ordinance unconstitutionally impaired the contract with the company. The United States Supreme Court upheld the injunction on the grounds the company's position under the contract was impaired by the ordinance and the contract was protected by the U.S. Constitution.

“[I]f there is a contract, which has been substantially impaired, and there is no legitimate public purpose justifying the impairment [] there [is] a violation of the Contract Clause.” 5 E. McQuillin, The Law of Municipal Corporations, § 19.35.50 (3d ed. 1996) (citing Energy Reserves Group, Inc., v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983)). See also, City of Charleston v. Pub. Serv. Comm. of W. Virginia, 57 F.3d 385, 390-91 (4th Cir. 1995) (same); 6 E. McQuillin, The Law of Municipal Corporations, § 20.72 (3d. ed. 1996).

The initiated City ordinance appears to be designed to vitiate the obligation to purchase water from the Southwest Pipeline Project, which is a substantial and material impairment of the Contract. The initiated city ordinance rejecting water from the Southwest Pipeline Project under the Contract was not an apparent necessary or reasonable exercise of the city police power. 459 U.S. at 411-12. See also Fairmont Foods Co. v. Burgum, 81 N.W.2d 639, 645-46 (N.D. 1957) (observing that to be valid as an exercise of the police power a law must reasonably be aimed at some evil or sinister purpose).

In this case the Contract is protected by both the federal and state constitutional provisions. Indeed, the City Home Rule Charter itself protects the contract. Art. 7, § 5. Home Rule Charter. “[A]n ordinance that violates the Constitution of the United States or of the state is void.” 5 E. McQuillin, The Law of Municipal Corporations, § 19.01 (3d ed. 1996). See also 6 E. McQuillin, The Law of Municipal Corporations, § 21.16 (3d ed. 1996) (generally, an ordinance unconstitutionally impairing a right under contract is void); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250-51 (1978) (invalidating a Minnesota

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statute which impaired an employer's pension fund agreements); Fairmont Foods Co. v. Burgum, 81 N.W.2d at 647-48 (holding certain laws impairing a right of contract were void). Based upon the foregoing, it is my opinion that the initiated city ordinance violates the constitutional prohibitions on impairment of contracts, and is therefore void.

Sincerely,

Wayne Stenehjem
Attorney General

tam/vkk