LETTER OPINION
97-L-155

September 26, 1997

Mr. Stephen M. McLean
City Attorney
City Hall, 115 South 5th St.
Oakes, ND 58474

Dear Mr. McLean:

Thank you for your letter inquiring about the validity and enforceability of sections 12.0401 through 12.0406 of the Oakes' city ordinances which provide for abatement and disposal of abandoned personal property, including automobiles, deemed a public nuisance.

North Dakota cities, including home rule cities, are creatures of the Legislature and only have those powers expressly granted to them or necessarily implied from the grant by the Legislature. N.D. Const. art. VII, § 6; Litten v. City of Fargo, 294 N.W.2d 628, 631-632 (N.D. 1980). Cities generally have the power "[t]o declare what shall constitute a nuisance and to prevent, abate, and remove the same," N.D.C.C. § 40-05-01(44), and to provide by ordinance for the taking and disposal of abandoned personal property after notice, by sale, subject to the owner's right to reclaim the property before sale and the proceeds after sale, less the expenses after taking and sale, N.D.C.C. § 40-05-02(20).

Oakes is a home rule city. The Legislature has provided for the powers which may be implemented through home rule and the procedure to implement them. See N.D.C.C. ch. 40-05.1. A home rule city has the power, if included in its charter and implemented through ordinances, "[t]o provide for adoption . . . of ordinances . . . to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof," N.D.C.C. § 40-05.1-06(7), and "[t]o define offenses against . . . the public health, safety, morals, and welfare, and provide penalties for violations thereof." N.D.C.C. § 40-05.1-06(9). Oakes' home rule charter contains comparable provisions. See Home Rule Charter, City of Oakes, North Dakota, art. 3(g),(i).

In addition to the powers included in its home rule charter, Oakes has the general powers granted to a city. See Haugland v. City of Bismarck, 429 N.W.2d 449 (N.D. 1988) (finding that a home rule city

without specific authority under its charter and ordinances has the authority given by the Legislature to all cities). "The statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the [home rule cities' charters or ordinances]." N.D.C.C. § 40-05.1-06.

Pursuant to N.D.C.C. §§ 40-05.1-05, 40-05.1-06(7) and (9), and the Oakes Home Rule Charter, art. 3(g),(i), Oakes generally, for purposes of providing for the public health, safety, morals and welfare, may adopt ordinances that supersede state laws. Thus, Oakes has the authority both under the general powers given to cities in N.D.C.C. §§° 40-05-01 and 40-05-02 and through its home rule charter to regulate nuisances including abandoned personal property.

A city has some limitations, however, in adopting ordinances under its home rule charter that conflict with general state law. "A city's implementation of home rule may not 'supersede or prevail over conflicting general law dealing with affairs purely of statewide concern.'" 1993 N.D. Op. Att'y Gen. 96, 101 (concerning a city's proposal to eliminate its municipal court) (emphasis added). Cities "cannot adopt ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state." 1994 N.D. Op. Att'y Gen. 64, 66 (quoting State v. Gronna, 59 N.W.2d 514, 531 (N.D. 1953)). But "[t]he mere fact that a state regulates an area of business however does not necessarily preempt all local legislation regarding that area." 1990 N.D. Op. Att'y Gen. 90, 92. See also 1994 N.D. Op. Att'y Gen. 64 (concerning preemption generally and concluding state licensing of tobacco dealers did not preclude local regulation of sale to minors).

State laws address abandoned and unclaimed personal property and nuisances. A nuisance consists of an act or omission that affects the comfort, repose, health or safety of others, offends decency, interferes with traffic, or "[i]n any way renders other persons insecure in life or in the use of property." N.D.C.C. § 42-01-01. See N.D.C.C. §§ 40-05-01(47), 40-05-02(22), ch. 42-03 (regarding animals); N.D.C.C. § 40-05-02(20) (regarding abandoned or unclaimed personal property); N.D.C.C. § 40-05-01(44) (regarding abatement of nuisances by a city); N.D.C.C. ch. 42-01 (regarding nuisances generally); N.D.C.C. ch. 42-02 (regarding abatement of common nuisances); N.D.C.C. ch. 42-04 (regarding agricultural operations as nuisances). See also N.D.C.C. chs. 23-04 and 23-05 (regarding powers of the city Board of Health, specifically sections 23-05-04 through 23-05-06 regarding any nuisance). Nothing in these chapters, however, would appear to pose a problem with the ordinances you asked me to review.

Abandoned Motor Vehicles

N.D.C.C. ch. 39-26 addresses the disposal of abandoned motor vehicles. The Legislature has determined that abandoned motor vehicles constitute a hazard to the health and welfare of the people of the state. N.D.C.C. § 39-26-01. In announcing its intent that the accumulation of abandoned motor vehicles be eliminated, the Legislature also signaled that "other acceptable and economically useful methods for the disposal of abandoned motor vehicles . . . be developed." N.D.C.C. § 39-29-01. Because ch. 39-26 is not expressly the exclusive means of dealing with the problem of abandoned motor vehicles, it does not preempt local regulation. Some portions of this chapter, however, do require statewide compliance to comport with statewide concerns. Thus, while local ordinances of home rule cities addressing abandoned motor vehicles may be inconsistent with N.D.C.C. ch. 39-26, it is my opinion that they may not disregard the basic scheme providing for notice of taking; the right to reclaim the vehicle prior to sale, and the proceeds less expenses after sale; and payment of unclaimed net sale proceeds to the state. While the city of Oakes could have relied on the provisions under N.D.C.C. ch. 39-26 for disposal of abandoned vehicles rather than implementing a duplicative ordinance, any city ordinance adopted regarding abandoned vehicles must provide the right to reclaim the net proceeds following the sale and the deposit of the net proceeds with the state treasurer in compliance with N.D.C.C. ch. 39-26.

Section 12.0406 provides for a report of sale within thirty days and for delivery of the proceeds of the sale to the city auditor to be deposited in the city general fund. This section is inconsistent with N.D.C.C. ch. 39-26 which requires holding the proceeds of sale for the owner for 90 days and if unclaimed, paying the proceeds less the expense of taking, storage and sale to the state treasury. It is my opinion that the statewide application of the right to reclaim the net proceeds and payment of the net proceeds, if not reclaimed, into the state treasury is a matter of statewide concern which can not be altered by conflicting ordinances under a city's home rule authority.

Abandoned Personal Property in General

A further issue arises from the fact that section 12.0403 and amended section 12.0404 provide for disparate fines for failure to abate a nuisance regarding abandoned property, including automobiles. The provision for fines of up to five hundred dollars a day under section 12.0403 and the provision of a fine of ten dollars upon a first offense and twenty dollars upon every subsequent offense for failure

to abate the nuisance for thirty-day periods under section 12.0404 conflict with one another and consequently may create an enforcement problem. Penalty provisions must constitutionally state with sufficient clarity the consequences of violating a criminal statute. U.S. v. Helmy, 951 F.2d 988, 993 (9th Cir. 1991), cert. denied, 504 U.S. 945 (1992). See also United States v. Evans, 333 U.S. 483, 495 (1948) (advising that uncertainty regarding the penalty in a criminal statute makes it unenforceable); City of Fargo v. Little Brown Jug, 468 N.W.2d 392, 394 n.2 (N.D. 1991) (suggesting different sentences for the same offense raises equal protection questions).

In conclusion, amending the ordinances to allow the right to reclaim net proceeds and to require deposit of unclaimed net proceeds in the state treasury and amending the penalty provisions to clarify which penalty applies would help resolve the conflicts with state law and eliminate any difficulties with enforceability.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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