

LETTER OPINION
99-L-118

November 26, 1999

Mr. A. Roger Kringlie
Northwood City Attorney
P.O. Box 418
Northwood, ND 58267-0418

Dear Mr. Kringlie:

Thank you for your letter requesting my opinion on the legality of an ordinance adopted by the city of Northwood which requires a city-issued franchise for the transmitting, furnishing, delivering or receiving of electric energy. If issued, the franchise would be effective for twenty-five years. Northwood City Ordinance no. 355. Your letter indicates Northwood is not a home-rule city, and is governed by a mayor and city council.

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 within which a municipality's exercise of discretion will not be interfered with or upset by the judiciary." Id. 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

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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). The ordinance is presumed valid and a court will not hold otherwise unless the ordinance is clearly arbitrary, unreasonable, and without relation to public health, safety, morals, or welfare. Id.

1996 N.D. Op. Att'y Gen. 12, 13.

N.D.C.C. § 40-05-01(12) gives a municipality the authority to regulate "electric light plants." Further,

[a]ny company or association of persons organized for the purpose of manufacturing illuminating gas or electricity to supply municipalities and the inhabitants thereof shall have authority, subject to existing rights, with the consent of the governing body of the municipality, to erect gas or electric light works and lay down pipes and string wires or poles in streets or alleys subject to such regulations as the municipality may prescribe by ordinance.

N.D.C.C. § 40-05-01(12)(emphasis added). See also N.D.C.C. § 40-05-01(67)(city has authority to maintain electric light and power plants), ch. 40-33 (city may operate municipal utilities), and ch. 40-33.2 (cities may operate a municipal power agency). Thus, municipalities have the specific statutory authority to regulate all facets of the creation and delivery of electricity to their residents.

Municipalities also have the specific statutory authority to grant and regulate the use of franchises. N.D.C.C. § 40-05-01(57). This office has previously opined that a municipality may grant a franchise to itself. Letter from Attorney General Nicholas J. Spaeth to David M. Wheelihan (Oct. 22, 1985). Except in the case of a railroad company, the duration of a franchise may not exceed twenty years. N.D.C.C. § 40-05-01(57).

In 1971, the North Dakota Supreme Court reviewed an ordinance adopted by the city of Crosby which appears to be quite similar to the Northwood ordinance. Montana-Dakota Utilities Co. v. Divide County School Dist. No. 1, 193 N.W.2d 723 (N.D. 1971). That opinion did not specifically address the legality of Crosby's ordinance. However, the Court's opinion stated that the school district could not obtain

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electricity from a company that did not possess a franchise from the city of Crosby. Id. at 732.

This office has also issued an opinion relating to an ordinance similar to that adopted by the city of Northwood. 1955 N.D. Op. Att'y Gen. 53. While not specifically addressing the legality of the ordinance, the opinion stated "it is the right and privilege of any city by ordinance to grant a franchise or privilege to persons, associations or corporations to operate within the incorporated limits of the city." The opinion concluded that the city had the discretion to determine whether it would grant a franchise to an electric company to operate within the city. Id.

Your question is whether it is lawful for a city to adopt an ordinance requiring an entity to obtain a franchise from the city before engaging in the distribution of electricity to the city's residents. Given the specific statutory authority of a city to regulate the delivery of electricity to its residents, the city's authority to issue franchises, and the previous opinions of the North Dakota Supreme Court and this office, it is my opinion that a city ordinance requiring an entity to obtain a franchise from the city before engaging in the distribution of electricity to the city's residents is lawful.

However, Northwood's ordinance does have one problem. Section 2 allows the duration of the franchise to be up to twenty-five years. Northwood City Ordinance no. 355, section 2. N.D.C.C. § 40-05-01(57) states that a franchise may not be issued for a period exceeding twenty years, unless the franchise is to a railroad company. Accordingly, it is my opinion that section 2 of Northwood's ordinance is contrary to state law and is unlawful. Nonetheless, the savings clause in section 4 of the ordinance retains the validity of the remainder of the ordinance even given the unlawfulness of section 2. Thus, Northwood City Ordinance no. 355 is lawful with the exclusion of the allowance of a term greater than twenty years.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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