

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-01

Date issued: January 6, 2000

Requested by: Syver Vinje, North Dakota Securities Commissioner

- QUESTIONS PRESENTED -

I.

Whether a non-home rule city or a non-home rule county may issue, or be a promoter or sponsor of, equity securities on behalf of a private company which would be sold to the general public in this state.

II.

Whether a home rule city or a home rule county may issue, or be a promoter or sponsor of, equity securities on behalf of a private company which would be sold to the general public in this state.

III.

Whether a city job development authority or a county job development authority may issue, or be a promoter or sponsor of, equity securities on behalf of a private company which would be sold to the general public in this state.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that neither a non-home rule city nor a non-home rule county may issue, or be a promoter or sponsor of, equity securities on behalf of a private company which would be sold to the general public in this state.

II.

It is my opinion that a home rule city may not issue equity securities on behalf of a private company which would be sold to the general public in this state. It is my further opinion that a home rule city may promote or sponsor equity securities of a private company which would be sold to the general public in this state, if the home rule charter includes the authority to engage in an enterprise, such authority is properly implemented in a city ordinance, the enterprise is for a public purpose, and the promotion or sponsorship does not

represent or imply that such equity securities are being issued by the home rule city. It is my further opinion that a home rule county may not issue, or be a promoter or sponsor of, equity securities of a private company which would be sold to the general public in this state.

III.

It is my opinion that neither a city job development authority nor a county job development authority may issue equity securities on behalf of a private company which would be sold to the general public in this state. It is my further opinion that both a city job development authority and a county job development authority may promote or sponsor equity securities of a private company which would be sold to the general public in this state.

- ANALYSES -

I.

The office of the Securities Commission has received inquiries from several North Dakota cities and counties that are considering entering into cooperative arrangements with private companies in which the cities or counties would "lend their good name" to an equity securities issue. Their purpose is to foster economic development in their communities.

Cities and counties have only those powers expressly conferred upon them by the Legislature, or those necessarily implied from the powers expressly granted. See Parker Hotel Co. v. City of Grand Forks, 177 N.W.2d 764, 768 (N.D. 1970); Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924). See also N.D. Const. art. VII, § 2. There is no state law that specifically authorizes non-home rule cities or non-home rule counties to issue, or be a promoter or sponsor of, equity securities on behalf of a private company, and there is no state law from which such authority can be necessarily implied. Cf. N.D.C.C. § 10-30.2-11 (The Myron G. Nelson Fund, Incorporated, can issue stock, or create a separate legal entity to issue stock, for the purpose of obtaining investment capital from the public).

N.D.C.C. §§ 10-04-05(1) and 10-04-06(12) exempt securities issued or sold by political subdivisions, including cities and counties, from certain requirements of N.D.C.C. ch. 10-04, the North Dakota Securities Act. These exemptions do not themselves authorize non-home rule cities or non-home rule counties to issue equity securities. Instead, they serve to exempt securities issued or sold by cities and

counties as authorized by other state laws. Various laws specifically authorize cities and counties to issue debt securities, such as bonds. See, for example, N.D.C.C. § 40-05-01(5) (cities may issue bonds), ch. 21-03 (cities and counties may issue bonds), ch. 40-57 (cities and counties may issue industrial development bonds on behalf of certain private businesses).

Thus, it is my opinion that neither a non-home rule city nor a non-home rule county may issue, or be a promoter or sponsor of, equity securities on behalf of a private company which would be sold to the general public in this state.

II.

The Legislature has provided by law for the establishment and exercise of home rule in cities and counties. See N.D. Const. art. VII, § 6, and N.D.C.C. chs. 11-09.1 and 40-05.1. The Legislature has specified certain powers home rule cities and home rule counties can acquire, and any local ordinances passed pursuant to the home rule charters will supersede state law. See N.D.C.C. §§ 11-09.1-05 and 40-05.1-06. A city home rule charter and a county home rule charter extend to all city and county matters, respectively. See N.D.C.C. §§ 11-09.1-04 and 40-05.1-05. The charter, and the ordinances implementing the powers in the charter, will supersede, within the city or county, any law of the state in conflict with the charter and ordinances, and must be liberally construed for such purposes. N.D.C.C. §§ 11-09.1-04 and 40-05.1-05. Home rule authority gives to the people in home rule cities and home rule counties the full right of self-government in all matters within the powers enumerated in the home rule chapters. N.D.C.C. §§ 11-09.1-05 and 40-05.1-06.

Through its home rule charter, a home rule city may acquire the authority "[t]o engage in any . . . enterprise permitted by the constitution or not prohibited by statute . . ." N.D.C.C. § 40-05.1-06(10). An "'enterprise' means any activity which does not violate the North Dakota Constitution or statutes and which is of some scope, complication, or risk." 1993 N.D. Op. Att'y Gen. 40, 42. The question is whether issuing, or being a promoter or sponsor of, equity securities on behalf of a private company which would be sold to the general public in this state can constitute an "enterprise" of the home rule city.

The North Dakota Supreme Court and the Attorney General's office have previously determined whether certain acts constitute an enterprise:

A city engages in an enterprise, as that term is used in Article X, Section 18 of the North Dakota Constitution [and N.D.C.C. § 40-05.1-06(10)], when it leases a sugar

processing plant. Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964). Housing finance programs are enterprises. N.D.C.C. §§ 54-17-01, 54-17-07.1 through 54-17-07.9. Educational assistance is an enterprise. 1981 N.D. Op. Att'y Gen. 53, 54, N.D.C.C. chs. 15-62.2, 15-62.3. "The investment activities of the Land Board concerning the coal severance tax trust fund . . . constitute a lawful enterprise" 1992 N.D. Op. Att'y Gen. 57, 63, N.D.C.C. §§ 15-02-08, 15-03-04, 15-03-04.1, 15-03-14 through 15-03-18, and 21-10-06. Historical promotion and historical work of a county is an enterprise. Letter from Attorney General Olson to James E. Sperry (March 7, 1973), N.D.C.C. ch. 11-11. A city is engaging in an enterprise when it enters into an urban renewal project. 1982 N.D. Op. Att'y Gen. 74, 76, N.D.C.C. ch. 40-58.

1993 N.D. Op. Att'y Gen. 40, 41-42. Also, a home rule city which has not created a job development authority may engage in the enterprise of giving grants and making loans to private entities. 1993 N.D. Op. Att'y Gen. 40. Providing county ambulance services is a permissible enterprise in which counties may engage. N.D.C.C. § 23-12-08, letter from Attorney General Heidi Heitkamp to Fabian Noack (August 10, 1995). A home rule city may engage in an enterprise whereby the city provides funds for the use of a private nursing home. Letter from Attorney General Heidi Heitkamp to Jon Fitzner (August 30, 1996). Providing services to senior citizens is a permitted enterprise in which counties may engage. N.D.C.C. §§ 11-11-58, 1997 N.D. Op. Att'y Gen. 40. A home rule city could donate funds for the construction of a new YMCA building if the donation was made in connection with an enterprise. 1998 N.D. Op. Att'y Gen. 151. However, a city may not engage in an enterprise unless it is for a public purpose. Id. at 155. In addition, any implementing ordinance must be sufficiently detailed so that the public is properly informed of the authority and limits of the enterprise. Id.

Given the broad range of activities cited that have been determined by the North Dakota Supreme Court, Attorney General opinions, and state law to constitute "enterprises," it is my opinion that a home rule city, if authorized by its home rule charter and properly implemented through an ordinance, may promote or sponsor the issuance of equity securities by a private company which would be sold to the general public in this state if done for a public purpose such as economic development or job creation¹ and if such promotion or sponsorship does not represent or imply that such equity securities are being issued by

¹ "Economic development is generally recognized as a valid public use or purpose." City of Jamestown v. Leever's Supermarkets, Inc., 552 N.W.2d 365, 369 (N.D. 1996).

the home rule city.² A home rule city, as a promoter or sponsor, would also have to comply with any applicable laws in N.D.C.C. ch. 10-04, the North Dakota Securities Act.

Even though I have concluded that promoting or sponsoring equity securities as outlined above may constitute an enterprise, it is my opinion that existing case law and opinion precedent do not support the conclusion that a home rule city may issue equity securities on behalf of a private company as an enterprise, given the unique nature of the issuance of equity securities. Equity securities represent ownership interests in a company. There is no precedent which suggests that a home rule city, even as part of an enterprise, could issue ownership interests on behalf of a private company. Generally, only the entity itself may issue ownership interests in itself. For example, if the private company is a corporation formed under N.D.C.C. ch. 10-19.1, the North Dakota Business Corporation Act, only the directors of the business corporation would have the authority to issue the corporation's equity securities. See N.D.C.C. §§ 10-19.1-30(2), 10-19.1-61. While cities have the authority under certain circumstances under N.D.C.C. ch. 40-57 to issue debt securities for certain private businesses, no comparable authority exists for issuing equity securities on behalf of private businesses.

Home rule counties, unlike home rule cities, cannot acquire the power to engage in any enterprise permitted by the constitution or not prohibited by statute. Compare N.D.C.C. §§ 11-09.1-05 and 40-05.1-06. Therefore, it is my further opinion that a home rule county may not issue equity securities on behalf of a private company, or become the promoter or sponsor of equity securities issued by a private company which would be sold to the general public in this state.

III.

Like political subdivisions, city job development authorities and county job development authorities created under N.D.C.C. chs. 11-11.1 and 40-57.4 have only those powers expressly conferred upon them by the Legislature, or those necessarily implied from the powers expressly granted. See Ebach v. Ralston, 469 N.W.2d 801 (N.D. 1991) (cities); Murphy v. Swanson, 198 N.W. 116 (N.D. 1924) (counties);

² See Langenes v. Bullinger, 328 N.W.2d 241, 246 (N.D. 1982) ("it is a common maxim that the law does not permit by indirection what cannot be accomplished directly"). Since I have determined that a home rule city may not issue equity securities on behalf of a private business, neither may it represent or imply if it promotes or sponsors equity securities of a private business that the home rule city has some involvement in the issuance of the equity securities.

letter from Attorney General Heidi Heitkamp to Rep. William Gorder (Nov. 7, 1996) (county job development authorities).

City job development authorities and county job development authorities must use their financial and other resources to encourage and assist in the development of employment within the city or county, respectively. See N.D.C.C. §§ 40-57.4-03 and 11-11.1-03. A city job development authority may exercise the following powers, among others:

10. To loan, grant, or convey any funds or other real or personal property held by the authority for any purpose necessary or convenient to carry into effect the objective of the authority established by this chapter.

. . . .

12. To exercise any other powers necessary to carry out the purposes and provisions of this chapter.

N.D.C.C. § 40-57.4-03. State law authorizes county job development authorities to exercise these same powers. See N.D.C.C. § 11-11.1-03(10), (12).³

The question is whether these powers of city and county job development authorities authorize a job development authority to issue, or be a promoter or sponsor of, equity securities on behalf of a private company which would be sold to the general public in this state. Subsection 10 of N.D.C.C. § 40-57.4-03 and subsection 10 of N.D.C.C. § 11-11.1-03 authorize a job development authority to grant property held by the authority for any purpose necessary or convenient to encourage and assist in the development of employment within the city or county, respectively. By "lending its good name," through the promotion or sponsoring of equity securities issued by a private company, the job development authority, in effect, would be granting property to encourage and assist in the development of employment within the city or county.

Thus, it is my opinion that subsection 10 of N.D.C.C. § 40-57.4-03 and subsection 10 of N.D.C.C. § 11-11.1-03 authorize both a city job development and a county job development authority to promote or sponsor equity securities issued by a private company which would be

³ A city or county may contract with an industrial development organization in lieu of establishing a job development authority. N.D.C.C. §§ 11-11.1-06, 40-57.4-04. The industrial development organization could have the same powers as a city or county job development authority. Id.

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sold to the general public in this state. However, it is my further opinion that no state law authorizes either a city job development authority or a county job development authority to issue equity securities on behalf of a private company which would be sold to the general public in this state.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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