

**FORMAL OPINION
2001-F-09**

DATE ISSUED: November 2, 2001

REQUESTED BY: Senator Ben Tollefson

QUESTION PRESENTED

Whether a home rule city may establish a special assessment district that would include tax exempt property for the purpose of causing tax exempt entities to pay a portion of city, police, and fire protection costs.

ATTORNEY GENERAL'S OPINION

It is my opinion that the North Dakota Constitution prohibits a home rule city from levying a special assessment on tax exempt entities for the recovery of costs relating to generally available city services.

ANALYSIS

A city's home rule authority is limited by the North Dakota Constitution and by state statutes.

[A] city, whether home rule or otherwise, has no inherent power except as expressly granted or necessarily implied from the grant by the Legislature

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The power and authority of a city must be found either in a constitutional or statutory provision.

Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D. 1980). The powers that may be included within a home rule charter and implemented through ordinances are defined at N.D.C.C. § 40-05.1-06. "[T]he legislature intended the cities to exercise broad plenary powers in those items specified under § 40-05.1-06, except where specifically provided

that these powers may be exercised only by conforming or complying with state law.” Litten, supra.

The North Dakota Constitution provides that “property used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation.” N.D. Constitution, Art. X, §5. While this property is exempt from taxation, these tax exempt entities are not exempt from licensing or other fees raised for a specific purpose particular to the entity. 2000 N.D. Op. Att’y Gen. L-32. The distinction between a tax and a fee determines whether a particular charge may be imposed under Article X, section 5.

The difference between an impermissible tax and a permissible fee does not depend upon the name given to the charge, but rather its purpose and function.

“Whether an exaction is called a ‘fee’ or a ‘tax’ is of little weight in determining what it really is.” Scott v. Donnelly, 133 N.W.2d 418, 423 (N.D. 1965). It is the nature of the charge rather than its designation that is controlling. Id. “A ‘tax’ is an enforced contribution for public purposes which in no way is dependent upon the will or consent of the person taxed.” Ralston Purina Company v. Hagemeister, 188 N.W.2d 405, 409 (N.D. 1971). “[A]ny payment exacted by the State as a contribution toward the cost of maintaining governmental functions, where special benefits derived from their performance are merged in the general benefit, is a tax.” Menz v. Coyle, 117 N.W.2d 290, 297 (N.D. 1962). The theory of the Menz case would apply equally to cities.

Conversely, fees “are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner ‘not shared by other members of society,’ they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.” Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (citations omitted). See also 1993 N.D. Op. Att’y Gen. 25.

1994 N.D. Op. Att’y Gen. L-123, L-125. This office has consistently determined that the cost of general city services available to all persons and entities alike, specifically including fire and police services, are paid by taxes and are not voluntary services that may be paid by charging fees. 1994 N.D. Op. Att’y Gen. L-123, 1999 N.D. Op. Att’y Gen. L-28, and 2000 N.D. Op. Att’y Gen. L-32.

Further, a city may not use its home rule authority to define for itself which entities are tax exempt under the Constitution. Although one of the enumerated powers a home rule city may adopt includes the power to control its finances and fiscal affairs, the power is limited in that "all real and personal property . . . shall be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments." N.D.C.C. §40-05.1-06(2). Therefore, a home rule city must assess taxes in uniformity with the state, and may not redefine for itself which entities qualify for the exemption under Article X, Section 5 of the North Dakota Constitution.

Therefore, it is my opinion that the North Dakota Constitution prohibits a home rule city from establishing a special assessment district that would include tax exempt property in order to require tax exempt entities to pay a portion of city, police, and fire protection costs.

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 question presented is decided by the courts.

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