

**LETTER OPINION
2004-L-23**

March 19, 2004

Mr. Patrick Donovan
Hazen City Attorney
PO Box 488
Hazen, ND 58545-0488

Dear Mr. Donovan:

Thank you for asking my opinion regarding the authorized uses for the city lodging and restaurant tax under N.D.C.C. ch. 40-57.3.

Section 40-57.3-01.1, N.D.C.C., allows a city to impose a one percent tax on the gross receipts of lodging facilities and restaurants within the city to be deposited in a "city visitors' promotion capital construction fund" (hereafter "Construction Fund"). This fund "must be used generally for tourism or the purchase, equipping, improving, construction, maintenance, repair, and acquisition of buildings or property consistent with visitor attraction or promotion." N.D.C.C. § 40-57.3-02 (emphasis added). This law was amended in 1997 to allow the Construction Fund to be used not only for capital improvements, but also for tourism. 1997 N.D. Sess. Laws ch. 428, § 2.

You advise that the City of Hazen has imposed a one percent lodging and restaurant tax under section 40-57.3-01.1. You ask if Hazen can use the money in its Construction Fund to promote tourism, or whether it is restricted to using it for capital construction and improvement projects.

The question arises because another section of law, N.D.C.C. § 40-57.3-03, specifically provides that the Construction Fund proceeds "may be used only for payment of bonds issued, and the costs of issuance related thereto, under this section or capital construction, maintenance, and repair or acquisition of property consistent with the purposes of [chapter 40-57.3]." This provision does not appear to allow the Construction Fund to be used for tourism.

The restriction on use of the Construction Fund only for capital improvements in section 40-57.3-03 conflicts with the dual use allowed after the 1997 amendment of section 40-57.3-02. Where a conflict in statutes is irreconcilable, that is, where effect cannot be

given to both provisions, a special provision prevails as an exception to a general provision “unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail.” N.D.C.C. § 1-02-07.

“[W]here there is an irreconcilable conflict between statutes it will be presumed that the Legislature intended that the earlier statute should give way to the later one.” Apple Creek Township v. City of Bismarck, 271 N.W.2d 583, 586 (N.D. 1978). Inconsistency in statutes should be resolved in favor of the more recently enacted and more specific statute. Matador Serv., Inc. v. Missouri Basin Well Serv. Inc., 367 N.W.2d 749, 754 (N.D. 1985).

The purpose of the 1997 amendment of section 40-57.3-02 was to allow use of the Construction Fund for tourism as well as capital improvements. Hearing on H.B. 1167 Before the Senate Judiciary Comm., 1997 N.D. Leg. (Mar. 4) (Statements of Sen. Traynor at a working session (Tape 4, Side B)). Senator Traynor stated that many cities were using the one percent tax for both tourism promotion and construction. Id. He said that representatives of cities and the tourism industry had no objection to his proposed amendment to allow the Construction Fund proceeds to be used for tourism promotion as well as capital improvements. Id. He explained that adding tourism to section 40-57.3-02 “would give [cities] more flexibility.” Id.

In my opinion the amendment allowing a city visitors' promotion capital construction fund to be used for tourism as well as capital construction prevails over the limitation on use of that fund in section 40-57.3-03.¹

Sincerely,

Wayne Stenehjem
Attorney General

tam/vkk

¹ A home rule city with the power in its home rule charter to control its finances and fiscal affairs could, by ordinance, permit even broader uses of the proceeds in the city visitors' promotion capital construction fund. N.D.C.C. § 40-05.1-06(2). An ordinance implementing powers in a home rule charter supersedes a conflicting state law. N.D.C.C. § 40-05.1-05. See also Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980) (recognizing that home rule ordinances implementing general home rule powers under N.D.C.C. § 40-05.1-06 supersede state law where there is a conflict).