

**LETTER OPINION
2004-L-74**

December 20, 2004

Mr. Daniel Gaustad
Pembina City Attorney
PO Box 352
Grafton, ND 58237-0352

Dear Mr. Gaustad:

Thank you for asking whether the city of Pembina may, given the current provisions in Pembina's home rule charter and the ordinances adopted pursuant to the home rule charter, use its sales tax revenue to financially assist private entities, including the Pembina Golf Course Association (Association), which operates a golf course on city land. It is my opinion that Pembina cannot financially assist private entities, including the Association, under its current ordinance structure, but that Pembina could implement the necessary ordinances to allow it to do so.

ANALYSIS

The city of Pembina regularly receives requests for donations from various types of private entities. The Association is an example of one of those private entities. The Association manages and operates a public golf course on Pembina city land. After the 1997 flood damaged the clubhouse, the Association obtained a loan to repair it. The Association asked Pembina to make its annual payment on the loan because of financial difficulties. Pembina is concerned that donations to private entities might violate N.D. Const. art. X, § 18, which generally prohibits a city from making a donation to an individual, association or corporation, subject to certain exceptions.

Pembina is a home rule city. Its home rule charter (Charter) provides that Pembina may engage in any utility, business, or enterprise permitted by the state constitution or not prohibited by statute. City Charter, art. 3(J). This tracks N.D.C.C. § 40-05.1-06(10), which authorizes home rule cities to engage in those activities if included in the home rule charter and implemented by ordinance. The Supreme Court, in Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964), recognized that a city may, consistent with N.D. Const. art. X, § 18, engage in any industry, enterprise or business and in connection therewith make loans, give its credit, or make donations. What is prohibited by the constitution is for the state or any political subdivision to loan or give its credit or make donations "otherwise" than in connection with an industry, enterprise

or business. Id. An enterprise is “any activity which does not violate the North Dakota Constitution or statutes and which is of some scope, complication, or risk.” N.D.A.G. 93-F-11.

An enterprise authorized by the constitution must be for a public purpose. N.D.A.G. 98-F-30, N.D.A.G. 93-F-11. “A public purpose or public business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division.” Gripentrog v. City of Wahpeton, 126 N.W.2d at 237, (N.D. 1964) quoting Green v. Frasier, 176 N.W. 11 (N.D. 1920) affirmed 253 U.S. 233 (1920). A golf course, for example, provides its users with both exercise (health) and recreational opportunities. As this office said in N.D.A.G. 2003-L-09, a strong argument can be made that a donation to support a recreational enterprise would serve a public purpose. See also 98-F-30 (a strong argument exists that providing funds to a YMCA, an organization that provides sporting, recreational, and athletic activities for people in the community, constitutes a public purpose).

The city of Pembina regularly receives requests for donations from private entities. Pembina’s charter, like other home rule cities with comparable provisions in their charters, authorizes it to make a loan or donation in connection with a business or enterprise. See, e.g., N.D.A.G. 2003-L-09; N.D.A.G. 98-F-30. In order to engage in an enterprise of making donations, Pembina must have an ordinance permitting it to do so. N.D.A.G. 98-F-30. See N.D.A.G. 93-F-11 (“the implementing ordinance must be sufficiently detailed so that the public is properly informed of the authority and limits of the enterprise”). But see N.D.A.G. 2003-L-22 (stating that it may have been preferable to have the supervisory controls in an implementing ordinance but nonetheless approving a city-proposed donation without the requisite ordinance when other controls implemented by the city were sufficient). An ordinance will be sufficient if it “(1) authorizes the city to engage in the proposed enterprise, (2) provides assurance that the activity has a public purpose, (3) sufficiently details the manner of implementing the activity, and (4) provides for supervisory controls to ensure the public purpose is met.” See N.D.A.G. 98-F-30. Pembina does not currently have an ordinance with those provisions, but could enact one.

Pembina proposes to pay the Association’s loan payment with sales tax revenue. Section 40-05.1-06(2), N.D.C.C., empowers a home rule city to “control its finances and fiscal affairs” if that power is included in a home rule charter and implemented through the appropriate ordinances. See also City Charter art. 3(B) (providing that power). Section 40-05.1-06(16), N.D.C.C., authorizes a home rule city to impose a sales tax. See also City Charter art. 3(P) (providing that power). City Ordinance No. 1992-2 created chapter 16, relating to sales and use taxes, pursuant to the City Charter. Chapter 16, § 16.009 provides that sales tax revenues are to be maintained in a separate fund and may be used for, among other things, “projects developing and

LETTER OPINION 2004-L-74
December 20, 2004
Page 3

enhancing the general welfare of the community including but not limited to such projects for health, recreation, business and commerce infrastructure development.” (Emphasis added). Thus, City sales tax revenue may be devoted to a recreation project to benefit the health and welfare of the citizenry. Support of the Association’s golf course by making a loan payment arguably is such a project. See N.D.A.G. 98-F-30 (concluding Minot could establish a grant program to promote recreation to benefit its citizens); N.D.A.G. 2003-L-22 (concluding Grand Forks could establish a sales tax grant program for economic development including promotion of the city as a recreation center).

Accordingly, it is my opinion Pembina cannot financially assist private entities, including the Association, under its current ordinance structure. However, if Pembina enacts an ordinance with the safeguards described above, it is my opinion Pembina could then provide the requested financial assistance.

Sincerely,

Wayne Stenehjem
Attorney General

tam/sam/vkk

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. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).