

**LETTER OPINION
2005-L-30**

October 6, 2005

The Honorable Tim Mathern
State Senator
429 16th Avenue South
Fargo, ND 58103-4329

Dear Senator Mathern:

Thank you for your letter asking whether a home rule city may enter into a joint powers agreement with a school district for the purpose of utilizing city sales tax revenue for school funding, and whether the city may establish exemptions from real estate taxes to be funded by sales tax revenues. It is my opinion that a home rule city may enter into a joint powers agreement with a school district to utilize city sales tax revenue for school funding as long as the city home rule charter and implementing ordinances authorize the use of sales tax revenue for that purpose. It is my further opinion that a home rule city may establish exemptions from real estate taxes to be funded by sales tax revenues if it does so in connection with a permissible utility, business, or enterprise, or for the reasonable support of the poor under the authority of a state statute.

ANALYSIS

You first ask whether a home rule city may enter into a joint powers agreement with a school district for the purpose of utilizing sales tax revenue for school funding. A home rule city has the authority under N.D.C.C. § 40-05.1-06, if included in its charter and implemented through appropriate ordinances, to control its finances and fiscal affairs including the power to levy and collect taxes and to impose sales taxes. N.D.C.C. § 40-05.1-06(2) and (16).¹

¹ Effective September 30, 2005, N.D.C.C. § 40-05.1-06(16) provides as follows:

To impose registration fees on motor vehicles, farm machinery gross receipts taxes, alcoholic beverage gross receipts taxes, or sales and use taxes in addition to any other taxes imposed by law. After December 31, 2005, sales and use taxes and gross receipts taxes levied under this chapter:

- a. Must conform in all respects with regard to the taxable or exempt status of items under chapters 57-39.2, 57-39.5, 57-39.6, and 57-40.2 and may not be imposed at multiple rates with the exception of sales of electricity, piped natural or artificial gas, or other heating fuels delivered by the seller or the retail sale or transfer of motor

Any city, school district, or other political subdivision of the state, upon approval of its respective governing body, may enter into an agreement with any other political subdivision of the state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them. N.D.C.C. § 54-40.3-01(1). However, no essential legislative powers or taxing authority may be delegated by a joint powers agreement to a separate administrative or legal entity. N.D.C.C. § 54-40.3-01(1)(c). The joint powers agreement may address the manner in which the parties will finance the cooperative or joint undertaking. N.D.C.C. § 54-40.3-01(1)(d). The parties may use current funds and funds accumulated from year to year for the provision of services and facilities and the parties may otherwise share and contribute property. Id.

I found no North Dakota case specifically addressing your questions. However, at least one other court has determined that a home rule city had the authority to grant city sales tax funds to school districts lying within its corporate limits because of a financial crisis in the school district. Enright v. Kansas City, 536 S.W.2d 17, 19 (Mo. 1976). The court noted that the people of the city have an interest in assuring the viability of public schools which educate the children within their community and that giving funds to the school district served a public or municipal use or purpose. Id. at 19-20.

This office has previously determined that a home rule city may use sales tax revenue to fund construction of a school to be owned, maintained, and primarily used by a school district under a joint powers agreement between the city and school district if the city charter and implementing ordinances authorize the use of such revenue for that purpose.

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- vehicles, aircraft, watercraft, modular homes, manufactured homes, or mobile homes.
 - b. May not be newly imposed or changed except to be effective on the first day of a calendar quarterly period after a minimum of ninety days notice to the tax commissioner or, for purchases from printed catalogs, on the first day of a calendar quarter after a minimum of one hundred twenty days notice to the seller.
 - c. May not be limited to apply to less than the full value of the transaction or item as determined for state sales and use tax purposes, except for farm machinery gross receipts tax.
 - d. Must be subject to collection by the tax commissioner under an agreement under section 57-01-02.1.

The statute will further provide that:

After December 31, 2005, any portion of a charter or any portion of an ordinance passed pursuant to a charter which does not conform to the requirements of subsection 16 is invalid to the extent that it does not conform.

N.D.A.G. 2000-F-04. See also N.D.A.G. 2002-F-03 (city may make donation of sales tax funds to another political subdivision like a school district through a joint powers agreement or through home rule authority); N.D.A.G. 95-L-115 (a home rule city can be authorized by its charter to levy additional sales tax for construction and maintenance of recreational facilities but only if it enters into a joint powers agreement with the park district to cooperatively exercise authority over city parks).

Furthermore, such a grant from a city to a school district would not violate the anti-gift provision contained in N.D. Const. art. X, § 18.² See N.D.A.G. 2002-F-03; N.D.A.G. Letter to Belisle (Apr. 7, 1992). See also, Berry v. State, 908 S.W.2d 682, 685 (Mo. 1995) (Missouri's version of constitutional anti-gift provision does not apply to shifts in revenue among public bodies).

Based on these prior determinations, it is my opinion that a home rule city may enter into a joint powers agreement with a school district to utilize city sales tax revenue for school funding as long as the city home rule charter and implementing ordinances authorize the use of sales tax revenue for that purpose.

You also ask whether a home rule city may establish additional exemptions or partial exemptions from real estate taxes financed by the use of sales tax revenues. A similar issue was raised in N.D.A.G. 93-L-292. In that case, the question was whether a home rule city may use sales tax revenues to fund tax credits for individual property taxpayers. The opinion noted that "using revenues from the city sales tax to reduce individual property taxes in the manner proposed would have the effect of transferring to property owners moneys held for all the people of the city, not just property owners." (Citing Solberg v. State Treasurer, 53 N.W.2d 49, 53-54 (N.D. 1952).) The opinion concluded that "[s]ince it does not appear the transfers would be made in connection with the city's engaging in a permissible utility, business, or enterprise, . . . such transfers would violate Article X, Section 18 of the North Dakota Constitution." N.D.A.G. 93-L-292.

Creating additional exemptions or partial exemptions from real property taxes to be financed with sales tax revenues is really no different than the proposed arrangement for

² The anti-gift clause provides:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

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creating tax credits for individual property taxpayers to be financed by sales tax revenues discussed in N.D.A.G. 93-L-292, unless such exemptions were established for the reasonable support of the poor which is a specific exemption contained in N.D. Const. art. X, § 18. See note 2 above; State ex rel. Eckroth v. Borge, 283 N.W. 521 (N.D. 1939). However, N.D. Const. art. X, § 18, has never been construed to be self executing. N.D.A.G. 2000-F-19. Any authority of a political subdivision "to make donations for the support of the poor . . . must be derived from state law passed by the North Dakota Legislature." N.D.A.G. 2000-L-153. Consequently, it is my further opinion that a home rule city may lawfully establish exemptions or partial exemptions from real estate taxes to be financed by city sales tax revenues under N.D. Const. art. X, § 18 if established in connection with a permissible utility, business, or enterprise, or for the reasonable support of the poor under the authority of a state statute.

Finally, you ask whether a home rule city may, through a joint powers agreement, allocate or grant sales tax revenue to other political subdivisions of the state which are supported by real property taxes. As indicated above, it has been previously determined by this office that a home rule city may have the authority to grant its sales tax revenues to political subdivisions such as school districts and park districts, assuming that the city is exercising powers contained in its charter and implementing ordinances and if done through an appropriate joint powers agreement. See N.D.A.G. 2000-F-04; N.D.A.G. 95-L-115; see also N.D.A.G. 2002-F-03. Thus, it is also my opinion that city home rule sales tax revenues may, through a joint powers agreement, be granted or allocated to other political subdivisions of the state which are supported by real property taxes if the home rule authority for the sales tax is properly contained in the city's home rule charter and implementing ordinances.

Sincerely,

Wayne Stenehjem
Attorney General

jff/vkk
Enclosure

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).