

LETTER OPINION
2008-L-04

April 7, 2008

Mr. Frederick R. Fremgen
Stutsman County State's Attorney
511 2nd Avenue SE
Jamestown, ND 58401-4210

Dear Mr. Fremgen:

Thank you for your letter asking whether a home rule county may enact an ordinance imposing an additional property tax levy solely on land classified as agricultural to finance construction and repair of county roads primarily necessitated by agricultural-related use of the roads. For the reasons indicated below, it is my opinion that if the home rule county's charter contains the authority to control its finances and to levy and collect property taxes as authorized by N.D.C.C. § 11-09.1-05(2), the power is properly implemented by ordinance, and if, as here, the limitations contained in that statute relating to property taxes are not implicated, the county is authorized to levy and collect additional property taxes solely on land classified as agricultural to finance road construction and repairs primarily necessitated by agricultural-related use. It is my further opinion that such an ordinance would not violate the uniformity clause contained in N.D. Const. art. X, § 5.

ANALYSIS

In your letter you indicate that Stutsman County, a home rule county,¹ is considering an ordinance to be put to a vote of the people, which would impose a property tax increase only on land classified as agricultural. You indicate that the basis for imposing the property tax increase solely on the land classified as agricultural is that most of the damage done to the rural roads that would be repaired has been caused by trucks and equipment owned or operated by the owners of the agricultural land or by entities servicing the agricultural property. You further indicate that the ordinance will be placed on the June 2008 election ballot.²

¹ County home rule was passed in 1985 and was patterned after existing city home rule provisions. N.D.A.G. 2002-L-38. Article VII, § 6, N.D. Const., states that the Legislature "shall provide by law for the establishment and exercise of home rule in counties and cities."

² See Stutsman County Home Rule Charter, art. 3, § 2 and art. 8, § 2.

You also indicate that the county's home rule charter contains a number of powers, which are essentially those authorized in N.D.C.C. § 11-09.1-05(2).³ That subsection provides in pertinent part that the county may, if included in the charter and implemented through ordinances:

2. Control its finances and fiscal affairs; appropriate money for its purposes, and make payments of its debts and expenses; subject to the limitations of this section levy and collect property taxes, sales and use taxes . . . and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; establish charges for any county or other services to the extent authorized by state law, and establish debt and mill levy limitations; provided, that all property in order to be subject to the assessment provisions of this subsection must be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments. A charter or ordinance or act of a governing body of a home rule county may not supersede any state law that determines what property or acts are subject to, or exempt from, ad valorem taxes.⁴

Section 11-09.1-05, N.D.C.C., also provides:

³ Stutsman County Home Rule Charter, art. 2, § 2, provides as follows:

To control its finances and fiscal affairs; appropriate money for its purposes, and make payments of its debts and expenses; subject to the limitations of this section, and Article 8 herein, levy and collect taxes, excises, fees and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; establish charges for any county or other services to the extent authorized by state law, and establish debt and mill levy limitations subject to Article 8. Notwithstanding the other provisions of this subsection, the Board of County Commissioners shall not commingle dedicated mill levies with one another or with the general fund levy.

Stutsman County Home Rule Charter, art. 8, § 2(d) also provides as follows:

In order to be subject to the assessment provisions of the Article, all property must be assessed in a uniform manner as prescribed by the State Board of Equalization; and the State Supervisor of Assessments. No ordinance or resolution of the Board of County Commissioners may supersede any state law which determines what property is subject to or exempt from ad valorem, sales or use taxes.

⁴ N.D.C.C. § 11-09.1-05(2).

The people of all counties coming within this chapter have the full right of self-government in all matters within the powers enumerated in this chapter. The statutes of this state, so far as applicable, continue to apply to counties, except as superseded by the charters of the counties or by ordinances passed pursuant to the charters.⁵

Further, N.D.C.C. § 11-09.1-04 provides:

If a majority of the qualified electors voting on the charter at the election vote in favor of the home rule charter, it is ratified and becomes the organic law of the county . . . and extends to all its county matters. The charter and the ordinances made pursuant to the charter in county matters must be liberally construed to supersede within the territorial limits and jurisdiction of the county any conflicting state law except for any state law [non-applicable exceptions].⁶

Section 11-09.1-05(2), N.D.C.C., has not been construed by the North Dakota Supreme Court; however, it has been discussed in several opinions issued by this office. In 1989, then Attorney General Nicholas J. Spaeth explained:

N.D.C.C. § 11-09.1-05(2) . . . allows a county home rule charter to determine the method by which county functions and services are financed. The home rule charter may address separate levies or one general levy and may address any requirement for voter approval. The amount of debt and mill levy is left to the county's determination as provided by the home rule charter and ordinances.

This statutory provision states that it is subject to the "limitations of this section." There are only two such limitations. First, all property must be assessed in a uniform manner as prescribed by the State Board of Equalization and the State Supervisor of Assessments. Second, a charter, ordinance, or act of a governing body of a home rule county may not supersede any state law that determines what property or acts are subject to or exempt from ad valorem or sales and use taxes. N.D.C.C. § 11-09.1-05(2). Beyond these statutory restrictions, the only restrictions applicable would be those contained within the home rule charter and ordinance.⁷

⁵ N.D.C.C. § 11-09.1-05 (emphasis added).

⁶ N.D.C.C. § 11-09.1-04 (emphasis added).

⁷ N.D.A.G. Letter to Omdahl (Aug. 16, 1989) (emphasis added). Cf. N.D.A.G. 95-L-48 ("[O]ther than the two tax levy and collection restrictions in N.D.C.C. § 11-09.1-05(2), a home rule county may create special assessment districts and impose assessments thereunder for improvements. This may be done only according to authority contained in the home rule county charter and pursuant to an ordinance enacted to implement the charter authority. . . . If the authority is properly reserved and implemented, the county home rule ordinance will supersede state law in conflict therewith . . .").

Similarly, in N.D.A.G. 2006-L-07, I noted:

Home rule counties and cities may exercise the powers contained in N.D.C.C. § 11-09.1-05 and N.D.C.C. § 40-05.1-06, respectively, if those powers are included in their charters and implemented through an ordinance. Those sections authorize counties and cities to control their finances, levy and collect property taxes, and establish debt and mill levy limitations. Ordinances adopted to implement charters may supersede state law within the implementing county or city's jurisdiction.

The home rule powers to levy and collect property taxes and special assessments and to establish debt and mill levy limitations give home rule entities the authority to determine the method by which the entities' functions and services are financed. If a county or city's home rule charter contains these provisions, the county or city may, by appropriate ordinance, supersede mill levy limitations otherwise established by law. . . .

A home rule charter or ordinance may also address any requirement for voter or property owner approval.⁸ Home rule entities with the power to control their finances, levy and collect property taxes, and establish debt and mill levy limitations may enact ordinances superseding a statute requiring a vote of a certain percent of the electors. . . . If the ordinance did provide for voter approval, the voting requirements could differ from those set forth in [law].

There are some limitations, however, of which home rule entities should be aware. Home rule entities must comply with any limitations in their charters regarding the entities' control of their finances or on their power to levy a tax. And, N.D.C.C. § 11-09.1-05(2) and N.D.C.C. § 40-05.1-06(2) contain limitations with regard to property taxes applicable to home rule entities. All property must be assessed in a uniform manner within the taxing district and a home rule county may not supersede a state law that determines what property or acts are subject to or exempt from ad valorem or sales and use taxes.⁹

In addition to the county home rule charter becoming the organic law of the county with the full right of self-government,¹⁰ both the North Dakota Supreme Court¹¹ and this office have indicated that home rule powers are broad powers, and that statutes applicable to home rule

⁸ See Stutsman County Home Rule Charter, art. 3, § 2 and art. 8, § 2.

⁹ N.D.A.G. 2006-L-07 (citations omitted).

¹⁰ N.D.C.C. §§ 11-09.1-04 and 11-09.1-05.

¹¹ See, e.g., City of Fargo v. Malme, 737 N.W.2d 390, 394 (N.D. 2007) (in order to determine what broad powers were given to home rule city, court will look to provisions of N.D.C.C. § 40-05.1-06); Haugland v. City of Bismarck, 429 N.W.2d 449, 452 (N.D. 1988) (home rule city can have broad powers over its property and to control its finances and fiscal affairs if those powers are included in its charter and implemented through ordinances).

entities that permit inclusion in their charter the control of finances and fiscal affairs¹² are “very broad.”¹³

In addition, once it is determined that a political subdivision has a specific power, the manner and means of exercising that power are generally left to the discretion of the political subdivision officials.¹⁴

Thus, if a home rule county complies with the two limitations in N.D.C.C. § 11-09.1-05(2), the broad powers in its charter to control its finances and fiscal affairs and levy and collect property taxes would authorize the home rule county to levy and collect additional property taxes from a single classification of property, if those powers are properly implemented through an ordinance.¹⁵

One of the limitations in N.D.C.C. § 11-09.1-05(2) is that a “charter or ordinance or act of a governing body of a home rule county may not supersede any state law that determines what property or acts are subject to, or exempt from, ad valorem taxes.” It is my understanding that the county does not intend to define differently from state law what property is taxable as agricultural property or to otherwise impose a tax on exempt property.¹⁶ Thus, this limitation is

¹² N.D.C.C. § 11-09.1-05(2) and N.D.C.C. § 40-05.1-06(2).

¹³ See N.D.A.G. 2002-L-33 (city’s home rule charter contains very broad power authorized by N.D.C.C. § 40-05.1-06(2) to control its finances and fiscal affairs); N.D.A.G. 2000-L-156 (home rule cities have very broad powers to control their finances and fiscal affairs). See also N.D.A.G. 2004-L-38 (home rule city has certain broad powers including to “control its finances and fiscal affairs; to appropriate money for its purposes . . . to levy and collect taxes, excises, fees, charges, and special assessments for benefits conferred”); N.D.A.G. 2004-L-28 (home rule city and its citizens can assume broad control over their finances and fiscal affairs; city charter statutory language prescribes broad powers of a home rule city to control finances and fiscal affairs); N.D.A.G. 2003-L-25 (home rule counties can acquire specific powers listed in N.D.C.C. § 11-09.1-05 including broad power to control finances and fiscal affairs under N.D.C.C. § 11-09.1-05(2)).

¹⁴ See N.D.A.G. 2003-L-19; Lang v. City of Cavalier, 228 N.W. 819, 822 (N.D. 1930) (“A municipal corporation is an agency of the state. It is purely a creature of statute. . . . In defining its powers, the rule of strict construction applies, and any doubt as to their existence or extent must be resolved against the corporation. . . . But the existence and extent of a municipal corporation’s powers having been determined and measured the rule of strict construction no longer applies, and the manner and means of exercising those powers where not prescribed by the Legislature are left to the discretion of the municipal authorities.”).

¹⁵ See N.D.A.G. 93-F-11.

¹⁶ Compare N.D.A.G. 97-F-02 (home rule county may not establish by ordinance a method for determining what property is taxable as commercial since it may undermine requirement that property be assessed in uniform manner and what property is subject to or exempt from property tax) and N.D.A.G. 2001-F-09 (home rule city may not levy special assessment on tax-exempt entities to pay portion of cost of police and fire protection since it would unlawfully tax entities exempt under law).

not implicated here. It has been suggested that N.D.C.C. § 57-15-02 is a state law that the home rule charter or ordinance cannot supersede.¹⁷ That statute, dealing with the determination of property tax rates, provides in part that “[t]he rate must be based and computed on the taxable valuation of taxable property in the municipality or district levying the tax.”¹⁸ However, this statute does not state that the rate must be based and computed on the taxable valuation of all taxable property in a municipality or district, as was suggested. Consequently, the language in this provision does not limit a home rule county’s ability to impose an additional tax on one classification of real property, especially in view of the county’s justification for doing so, i.e., that the tax is being levied against the property for repairs and construction of the roads necessitated by the agricultural-related use of those roads.¹⁹

The other limitation in N.D.C.C. § 11-09.1-05(2) is that “all property . . . must be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments.” It is my understanding that the county is not attempting to alter the assessed valuation of any agricultural property, or to affect the uniformity of assessment²⁰ of such property. It is, instead, proposing to increase the rate of tax on agricultural property in order to pay for repairs and improvements to certain roads necessitated by agricultural use of those roads. Thus, this limitation contained in N.D.C.C. § 11-09.1-05(2) is likewise not applicable to this ordinance proposed by this home rule county.

The question has also been raised whether the levy and collection of property taxes in this instance solely on land classified as agricultural would violate the state constitution’s requirement of uniformity. Article X, § 5, N.D. Const., provides in part that “[t]axes shall be

¹⁷ See E-mail from Donnita A. Wald to John J. Fox (Mar. 4, 2008, 11:11 a.m.).

¹⁸ N.D.C.C. § 57-15-02. This statute does not deal directly with exemptions from taxation, one of the limitations on the power of a home rule county to levy and collect property taxes contained in N.D.C.C. § 11-09.1-05(2). It has also been suggested that State ex rel. Strutz v. Huber, 291 N.W. 126 (N.D. 1940), supports the argument that a home rule county may only levy and collect property taxes on all classified property. However, this case was decided almost five decades before county home rule was instituted and is inapposite.

¹⁹ Cf. State v. Wetz, 168 N.W. 835, 842 (N.D. 1918) (“If the Legislature deems it appropriate to single out a given class of property and to require that the owners of that property who, as a class, derive most benefit from the proper performance of a given governmental duty, must contribute most to the legitimate cost of its maintenance, and that they may be favored by a corresponding reduction of other burdens, it cannot be said that the property subject to the particular burden is exempt from taxation. The most that can be said is that it is singled out for special treatment and taxed according to a method that is thought to be more appropriate for measuring the relative burden than would be the case if it were taxed according to valuation.”).

²⁰ See, e.g., N.D.C.C. § 57-01-05 (state supervisor of assessments to see that uniform assessment of all real and personal property be attained); N.D.C.C. § 57-13-03 (State Board of Equalization to act so that all assessments of similar taxable property are uniform and equal throughout the state at full and true value).

uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax.” Apparently, the concern is whether this constitutional provision would come into play if only one classification of property is subject to the additional tax in order to finance the road construction and repairs.

A recent opinion of this office discussed the classification of agricultural lands for property tax purposes:

By definition, the classification of agricultural lands is distinguished from four other classes of property: centrally assessed, commercial, railroad and residential. See N.D.C.C. § 57-02-01(1), (4), (5), (11), (12). All classes of property are assessed on the basis of the value of the property. N.D.C.C. § 57-02-27.1. However, the determination of the value of agricultural property is significantly different than other types of property. Since 1981, the true and full value of agricultural lands is calculated by creating a subclassification for crop lands and a subclassification for grazing lands and then applying a specific formula to each subclassification. N.D.C.C. § 57-02-27.2.²¹

In a 1992 opinion, the concept of uniformity as used in the state constitution was explained:

Our state constitution requires that no tax shall be levied except in pursuance of law. N.D. Const. art. X, § 3. The constitution further requires that:

Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax.

N.D. Const. art. X, § 5.

Opinions by the North Dakota Supreme Court make it apparent that classification of property for tax purposes may be done only pursuant to legislative authority and that uniformity as provided in the constitution means that all property similarly situated shall be treated alike.²²

The opinion went on to state:

[I]n Souris River Telephone Mutual Aid Corporation v. State, 162 N.W.2d 685 (N.D. 1968), the supreme court considered an argument that the tax on telephone cooperatives under N.D.C.C. ch. 57-34 was not uniform under the North Dakota Constitution because the classification used was of persons for property tax purposes and that the classification was based on relative affluence of owners of telephones on a density basis. The court determined that

²¹ N.D.A.G. 2002-L-09.

²² N.D.A.G. 92-09 (emphasis added).

uniformity for constitutional purposes requires that all similarly situated be treated alike. The court determined that because each telephone cooperative similarly situated (in a subclass by virtue of its density of operation) is taxed in the same manner and at the same rate as other companies within the same classification, the equality and uniformity requirement was met.²³

In a 1989 opinion concerning the uniformity requirement of the state constitution, it was noted that the North Dakota Supreme Court:

also recognized that the uniformity requirement of the state constitution is substantially the same as that required by the equal protection clause of the fourteenth amendment of the United States Constitution. . . .

The United States Supreme Court has clearly articulated that federal standard . . . In Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973), the Court wrote:

The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. Harper v. Virginia Board of Elections, 383 U.S. 663, 666, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.²⁴

In the present case, the uniformity provision contained in N.D. Const. art. X, § 5 would not be violated since the proposed action by Stutsman County would treat similarly situated property uniformly, i.e., all land within the agricultural classification would be subject to the same tax increase. The uniformity clause is not implicated when land within a classification is taxed the same. Land in other classifications does not involve similarly situated property; persons owning land classified as residential or commercial, for example, are not similarly situated to individuals owning land classified as agricultural.²⁵ As long as property classified as agricultural is subject to the same treatment, no violation occurs.

²³ N.D.A.G. 92-09.

²⁴ N.D.A.G. 89-4.

²⁵ See Matter of Refusal of State Bd. of Equalization to Hear Appeal of the Lake Poinsett Area Dev. Ass'n, 330 N.W.2d 754, 758 (S.D. 1983) (while uniformity within a class is necessary, constitutional uniformity clause does not require uniformity of taxation between classes). See also Foss v. City of Rochester, 480 N.E.2d 717, 720-22 (N.Y. 1985) ("The integrity of any system of taxation, and particularly real property taxation, rests upon the premise that similarly situated taxpayers pay the same share of the tax burden The Federal and State Constitutions do not prohibit dual tax rates or require that all taxpayers be treated the same. They require only that those similarly situated be treated uniformly. Thus, the creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and taxes imposed are uniform within the class.").

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Based on the foregoing, it is my opinion that if the home rule county's charter contains the authority to control its finances and to levy and collect property taxes as authorized by N.D.C.C. § 11-09.1-05(2), the power is properly implemented by ordinance, and if, as here, the limitations contained in that statute relating to property taxes are not implicated, the county is authorized to levy and collect additional property taxes solely on land classified as agricultural to finance road construction and repairs primarily necessitated by agricultural-related use. It is my further opinion that such an ordinance would not violate the uniformity clause contained in N.D. Const. art. X, § 5.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

cc: Representative Craig Headland

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.²⁶

²⁶ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).