

**LETTER OPINION
2009-L-19**

December 28, 2009

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

Dear Mr. Fremgen:

Thank you for your letter regarding a proposed home rule county weight restriction ordinance. You raise several questions about implementing such an ordinance and whether it may be utilized in conjunction with a joint powers agreement between Stutsman County and one or more non-home rule counties. It is necessary however, to consider the threshold issue of whether the county may enact a weight restriction home rule ordinance which shifts revenue from the state treasury to any county. For the reasons indicated below, it is my opinion that while a home rule county may enact a weight restriction ordinance which essentially duplicates N.D.C.C. ch. 39-12, it may not contain any provisions which would divert any revenue raised through enforcement of the ordinance from the state treasury to any county.

ANALYSIS

You indicate in your letter that as a home rule county, Stutsman County is proposing to enact a weight restriction ordinance. Although you state that the county's primary goal is to protect its roads, you do indicate several times that the county and any other county that is a party to a possible joint powers agreement hope to retain any revenue generated through enforcement of the ordinance. You enclosed the proposed ordinance with your letter. An examination of the proposed ordinance reveals that it is essentially the same as N.D.C.C. ch. 39-12, one notable exception being that any road use fees or permit fees generated under the ordinance and the proceeds of any sale following vehicle impoundment would be retained by the county, rather than being remitted to the state treasury.¹

¹ See Proposed Stutsman County Ordinance #2006-1, §§ 2(3), 5(4), 14.1, and 20. Cf. N.D.C.C. §§ 39-12-02(3), 39-12-14.1, and 39-12-20.

You raise questions about implementing such an ordinance as well as questions related to entering into a joint powers agreement with non-home rule counties to enforce the Stutsman County home rule weight restriction ordinance. However, it is necessary to examine the threshold issue of whether enactment of an ordinance with such fee-shifting features would be lawful.

State law provides that a county and its citizens may, if included in its charter and implemented through ordinances:

Provide for the adoption, amendment, repeal, initiative, referral, enforcement, and civil and criminal penalties for violation of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare. However, this subsection does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.²

Stutsman County has implemented a similar, although not verbatim, provision in its home rule charter.³

The proposed ordinance would be enacted under N.D.C.C. § 11-09.1-05(5) and its home rule charter counterpart.⁴ However, the county home rule law “does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.”⁵ Chapter 39-12, N.D.C.C., containing 25 detailed sections, regulates the size, width, and height restrictions for state highways and other public roads. This chapter provides concurrent authority both for the state and the counties to exercise power in their respective jurisdictions over classifying highways as to weight and load capacities, issuing special permits for vehicles of excessive size and weight, limiting use of certain vehicles on highways, and imposing restrictions as to the weight of such vehicles, among other things.⁶ Any police officer, including any member of the state Highway Patrol, is authorized to weigh a vehicle if the officer believes a vehicle may be over the legal weight limit.⁷ Overweight vehicles may be impounded by any peace officer and

² N.D.C.C. § 11-09.1-05(5) (emphasis added).

³ See Stutsman County, N.D., Home Rule Charter, art. 2, § 5 (2000), indicating the county has the authority to “provide for adoption, amendment, repeal, initiative, referral, enforcement, and penalties for violation of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, and welfare. However, this subsection does not confer any authority to regulate any industry or activity that is exclusively regulated by state or federal law or by rules adopted by a state or federal agency.”

⁴ Id.

⁵ N.D.C.C. § 11-09.1-05(5). Enforcement of size and weight restrictions is also authorized under N.D.C.C. § 24-01-13. Movement of oversized and overweight vehicles and loads is similarly regulated by state administrative rules. See N.D.A.C. art. 38-06.

⁶ See N.D.C.C. §§ 39-12-01, 39-12-02, 39-12-03, and 39-12-05.3.

⁷ See N.D.C.C. § 39-12-07.

taken to a storage area.⁸ The state's attorney of a county where such vehicles are impounded may file a civil complaint "on behalf of the authority having jurisdiction of the road whereon the violation occurred, for the purpose of recovering charges for the extraordinary use of the highways, streets, or roads of this state."⁹

The county home rule law quoted above, N.D.C.C. § 11-09.1-05(5), has been construed both by the North Dakota Supreme Court and this office. The court, citing with approval N.D.A.G. 90-21, concluded that:

N.D.C.C. § 11-09.1-05(5) limits the county's authority to enact ordinances in two instances: (1) when there is an explicit state law or rule restraining the county's authority, *see, e.g.*, N.D.C.C. § 11-09.1-05(2) (county ordinances may not supersede state law in certain taxation matters); *see also Sauby v. City of Fargo*, 2008 ND 60, ¶ 10, 747 N.W.2d 65; or (2) when the industry or activity involved is already subject to substantial state control through broad, encompassing statutes or rules.¹⁰

The analysis in N.D.A.G. 90-21 discussed the somewhat sparse legislative history regarding the second sentence of N.D.C.C. § 11-09.1-05(5). The history indicated that the second sentence of the statute was intended to relate to matters in which there is substantial state management and control, citing, for example, reclamation and siting issues handled by the Public Service Commission which are subject to substantial state administrative regulation.¹¹ The opinion concluded that the Legislature only intended to prevent a home rule county from addressing an activity or industry which "is subject to substantial state control, management, or supervision."¹²

"This office has . . . summarized the steps utilized by the North Dakota Supreme Court and this office to resolve questions regarding home rule authority."¹³

⁸ N.D.C.C. § 39-12-11.

⁹ N.D.C.C. § 39-12-14.

¹⁰ *State v. Brown*, 771 N.W.2d 267, 275 (N.D. 2009).

¹¹ N.D.A.G. 90-21.

¹² *Id.* Later opinions issued by this office have determined that a state-regulated activity or industry may prevent a home rule county from engaging in its own regulation. For example, the activity of building construction was noted to be regulated by N.D.C.C. ch. 54-21.3, the law establishing the state building code. Thus, a home rule county was subject to the provisions of that law and was required to adopt the state building code if it chose to administer and enforce a building code. *See* N.D.A.G. 95-F-11. Similarly, North Dakota state law regulates the sale of tobacco products by specifically requiring distributors and dealers to be licensed by the state, and also regulates the activity of smoking by restricting the places where a person is allowed to smoke. Accordingly, it was determined that home rule counties may not adopt ordinances licensing tobacco products, regulating the sale of tobacco products, or limiting the use of tobacco products in buildings not owned or leased by the county. *See* N.D.A.G. 97-F-05.

¹³ N.D.A.G. 2000-F-06.

A home rule political subdivision may exercise powers not allowed under state law if: (1) the Legislature granted it that power [as a home rule political subdivision]; (2) the political subdivision included that power in its home rule charter; (3) the political subdivision properly implemented the power through an ordinance; and (4) the power concerns only local, rather than statewide, matters. See Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980); Letter from Attorney General Heidi Heitkamp to Stephen M. McLean (Sep. 26, 1997).¹⁴

One noted author has stated that:

It is a general rule that a charter provision, whether of a home-rule or other municipality, does not supersede or prevail over conflicting general law dealing with affairs purely of statewide concern, even though they may pertain to municipal corporations; on the contrary, the charter provision is superseded and prevailed over by such general law.¹⁵

“Whether an ordinance implementing a home rule power concerns a statewide matter is not always clear.”¹⁶ However, an opinion issued by this office dealing with a home rule city’s ordinance for disposal of abandoned motor vehicles is instructive. In that instance, N.D.C.C. ch. 39-26, pertaining to abandoned motor vehicles, was analyzed.¹⁷ The opinion noted that “[b]ecause ch. 39-26 is not expressly the exclusive means of dealing with the problem of abandoned motor vehicles, it does not preempt local regulation. Some portions of this chapter, however, do require statewide compliance to comport with statewide concerns.”¹⁸ The opinion determined that while there may be some inconsistencies between a home rule ordinance and N.D.C.C. ch. 39-26, the local ordinances may not disregard, among other things, payment of unclaimed net sale proceeds to the state.¹⁹ “While the city . . . could have relied on the provisions under N.D.C.C. ch. 39-26 for disposal of abandoned vehicles rather than implementing a duplicative ordinance, any city ordinance adopted regarding abandoned vehicles must provide the right to reclaim the net proceeds following the sale and the deposit of the net proceeds with the state treasurer in compliance with N.D.C.C. ch. 39-26.”²⁰ In that case, the city ordinance in question provided for delivery of the proceeds of the sale to the city auditor to be deposited in the city general fund.²¹

Even though the state statutes that regulate the weight and load of trucks and other vehicles on public roads in this state grant part of that authority concurrently to both state

¹⁴ Id. (quoting N.D.A.G. 98-L-117) (emphasis added).

¹⁵ Eugene McQuillin, The Law of Municipal Corporations § 21:30 (3d ed. 2007).

¹⁶ N.D.A.G. 2000-F-06.

¹⁷ N.D.A.G. 97-L-155.

¹⁸ Id. (emphasis added).

¹⁹ Id.

²⁰ Id.

²¹ Id.

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and local officials, there remains, in part, substantial state control, management, or supervision of that activity, particularly as it relates to the disposition of any enforcement fees.

In the present case, N.D.C.C. ch. 39-12 is not the exclusive means of dealing with the problem of overweight vehicles and does not preempt all local regulation. However, N.D.C.C. §§ 39-12-02(3), 39-12-14.1, and 39-12-20 require permit and road use fees to be remitted to the state treasury for credit to the state highway fund, and proceeds of the sale of impounded vehicles to be remitted to the state treasury for deposit in the highway fund, after paying any costs to the county.²² As noted above, certain provisions in the proposed county home rule ordinance would direct those funds to the county treasury rather than to the state. Consistent with N.D.A.G. 97-L-155, the statewide application of the payment of the permit and road use fees and net proceeds of any sale into the state treasury "is a matter of statewide concern which can not be altered by conflicting ordinances under . . . home rule authority."²³

Based on the foregoing, it is my opinion that while a home rule county may enact a weight restriction ordinance which essentially duplicates N.D.C.C. ch. 39-12, it may not contain any provisions which would divert any revenue raised through enforcement of the ordinance from the state treasury to any county. Because it is apparent from your correspondence that one of the primary reasons for passage of this county home rule ordinance would be to allow Stutsman County (or another county under a joint powers agreement) to retain any enforcement fees generated, and because I have determined that diverting the fees from the state treasury to the county treasury would not be lawful, it is unnecessary to address the remainder of your questions.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

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.²⁴

²² See N.D.C.C. §§ 39-12-02(3), 39-12-14.1 and 39-12-20.

²³ N.D.A.G. 97-L-155; see also N.D.A.G. 2002-L-38 (provisions for county home rule patterned after existing city home rule provisions; it is therefore reasonable to look to city home rule precedent for county home rule matters).

²⁴ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).