

**LETTER OPINION**  
**96-L-142**

August 12, 1996

The Honorable Tony Grindberg  
State Senator, District 41  
2832 39½ Ave SW  
Fargo, ND 58104

Dear Senator Grindberg:

Thank you for your letter asking whether a home rule city may increase the city lodging tax or the city lodging and restaurant tax beyond the limits imposed by N.D.C.C. ch. 40-57.3 for the support of a city visitor's promotion fund.

The governing body of any city may impose a lodging tax which may not exceed 2 percent of the gross receipts from lodging within the city for periods of less than 30 consecutive days or one month. N.D.C.C. § 40-57.3-01. All proceeds of this tax are to be deposited in the city visitor's promotion fund and may be spent only as provided in chapter 40-57.3. Id. Further, the governing body of any city may impose an additional lodging and restaurant tax, not to exceed one percent on the gross receipts from lodging within the city for periods of less than 30 days or one month and also upon the gross receipts of restaurants from the sales of prepared food or certain beverages. N.D.C.C. § 40-57.3-01.1. The proceeds from this tax must be deposited in the city visitor's promotion capital construction fund and used only as provided in chapter 40-57.3. Id.

N.D.C.C. ch. 40-57.3 applies to all cities "and does not limit the authority of a home rule city to levy any taxes authorized by other provisions of law." N.D.C.C. § 40-57.3-01. A home rule city can acquire powers beyond those specified in state law by including any or all of the powers listed in N.D.C.C. § 40-05.1-06 in its home rule charter and then implementing those powers through ordinances. See N.D.C.C. § 40-05.1-06; Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D. 1980). In this manner a home rule city can acquire broad control over its finances and fiscal affairs, and also can acquire the power to levy a city sales tax. See N.D.C.C. § 40-05.1-06(2) and (16). The power to levy sales taxes is not limited in purpose and

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may be used either to raise general revenue for the city or to raise money dedicated for specific public projects. 1995 N.D. Op. Att'y Gen. L-115.

Therefore, it is my opinion that if a city's home rule charter includes the powers contained in N.D.C.C. §§ 40-05.1-06(2) and (16), that city, by ordinance, may supersede the limitations in N.D.C.C. ch. 40-57.3 concerning the amount of the city lodging tax or the city lodging and restaurant tax which may be imposed. However, a city must also comply with any limitations which the home rule charter contains on the city's control over its finances and fiscal affairs or on its power to levy a sales tax.

The taxes which a city may impose under N.D.C.C. ch. 40-57.3 are based upon sales of lodging or prepared food and certain beverages and are required to be collected in the same manner as the state sales tax is collected under N.D.C.C. ch. 57-39.2. Therefore, these taxes are sales taxes. If the city's home rule charter contains the general taxing power provided by N.D.C.C. § 40-05.1-06(2) but not the specific power to levy sales taxes contained at N.D.C.C. § 40-05.1-06(16), then the city does not have authority under its home rule charter to adopt a sales tax. 1995 N.D. Op. Att'y Gen. L-97. Thus, it is my further opinion that a home rule city's charter must contain the power to levy a sales tax as authorized by N.D.C.C. § 40-05.1-06(16) in order to supersede the limitations on lodging taxes and lodging and restaurant taxes under N.D.C.C. ch. 40-57.3.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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