

Overruled in part by N.D.A.G. 2002-L-61

**LETTER OPINION
96-L-107**

May 13, 1996

The Honorable Harvey Tallackson
State Senate
53 W 5th St
Grafton, ND 58237

Dear Senator Tallackson:

Thank you for your April 25, 1996, letter asking whether the city of Grafton's economic development fund may directly or indirectly pay for advertising and other promotions in support of a measure to be voted upon at the June 11 primary. The measure in question would provide for two veterans homes to be built, one of which would be in Grafton.

Cities, including home rule cities, have no inherent power except as expressly conferred upon them by statute or such as may be necessarily implied from the powers expressly granted. Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D. 1980). "In defining a city's powers, the rule of strict construction applies and any doubt as to the existence or the extent of the powers must be resolved against the city." Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980). However, once the city's powers have been determined, the rule of strict construction no longer applies, and except where specifically prescribed by the Legislature, the manner and means of exercising those powers are left to the discretion of the municipal authority. Haugland v. City of Bismarck, 429 N.W.2d 449, 453-54 (N.D. 1988). See also N.D.C.C. § 40-06-07. After it is determined that a regulation is within the subject matter of a city's authority, a party challenging the ordinance must show the ordinance is clearly arbitrary, unreasonable, and without relation to public health, safety, morals, or welfare. A. & H. Services v. City of Wahpeton, 514 N.W.2d 854, 857 (N.D. 1994).

The city of Grafton has adopted a home rule charter and has adopted an ordinance providing for economic development. A home rule city's ordinances may supersede state law in the subject areas listed in N.D.C.C. § 40-05.1-06 if those powers are included in the city's home rule charter and the ordinances properly implement the power. N.D.C.C. §§ 40-05.1-05, 40-05.1-06. Among the powers contained in N.D.C.C. § 40-05.1-06 is the power of a city to control its finances and fiscal affairs, including the power to levy and collect sales and use taxes; the power to engage in any utility, business, or enterprise permitted by the constitution, or not prohibited by statute; and the power to contract with and receive grants from any other governmental entity or agency with respect to any local, state, or federal program, project, or work. These powers are included in Grafton's home rule charter.

The city of Grafton has enacted a sales and use tax, the proceeds of which are dedicated to a community development fund. Apart from administrative expenses, use of the revenue contained in the fund is limited to community and economic development projects:

Dedication of tax proceeds.

- (a) All revenues raised and collected under this article, less administrative expenses, shall be dedicated only to a community development fund. All revenue shall be maintained in the fund, to be known as the Grafton community development fund, separate and apart from all other funds, except as provided by this section.
- (b) The revenue contained in such fund shall be used for community and economic development projects, and may be used for projects developing and enhancing the general welfare of the community including, but not limited to, such projects for health, recreation, business and commerce expansion and retention, public transportation, and general infrastructure development, including water, sewage, roads, utilities, and other projects that will enhance the growth, maintenance and development of the Grafton area.

Grafton Code § 22.5-29. Whether any particular project or activity would be an appropriate use of the Grafton Community Development Fund involves the interpretation of a local ordinance, which is a decision left to the discretion of Grafton's governing body. See 1993 N.D. Op. Att'y Gen. 71.

Public officials and public entities have an implied power to express an opinion on issues affecting the operations and affairs of government, including measures pending before the public. See Letter from Attorney General Nicholas J. Spaeth to Representative Diane Larson, July 7, 1989. No statute prohibits a city from spending money for this purpose. However, even where a statute specifically prohibits the use of state money or property for political purposes, the prohibition is limited to support of candidates for office or political parties, committees or organizations. N.D.C.C. § 16.1-10-02. This statute specifically excludes activities undertaken in performance of a duty of state office from the prohibition. Id. The expression of an opinion on initiated or referred measures is not a prohibited political purpose under this statute. Letter from Attorney General Nicholas J. Spaeth to Representative Diane Larson, July 7, 1989. This office has previously concluded that state funds may be spent for nonpolitical advertising relating to the duties of a state agency. Letter from Attorney General Nicholas J. Spaeth to Commissioner of Labor Craig Hagen, June 10, 1991. This office has also provided advice to the State Water Commission that it

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could spend state funds in support of an initiated measure. Memorandum from Assistant Attorney General Julie Krenz to State Engineer David Sprynczynatyk, January 30, 1992.

Local elected officials are the agents and representatives of political subdivisions, and are exempt from the registration and fee requirements of the state lobbying law when appearing in their official capacities before the Legislature. N.D.C.C. § 54-05.1-02(2)(c). See also Letter from Attorney General Allen I. Olson to Secretary of State Ben Meier, January 3, 1977. Given that local officials are authorized to lobby the Legislature regarding bills before it, the authority for political subdivisions to express an opinion and spend funds to support or oppose an initiated measure that would affect the city can be implied. Whether an initiated measure affects the city is a matter left to the discretion of the city's governing body. See generally 1993 N.D. Op. Att'y Gen. 71.

Therefore, it is my opinion that a home rule city may spend public funds to promote or defeat an initiated ballot measure which affects the city through sponsorship of nonpolitical public announcements. Whether the Grafton Community Development Fund is an appropriate source of funds for this purpose is a determination based on local laws. This determination is to be made by the city governing body and rests in that body's discretion.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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