

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 97-F-07

Date Issued: September 23, 1997

Requested by: Wayne P. Jones, Ransom County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a regional planning council may create a separate nonprofit corporation under N.D.C.C. ch. 10-24.

II.

Whether a regional planning council may transfer some or all of its powers and duties to a nonprofit corporation.

III.

Whether a regional planning council may transfer funds or money to a nonprofit corporation.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a regional planning council does not have authority to create a separate nonprofit corporation under N.D.C.C. ch. 10-24.

II.

It is my opinion that a regional planning council may not transfer powers and duties involving judgment and discretion, but otherwise may contract with a nonprofit corporation for the nonprofit corporation to perform some of the regional council's duties and exercise some of its powers. It is my further opinion that the regional planning council remains responsible for the performance of the transferred powers or duties.

III.

It is my opinion that a regional planning council may only transfer funds or money to a nonprofit corporation pursuant to a public

purpose in accordance with N.D.C.C. ch. 54-40.1 and Article X, Section 18 of the North Dakota Constitution.

- ANALYSES -

I.

The regional planning councils created under N.D.C.C. ch. 54-40.1 are political subdivisions of the state created to further a statewide policy by promoting planning activities for state and local governmental units. 1995 N.D. Op. Att'y Gen. L-281 (Letter to Robert W. Peterson, Nov. 30). See Letter from Attorney General Allen I. Olson to Russell Staiger (July 28, 1978) (regional council is an "agency" able to accept county contracts and receive county economic development tax money to perform county planning); Letter from Chief Deputy Gerald W. VandeWalle to Russell Staiger (March 11, 1976) (a county contribution to a regional planning council is not a prohibited contribution to a private person or corporation under Article X, Section 18 of the North Dakota Constitution). See also 1997 Senate Bill No. 2047 (Regional planning councils added to list of political subdivisions subject to biannual audit). As a political subdivision created by state law, a regional development council possesses only those powers expressly granted to it by the Legislature or those powers necessarily implied from the powers expressly granted. See Ebach v. Ralston, 469 N.W.2d 801 (N.D. 1991) (cities); American Federation of State, County, and Municipal Employees Council Co. 95 v. Olson, 338 N.W.2d 97 (N.D. 1983) (public officials); Murphy v. Swanson, 198 N.W. 116 (N.D. 1924) (counties); 1993 N.D. Op. Att'y Gen. L-175 (rural fire protection districts); 1996 N.D. Op. Att'y Gen. L-205 (Letter to Gorder, Nov. 7) (job development authority).

Before a political subdivision may act it must have specific authority to act in that subject area. "In defining a [political subdivision'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 [political subdivision]." Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980). After it has been determined that a political subdivision has the particular power, the rule of strict construction no longer applies, and the manner and means of exercising those powers, where not limited or specified by the Legislature, are left to the discretion of the political subdivision. Haugland v. City of Bismarck, 429 N.W.2d 449, 453 (N.D. 1988).

The powers and duties of regional councils are set out in N.D.C.C. § 54-40.1-04, which provides:

A regional council shall:

1. Adopt agreements, rules, or procedures as may be necessary to effectuate planning and development in the region.
2. Coordinate planning and development within the region for all matters of regional concern as determined by the regional council, including land use, social and economic planning, economic development, transportation, health, environmental quality, water and sewerage, solid waste, flood relief, parks and open spaces, hospitals, and public buildings.
3. Participate with other public agencies and private organizations in regard to research for planning activities relevant to the region.
4. For the purpose of coordination, work with state departments, agencies, and institutions in reviewing and commenting on all plans and federal aid applications as to their impact on the region.
5. Develop guidelines for the coordination of land use plans and ordinances within the region.
6. Prepare a regional comprehensive plan and upon the preparation of such a plan or any phase, amendment, revision, extension, addition, functional part, or part thereof, file such plan, phase, functional part, amendment, revision, extension, addition, or part thereof with the office, all local planning agencies within the region, and other planning agencies in adjoining areas.
7. Develop an annual budget for operations during a fiscal year.
8. Receive and expend federal, state, and local funds, and contract for services with units of general local government and private individuals

and organizations, consistent with the scope and objectives of planning and development functions.

9. Upon availability of funds, hire an executive director who must be given full control over the staff of the regional council. The executive director shall act as a liaison between the regional council and the staff of the regional council and shall advise and assist the regional council in the selection of staff.
10. Provide technical assistance for primary sector business development by leveraging local funds to assist in product development, product testing, business plan development, feasibility studies, gaining patent protection, legal services, market strategy development, and other needs to stimulate business development.
11. Host business outreach forums to stimulate entrepreneurship and interchange with potential investment and forums on other matters of importance to the local area.
12. Upon request, facilitate the financing of local economic development activities, such as interest buydown programs and local revolving loan fund programs, without regard to the fiscal source.
13. Act as a regional development corporation as provided by the individual regional council's bylaws.
14. Have authority to purchase, own, and manage real property for the purpose of the business incubator and regional council administrative functions.

The only enumerated power which could remotely be construed in support of a regional planning council having authority to incorporate a separate nonprofit corporation is the power to "[a]ct as a regional development corporation as provided by the individual regional council's bylaws." N.D.C.C. § 54-40.1-04(13). However, this power does not support the proposition that a regional planning council may incorporate a nonprofit corporation.

The incorporation of a separate nonprofit or for-profit corporation is not merely a manner and means of exercising powers, but is instead a power in and of itself to create a separate entity which has an independent identity. A corporation is looked upon as a separate legal entity from the individuals or corporations which incorporated the new corporation. Family Center Drug Store, Inc. v. North Dakota St. Bd. of Pharm., 181 N.W.2d 738, 745 (N.D. 1970). "A corporation is not in fact or in reality a person, but is created by statute and the law treats it as though it were a person by the process of fiction, or by regarding it as an artificial person distinct and separate from its individual stockholders." Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, 602 (N.D. 1983). The authority to create a separate and distinct legal identity from oneself with limited liability for the actions of the corporation is one of the major reasons for seeking incorporation. Fire Ass'n of Philadelphia v. Vantine Paint & Glass Co., 133 N.W.2d 426, 430-431 (N.D. 1965). Public policy indicates that governments should be accountable to the people and the power to incorporate a separate entity would weaken that public policy.

The North Dakota Nonprofit Corporation Act indicates that one or more "persons" may incorporate a nonprofit corporation. N.D.C.C. 10-24-28. However, this statute does not constitute the specific authority contemplated by the strict construction of a political subdivision's powers under Roeders. A corporation acquires its existence and authority to act from the state. Brend v. Dome Development, Ltd., 418 N.W.2d 610, 611 (N.D. 1988), State v. J.P. Lamb Land Co., 401 N.W.2d 713, 717 (N.D. 1987). A corporation is a creature of statute which cannot exist without consent of the sovereign, and the power to create a corporation is an attribute of sovereignty subject to conditions that the state may impose. State v. J.P. Lamb Land Co., 401 N.W.2d at 717, Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d at 603. N.D.C.C. § 10-24-28 neither specifically grants nor necessarily implies the authority of a political subdivision to incorporate a non-profit corporation.

Further, where the Legislature has intended a political subdivision to be able to charter a corporation, it has specifically granted that authority. For example, the Children's Services Coordinating Committee has specific authority to charter a public corporation to implement certain programs. N.D.C.C. § 54-56-04. See also 1993 N.D. Op. Att'y Gen. L-298 (letter to Myrdal, October 20). Other examples of legislatively created corporations include the Myron G. Nelson Fund, Inc., N.D.C.C. ch. 10-30.2; Technology Transfer, Inc., N.D.C.C. ch. 10-30.4; the North Dakota Development Fund, Inc., N.D.C.C. ch. 10-30.5; and the former North Dakota Future Fund, Inc. See 1994

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N.D. Op. Att'y Gen. L-251 (letter to Dvirnak, October 4), 1992 N.D. Op. Att'y Gen. 25. Compare, Sande v. City of Grand Forks, 269 N.W.2d 93 (N.D. 1978) (Statute grants city power to directly exercise urban renewal powers or to create an agency to exercise urban renewal powers).

Therefore, it is my opinion that a regional planning council does not have authority to create a separate nonprofit corporation under N.D.C.C. ch. 10-24.

## II.

Although a regional planning council may not create a separate corporation, it may contract with a separate corporation to provide services consistent with the scope and objectives of planning and development functions. N.D.C.C. § 54-40.1-04(8). Some of these functions may include providing technical assistance such as assisting in product development and testing, plan development, or feasibility studies; gaining patent protection, obtaining legal services or market strategy development; or meeting other needs which will stimulate business development. N.D.C.C. § 54-40.1-04(10). These functions could encompass the services of specialists whom it would not be practicable for the regional planning council to employ directly.

A political subdivision may contract with a private party for the performance of a duty which has been assigned to the political subdivision where this does not contradict a legislative prohibition. Taylor v. City of Wahpeton, 62 N.W.2d 31 (N.D. 1953).

However, a public officer "may not delegate to an agent power to do an act required by statute involving judgment and discretion unless authorized by statute." State v. Johnston, 113 N.W.2d 309, 312 (Iowa 1962). See also Nelms v. Civil Serv. Comm'n, 220 N.W.2d (Minn. 1974); School Dist. No. 3 v. Callahan, 297 N.W.2d 407 (Wis. 1941); 1995 N.D. Op. Att'y Gen. 12. Additionally, it has long been held by the North Dakota Supreme Court that "when a legislative enactment prescribes one mode of exercising an express power or privilege, it implies an inhibition to exercise the given power in any other way." Divide County v. Baird, 212 N.W. 236, 241 (N.D. 1927). Because N.D.C.C. § 54-40.1-04 grants regional planning councils with the express power to "contract for services with units of general local government and private individuals and organizations, consistent with the scope and objectives of planning and development functions," it by implication inhibits regional planning councils from accomplishing their statutory duties by delegating discretionary authority to carry out those duties to another entity. See Zueger v. Boehm, 164 N.W.2d

901, 906-07 (N.D. 1969) (The construction of a public highway may be performed by a private individual on a contract basis; however, the construction work must be done under the direction of the public official having direct statutory charge of construction.)

Thus, in the absence of statutory authorization and by implication of a regional planning council's express statutory authority to enter into service contracts, it is my opinion that a regional planning council may not delegate its discretionary responsibilities and duties to another entity. See Letter from Nicholas J. Spaeth to Lieutenant Governor Lloyd Omdahl (May 29, 1990) (concluding that the State Investment Board lacked the authority to delegate discretionary investment responsibilities to other governmental entities).

### III.

The state and its political subdivisions have limited authority in transferring funds or money to private entities such as nonprofit corporations. The anti-gift provision of the state constitution 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.

Article X, Section 18 of the North Dakota Constitution. A regional planning council is created by the state and consists of counties and cities in a cooperative effort. Therefore, a regional planning council is granted authority under this provision as a creation of the state and an extension of counties and cities.

The power to make internal improvements or engage in any industry, enterprise or business, not including liquor traffic, as provided in the anti-gift provision, must be used for a public purpose relating to the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of the people within the territorial boundaries of the particular political subdivision. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237 (N.D. 1964), Ferch v. Housing Authority of Cass County, 59 N.W.2d 849, 856-857 (N.D. 1953). Public purposes include the promotion of a general business district, Patterson v. City of Bismarck, 212 N.W.2d 374,

387-389 (N.D. 1973) (special assessment for provision of parking to business district including building additional commercial rental space to increase attractiveness of downtown commercial district for consumers); Gripentrog, supra, (city issuing bonds for construction of processing plant to improve local economy); Ferch, supra, (county removing slums and creating sanitary low cost housing).

The purpose of the regional planning council is to promote the public interest. This purpose is stated in N.D.C.C. § 54-40.1-01:

The legislative assembly finds that the citizens of the state have a fundamental interest in the orderly development of the state and its resources. This finding recognizes the fact that the mobility of the population, changes in economic forces, and governmental mandates within and without the state present problems that cannot always be met by individual counties or cities and that local government planning and development efforts can be strengthened when aided by studies, planning, and implementation of both a statewide and regional character.

The legislative assembly further finds that the state has a positive interest in the establishment, preparation, and maintenance of a long-term, continuing, comprehensive planning and development process for the physical, social, and economic development of the state and each of its regions to serve as a guide for activities of state and local governmental units.

It is the purpose of this chapter to establish a consistent, comprehensive statewide policy for planning, economic development, program operations, coordination, and related cooperative activities of state and local governmental units and to enhance the ability of and opportunity for local governmental units to resolve issues and problems transcending their individual boundaries. In furtherance of this purpose, the legislative assembly finds that the governor is required to assure orderly and harmonious coordination of state and local plans and programs with federal, state, and regional planning and programming.

Article X, Section 18 of the North Dakota Constitution authorizes the state and its political subdivisions "to engage directly in any industry, enterprises or business except the business of engaging in the traffic of liquor, subject to the restrictions of the due process clause of the Federal Constitution." Gripentrog, 126 N.W.2d at 237.



This provision does not prohibit making loans, giving credit, or making donations in connection with a political subdivision's engaging in an industry, enterprise, or business, but these activities must be in conjunction with engaging in a permissible industry, enterprise or business, and not otherwise. Id. at 237-238.

Therefore, it is my opinion that a regional planning council may transfer funds or money to a nonprofit corporation only for a public purpose through an industry, business, or enterprise in which it is engaged. See 1992 N.D. Op. Att'y Gen. 57.

- EFFECT -

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 questions presented are decided by the courts.

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