

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-30

Date Issued: December 17, 1998

Requested by: Representative Ben Tollefson

- QUESTION PRESENTED -

Whether the city of Minot, a home rule city, constitutionally may donate a sum of money to the Young Men's Christian Association (YMCA) to be used by the YMCA to defray part of the costs of constructing a new building to house the Association's offices and operations.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that it is a violation of Article X, Section 18 of the North Dakota Constitution for a home rule city to donate funds for construction of a new YMCA building unless the donation is made in connection with an enterprise authorized by the city's home rule charter and an implementing ordinance sufficiently detailed to ensure the donation has a public purpose and the public purpose is met.

- ANALYSIS -

The YMCA is a private organization. The information accompanying the request for an opinion states that the mission of the YMCA is "[t]o put Christian principles into practice through programs that build healthy spirit, mind, and body for all." The YMCA provides facilities in the community for people of both sexes to engage in sporting, recreational, and athletic activities.

The constitutional authority of the state, county, or city to donate funds to a private corporation was summarized in a 1993 Attorney General's opinion as follows:

The use of public funds is restricted by a number of state and federal constitutional provisions including Article X, Section 18 of the North Dakota Constitution, the Fourteenth Amendment of the United States Constitution and its North Dakota counterpart, Article I, Section 16.

Article X, Section 18 of the North Dakota Constitution provides:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, . . . 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.

The North Dakota Supreme Court has construed Article X, Section 18 as not prohibiting a state or political subdivision from loaning or giving its credit or making donations in connection with the state or political subdivision's operation of any authorized industry, enterprise, or business. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964). Rather, what it does prohibit is for the state or political subdivision to "otherwise" loan or give its credit or make donations. Id. . . .

Under the Fourteenth Amendment of the United States Constitution, a state may not "deprive any person of life, liberty or property without due process of law." North Dakota's constitution contains a similar provision in Article I, Section 16. Under these constitutional provisions, a state may expend public funds only for public purposes. Green v. Frasier, 253 U.S. 233 (1920). The legality of a given expenditure under these two due process constitutional provisions thus turns on whether it is primarily for a private or public purpose.

"A public purpose or business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residents within a given political subdivision." Gripentrog v. City of Wahpeton, 126 N.W.2d 230 at 237, (N.D. 1964) quoting Green v. Frasier, 176 N.W. 11 (N.D. 1920) affirmed 253 U.S. 233. Although each case is dependent upon its own unique facts and circumstances, courts will generally defer to a legislative determination

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that a particular expenditure will promote the public welfare. Green v. Frasier, 253 U.S. 233.

1993 N.D. Op. Att'y Gen. L-313, L-314 to L-315 (Nov. 3 letter to Allen Kopyy). Thus, the limitations of Article X, Section 18 of the North Dakota Constitution do not apply in three situations: (1) when the money is used to make internal improvements; (2) when the money is donated for the support of the poor; or (3) when the money is distributed pursuant to an authorized industry, enterprise, or business of the city.

As stated, a city may use its money to make internal improvements. The term "internal improvements" is not defined by the North Dakota Constitution or North Dakota statutes. Further, there are no North Dakota decisions defining the term "internal improvements."

In the absence of a statutory definition, words are to be given their plain and ordinary meaning. N.D.C.C. § 1-02-02; Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). Black's Law Dictionary defines "internal improvements" as follows:

With reference to governmental policy and constitutional provisions restricting taxation or the contracting of public debts, this term means works of general public utility or advantage, designed to promote facility of intercommunication, trade, and commerce, the transportation of persons and property, or the development of the natural resources of the state, such as railroads, public highways, turnpikes, and canals, bridges, the improvement of rivers and harbors, systems of artificial irrigation, and the improvement of water powers; but it does not include the building and maintenance of state institutions.

Black's Law Dictionary, 816 (6th ed. 1990). The history of Article X, Section 18 supports the above understanding of the term internal improvements. See Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245, 252 (N.D. 1960). Based upon the generally understood meaning of the term "internal improvement," it is my opinion that a city's donation of money for the construction of a building by a private entity to house a private association does not constitute an "internal improvement."

A city may also give donations for the support of the poor without engaging in an industry, business, or enterprise under Article X, Section 18 of the North Dakota Constitution. Donating money to the

YMCA to be used by the YMCA to defer part of the cost of constructing a new building does not constitute a donation "for reasonable support of the poor." Furthermore, Article VII, Section 2 of the North Dakota Constitution requires specific statutory authority, or a statute from which that authority can necessarily be implied, before a donation can be made. Simply asserting that a donation to a private entity is for the reasonable support of the poor is not a sufficient basis by which to make such a donation. See Letter from Attorney General Nicholas J. Spaeth to Charles R. Isakson (Sept. 29, 1992). Accordingly, from my review of the facts available, it is my opinion that Minot may not donate money to the YMCA under the exception regarding donations for the support of the poor.

A city, however, could constitutionally donate money to a YMCA if the donation were pursuant to an authorized industry, enterprise, or business of the city. The city of Minot is a home rule city. N.D.C.C. chapter 40-05.1 provides for home rule authority in cities. Under this chapter, a city may enact ordinances in matters of local concern that fall within the powers enumerated in N.D.C.C. § 40-05.1-06 if such powers are included in the city's home rule charter.

A home rule city may be authorized in its home rule charter to "engage in any utility, business, or enterprise permitted by the constitution or not prohibited by statute." N.D.C.C. § 40-05.1-06(10). If a home rule city wants to engage in an enterprise not authorized by statute, it must have such authorization in its charter, and the proposed enterprise must be implemented through an ordinance. N.D.C.C. §§ 40-05.01-06, 40-05.1-06(10).

1993 N.D. Op. Att'y Gen. 40, 40-41.

The home rule charter for the city of Minot authorizes the city to "engage in any utility or enterprise permitted by the constitution or not prohibited by statute" Home Rule Charter, City of Minot, Art. 3, sec. j (1972). No statute prohibits a home rule city from creating an enterprise through which the city could provide funds for the use of a private organization. Thus, it is necessary to determine whether a city's provision of funds for the use of a private organization such as the YMCA constitutes an enterprise. See 1993 N.D. Op. Att'y Gen. 40.

"[T]he term 'enterprise' means any activity which does not violate the North Dakota Constitution or statutes and which is of some scope, complication, or risk." Id. at 42. Participating in a program to

provide funds for the use of a private organization such as the YMCA is of some scope, complication, or risk and, therefore, would constitute a permissible enterprise if done appropriately.

Two examples of types of possible enterprises Minot could create for providing the type of support it proposes for the Minot YMCA are as follows. First, Minot could establish an enterprise to provide a physical fitness program for its citizens. Minot, through its enterprise, could contract with a third party, such as the YMCA, for the provision of services under that program.

A second example of an enterprise Minot could create would involve developing a grant program to provide funds to organizations for promoting the health and welfare of Minot's citizens. The grant program would necessarily need specific application criteria. If an applicant, such as the YMCA, met those criteria, the city could provide funding for the applicant's provision of services promoting the citizens' health and welfare. Minot's establishment of either type of these programs may be a permissible enterprise.

In its attempt to create a permissible enterprise, Minot should realize there are several restrictions on an enterprise's purpose and structure. This office has previously explained that "[a] city may not engage in an enterprise unless it is for a public purpose." 1993 N.D. Op. Att'y Gen. 40, 42. Furthermore, "[a]n ordinance permitting a home rule city to engage in a particular enterprise must provide for supervisory controls to ensure that the public purpose is met." Id. The implementing ordinance must also "be sufficiently detailed so that the public is properly informed of the authority and limits of the enterprise." Id.

Thus, it is my opinion that a home rule city whose home rule charter authorizes it to enter into enterprises may engage in an enterprise whereby the city participates in a program to provide funds for the use of a private organization, such as the YMCA, if the implementing ordinance: "(1) authorizes the city to engage in the proposed enterprise, (2) provides assurance that the activity has a public purpose, (3) sufficiently details the manner of implementing the activity, and (4) provides for supervisory controls to ensure the public purpose is met." See 1993 N.D. Op. Att'y Gen. 40, 42-43. The city of Minot has not identified an implementing ordinance creating an enterprise through which a sum of money could be donated to the YMCA. Absent an appropriate implementing ordinance, the city of Minot would not have an enterprise through which it could constitutionally donate funds to the YMCA.

In conclusion, a strong argument exists that contributing funds to the YMCA constitutes a public purpose. It is not, however, done for the reasonable support of the poor. Construction of a building to house the YMCA's offices and organization also does not constitute an "internal improvement" as that phrase is used in Article X, Section 18. Accordingly, it would be a violation of Article X, Section 18 of the North Dakota Constitution for the city of Minot to donate to the YMCA funds for construction of a new YMCA building, unless the donation were made in connection with an enterprise pursuant to the city's charter and an implementing ordinance sufficiently detailed to ensure the donation has a public purpose and the public purpose is met. See generally 1998 N.D. Op. Att'y Gen. 116 (the state may not donate money to the nonprofit foundation entitled Women in Military Service for American Memorial Foundations); 1993 N.D. Op. Att'y Gen. L-313 (the Department of Veterans Affairs may not make a donation to assist a private veterans organization); 1993 N.D. Op. Att'y Gen. L-292 (using revenues from the city sales tax to reduce individual property taxes would have the effect of transferring to property owners moneys held for all the people of the city and violate Article X, Section 18); 1985 N.D. Op. Att'y Gen. 43 ("[A] city may not contribute money to a private nonprofit corporation in order to assist the corporation in constructing the civic facility that the city will not own or control."); Letter from Attorney General Nicholas Spaeth to Kidder County State's Attorney Jerry Renner (Aug. 19, 1985) (a city park board cannot expend public monies to assist a nonprofit corporation in operating a swimming pool); 1968-1970 N.D. Op. Att'y Gen. 92 (a county may not contribute to a worthwhile county project); 1968-1970 N.D. Op. Att'y Gen. 507 (townships may not make donations to entities such as the Red Cross or American Cancer Society); Solberg v. State Treasurer, 53 N.W.2d 49 (N.D. 1952) (a state transfer of a 50% mineral interest reserved in property without consideration would be an unconstitutional gift); Herr v. Rudolf, 25 N.W.2d 916 (N.D. 1947) (a transaction involving the sale of state owned property for less than what could be obtained for the property violates Article X, Section 18).

- 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 question presented is decided by the courts.

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