

**LETTER OPINION**  
**99-L-83**

September 13, 1999

Honorable Elwood Thorpe  
State Representative  
600 22nd Avenue NW  
Minot, ND 58703-0986

Dear Representative Thorpe:

Thank you for your letter asking whether the Minot City Park District may enter into a multiple year lease arrangement with the Minot Family YMCA under which the Minot Park District would lease the YMCA's swimming pool and, in turn, hire the YMCA as manager of the leased pool.

The arrangement in question appears to constitute two agreements, one providing for the rental by the park district of the YMCA's swimming pool and, contained as a part thereof, a management agreement whereby the park district hires the YMCA to be assigned sole management responsibility of the leased premises. The question relating to such an agreement is whether a current municipal board, in this case the board of the park district, may enter into a contract which extends beyond the term of any of its members and thereby infringes on the governmental powers and discretion of future boards.

N.D.C.C. ch. 40-49 provides for municipal park districts and the duties and responsibilities of such districts. N.D.C.C. § 40-49-04(2) allows park districts to enter contracts. The concluding paragraph of N.D.C.C. § 40-49-04 defines the term "park" as including "public grounds used or acquired for use as airfields, parade grounds, public recreation areas, playgrounds and athletic fields, memorial or cemetery grounds, and sites or areas devoted to use and accommodation of the public as distinguished from use for purposes of municipal administration." A lengthy list of powers of the board of park commissioners is provided in N.D.C.C. § 40-49-12. Subsections 1 and 2 of N.D.C.C. § 40-49-12 deal with the acquisition of property and sites and the sole and exclusive authority of the board to maintain, govern, and improve land, to provide structures thereon and construct, maintain, manage, and govern buildings, pavilions, play and pleasure grounds or fields and such other improvements as it deems necessary.

In those jurisdictions that have considered the binding effect of contracts entered into by public entities which extend beyond the terms of the officers then acting for the entity, the distinction

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made in court opinions has been between the contracting authority of those entities relating to their governmental and legislative powers as opposed to their business or proprietary powers. The courts have held that no action taken by a public entity in exercise of its governmental powers is binding on successors. Proprietary powers, on the other hand, are not subject to the same limitation. Letter from Attorney General Nicholas Spaeth to John Schneider (August 24, 1987) (citing 10 E. McQuillin, Municipal Corporations § 29.101 (3rd ed. 1981)). The underlying purpose of the rule distinguishing between a public entity's legislative or governmental powers and its business or proprietary powers is "to protect the public by insuring that each governing body has available to it the powers necessary to effectively carry out its duties." Piedmont Public Service Dist. v. Cowart, 459 S.E.2d 876, 881 (S.C. Ct. App. 1995), aff'd 478 S.E.2d 836, 838 (S.C. 1996) (power of "perpetual succession" does not alter application of general rule).

This distinction is critical, because the doctrine here at issue has its roots in our fundamental notions of democratic government. We select public officials, legislative or executive, whom we believe will carry out the policies intended by the electorate. If they fail to do so, or if the people conclude that new policies are in order, they can be voted out of office. To allow an elected body to perpetuate its policies beyond its term of office would frustrate the ability of the citizenry to exercise its will at the ballot box.

Lobolito, Inc. v. North Pocono School Dist., 722 A.2d 249, 252 (Pa. Commonw. Ct. 1998).

The 1987 opinion to Representative Schneider dealt with the appointment of a city administrator and whether that appointment could be for a period of three years. The opinion noted that the city commission making the appointment would have one or more of its members up for reelection in less than one year from the time of the commencement of the anticipated appointment. The Attorney General further noted that the general rule followed in nearly all jurisdictions relating to employment contracts and public officers is that the appointment and removal of public officers is a governmental function and, as such, the municipal governing body cannot engage a public officer by contract for a term extending beyond the term of its own members.

The management agreement contemplated by the park district and YMCA in your request is an employment arrangement between the city park

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district and the YMCA to provide management services. It is therefore of an employment nature and is subject to the rules stated in the 1987 opinion. It is therefore my opinion that such a management contract arrangement may not obligate the board beyond the term of the board members entering into the agreement.

The other portion of your query relates to the leasing by the park district of the YMCA's swimming pool. As noted above, the powers and duties given to park district board members are broad, and the board inherently needs to make decisions on what recreational and other park facilities will be provided by an individual park district based on the interests of its citizens and its available revenue. Determining whether to provide swimming facilities, and at what locations, as opposed to other sorts of recreational facilities is the essence of governmental decision-making for a park district. "The establishment and maintenance of public parks have been held by majority rule to constitute an exercise of a governmental or legislative power, as distinguished from the business of a city for private benefit and gain to the city and its citizens." Leidigh v. Nebraska City, 292 N.W. 115, 117 (Neb. 1940).

Your letter refers to an opinion issued by this office on December 14, 1965, approving a multi-year lease for county office space. 1964-66 N.D. Op. Att'y Gen. 77. The 1965 opinion cannot be completely reconciled with the 1987 opinion discussed earlier in this letter. The 1965 opinion quotes at length from a previous edition of Corpus Juris Secundum indicating that some courts have upheld contracts of a public entity extending beyond the current term of the entity, without regard to the distinction between governmental and proprietary powers, if the contract is "fair, just, and reasonable and is prompted by the necessities of the situation or in its nature is advantageous to the municipality." Id. at 80 (quotation omitted). The opinion concluded that the county was authorized to enter into a multi-year lease for its office space.

The current edition of Corpus Juris Secundum does not include the rule of law quoted in the 1965 opinion. See 64 C.J.S. Municipal Corporations § 905 (1999). Instead, the "fair, just, and reasonable" standard appears to be applied to multi-year contracts involving the exercise of a public entity's proprietary or business powers. See, e.g., Piedmont Public Service Dist., 459 S.E.2d at 880. For contracts involving legislative or governmental powers, the current edition of Corpus Juris Secundum and current case law are consistent in indicating that contracts extending beyond the current term of the public entity are prohibited, notwithstanding the reasonableness or fairness of the contract terms.

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The 1965 opinion also is distinguishable from the question you present regarding the proposed lease of the YMCA's swimming pool. In applying the distinction between proprietary and governmental functions, there is a difference between a lease for necessary office space and a lease for the public's use of recreational facilities.

Consequently, it is my opinion that determinations on what services to provide and whether those services will include a swimming pool are governmental functions for a park district, and the authority of an existing park board to enter into contracts to provide those services is limited to the term of the members of the board in existence at the time the contract is made.

Sincerely,

Heidi Heitkamp  
Attorney General

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