

N.D.A.G. Letter to Martin (Feb. 11, 1991)

February 11, 1991

Honorable Clarence Martin, Chairman
Political Subdivisions Committee
House Chambers
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Representative Martin:

I have received a letter from Representative Ron Anderson, the House Speaker, in which he indicates that he has given approval for you to request my opinion with respect to whether the new subsections to N.D.C.C. §§ 11-11.1-03 and 40-57.4-03 proposed for enactment in sections 2 and 4 of House Bill No. 1177 are unconstitutional as a violation of N.D. Const. art. X, § 18.

N.D. Const. art. X, § 18 provides in part as follows:

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 Constitution is not a grant but is a limitation on legislative power. Thus, the Legislative Assembly may enact any law not expressly or inferentially prohibited by the constitution. Northwestern Bell Telephone Company v. Wentz, 103 N.W.2d 245, 252 (N.D. 1960).

A legislative enactment is presumed to be constitutional. This presumption is conclusive unless it is clearly shown that the statute is in violation of the constitution. Any doubt must be resolved in favor of the constitutionality of the statute. N.D. Council of School Adm'rs v. Sinner, 458 N.W.2d 280, 285 (N.D. 1990).

N.D.C.C. ch. 11-11.1, enacted in 1985, authorizes a board of county commissioners to create a county job development authority. N.D.C.C. ch. 40-57.4, enacted in 1987, authorizes the governing body of a city to create a city job development authority.

The objective of a job development authority, whether created by a board of county commissioners or by the governing body of a city, is to use its financial and other

resources to encourage and assist in the development of employment within the county or city. N.D.C.C. § 40-57.4-03.

The powers of a county job development authority and a city job development authority are identical. N.D.C.C. §§ 11-11.1-03 and 40-57.4-03. In fact, the only substantive distinction between a county and a city job development authority is that the members of the board of directors of a county job development authority must be appointed by the board of county commissioners from specifically identified groups, whereas there is no similar statutory requirement with respect to the members of the board of directors of a city job development authority. N.D.C.C. §§ 11-11.1-01 and 40-57.4-01. For the purposes of this opinion, therefore, the term "job development authority" will be used to refer to both a county job development authority and a city job development authority.

Sections 2 and 4 of House Bill No. 1177, if enacted, will allow a job development authority to exercise the following powers:

To loan, grant, or convey any funds or other real or personal property held by the authority for any purpose necessary or convenient to carry into effect the objective of the authority established by [Chapter 11-11.1 in the case of a county and Chapter 40-57.4 in the case of a city].

N.D. Const. art. X, § 18 in its present form is the result of a constitutional amendment which was proposed by an initiative petition and approved at the general election held on November 5, 1918. 1919 N.D. Sess. Laws ch. 89.

Following the adoption of N.D. Const. art. X, § 18, the Legislative Assembly, in 1919, established the Industrial Commission to conduct and manage, on behalf of the State, certain industries, enterprises, and businesses then established or to be established by law. The industries, enterprises, and businesses established by law during that legislative session included the Bank of North Dakota (the "Bank") and the Mill and Elevator Association (the "Mill and Elevator"), both of which are conducted and managed by the Industrial Commission.

In exploring the question of whether the establishment of the Mill and Elevator and the Bank violated N.D. Const. § 185, the North Dakota Supreme Court defined both private and public businesses. Green v. Frazier, 176 N.W. 11 (N.D. 1920).

[A private business] may be defined as a business or enterprise in which an individual or individuals, an association, copartnership, or private corporation, has invested capital, time, attention, labor, and intelligence for the purpose of creating and conducting such business, for the sole purpose that those who make such contributions may from the conducting of such business make, gain, and acquire a financial profit for their exclusive benefit, improvement, and enjoyment and exclusively for their own private purposes.

As contradistinguished from a private business, a public purpose or public business has for its objective the promotion of the general welfare of all the inhabitants or residents within a given political division, as, for example, a state, the sovereignty and sovereign powers of which are exercised to promote the public health, safety, morals, general welfare, security, prosperity, contentment, and equality before the law of all the citizens of the state.

Id. at 17.

The court then stated:

If the industries to be established and which are established are owned and operated by the state in order to promote the general welfare of all the people, and the net profits derived from the operation of such industries become public funds of the state of North Dakota, and payable as such into its treasury for the use and benefit of the state and inhabitants and residents thereof in like manner as other public funds, then it must follow that the purpose, business, and industries are public.

It must be kept in mind also that the "Bank of North Dakota," the "Mill and Elevator Association," and all other agencies established by the state for the purpose of operating the state industries in question are not private corporations or private agencies, but are, so to speak, arms of the sovereign power, the state, reaching out to execute its mandates. . . . The same is true of every other state industry which is the subject of this controversy.

Id. at 18.

A helpful statement of the North Dakota Supreme Court in connection with Your question is:

[Article X, § 18 of the North Dakota Constitution] does not prohibit the making of loans or giving of credit or making donations in connection with a city's engaging in any industry, enterprise, or business except engaging in liquor traffic. What it does prohibit is for a city "otherwise" to make loans or give its credit or make donations. In other words, making loans or giving credit may be done in connection with the city's engaging in any permissible industry, enterprise, or business. but not otherwise.

Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-238 (N.D. 1964).

In Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965), the court took a different approach and focused on the public purpose to which the borrower would put the loan proceeds. The statute in question authorized and appropriated funds to the Industrial Commission to make loans to privately or cooperatively owned enterprises for facilities to convert North

Dakota natural resources into low cost power and to generate and transmit such low cost power. The court's discussion of whether it would be a violation of N.D. Const. art. X, 18, for the Commission to make such a loan was limited simply to the statement that that section of the constitution authorizes the state and any county or city to engage in any industry, enterprise, or business, except the business of dealing in intoxicating liquor.

It seems clear that if the state were to engage directly in the business of transmitting power generated by lignite generation plants as a means of making electric power available to the consuming public, the public purpose test would be met.

The making of a loan to further the same purpose, i.e., the generation of electric energy and distribution of the same to the consuming public attains the same goal. This becomes evident in a case where a loan made by the state is defaulted and the state acquires the properties upon foreclosure of its security. If operation of the transmission facility is a public purpose when conducted by the state after acquisition upon foreclosure of the security, surely the making of a loan to construct and operate the facility prior to foreclosure serves the same public purpose.

Id. at 856.

Based upon the foregoing, it is my opinion that the state, county, or city may loan or give its credit or make donations only through an industry, business, or enterprise in which it is engaged. Further, the industry, enterprise, or business engaged in by the state, city or county must have for its objective the promotion of the general welfare of all the inhabitants or residents within the state, city or county. In other words, the industry, enterprise, or business must be engaged in by the state, county, or city for a public purpose.

As stated earlier, the objective of a job development authority is to use its financial and other resources to encourage and assist in the development of employment within the city or county. By enacting chapters 11-11.1 and 40-57.4, the Legislative Assembly has declared that the development of employment by a job development authority is a public purpose. It is therefore my opinion that, on their face, sections 2 and 4 of House Bill No. 1177 are constitutional.

While the cities and counties may therefore engage in the encouragement and assistance in the development of employment within the city or county, a question may arise whether the means proposed in sections 2 and 4 of House Bill No. 1177 to achieve the objectives are in harmony with N.D. Const. art. X, § 18. Because the question of whether a specific expenditure of funds would promote a public purpose is a question of fact which must be examined in light of the specific loan, grant or conveyance of funds or property under consideration, I cannot give a legal opinion on that issue. Those issues can only be resolved in light of the facts of each case which arises.

I hope that this discussion is helpful to you and your committee in your consideration of House Bill No. 1177. Please let me know if you have additional questions.

Sincerely,

Nicholas J. Spaeth

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