

N.D.A.G. Letter to Larson (Sep. 25, 1987)

September 25, 1987

Mr. Stuart A. Larson
Traill County State's Attorney
P.O. Box 188
Hillsboro, North Dakota 58045

Dear Mr. Larson:

Thank you for your letter of April 30, 1987, inquiring as to the authority of a city to contribute from its general funds to a charitable organization. The matter discussed in your letter refers to a contribution which the city of Hillsboro apparently wishes to make to the Health and Humanities Foundation whose purpose is to further the health care requirements of the Hillsboro Community Hospital. Enclosed with your letters were differing opinions on this question rendered by the Hillsboro city attorney and a private attorney. I apologize for the delay in responding.

I do appreciate receiving the comments from the two attorneys as to this question. Their discussion and citations were most helpful in attempting to review this matter and the applicable statutes and case law.

It appears that the accompanying materials to your letter regard N.D. Const. art. X, § 18, as the principal potential legal obstacle to the contemplated donation. That section states as follows:

Section 18. 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.

The North Dakota Supreme Court has had several opportunities to review this constitutional provision, which was previously known as Section 185 of the constitution. See Patterson v. City of Bismarck, 212 N.W.2d 374 (N.D. 1973); Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965); Gripentrog v. of Wahpeton, 126 N.W.2d 230 (N.D. 1964); Ferch v. Housing Authority of Cass County, 59 N.W.2d 849 (N.D. 1953); Stutsman v. Arthur, 16 N.W.2d 449 (N.D. 1944); Marks v. City of Mandan, 296 N.W. 39 (N.D. 1941); State ex rel. Kaufman v. Davis, 229 N.W. 105 (N.D. 1930);

Interpreting Section 185 of the constitution, the North Dakota Supreme Court in Gripentrog stated as follows

Section 185 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 a city's engaging in any permissible industry, enterprise, or business, but not otherwise.

126 N.W.2d at 237-238.

Inasmuch as North Dakota political subdivisions only have that authority provided for by the Legislature, N.D. Const. art. VII, § 2; Roeders v. City of Washburn, 298 N.W.2d 779 (N.D. 1980), the initial determination, before reaching the constitutional issues raised by N.D. Const. art. X, § 18, must be whether there exists statutory authority for the contemplated donation by the city of Hillsboro. In Gripentrog, as in the other cases cited above, the challenged action was being exercised pursuant to statutory authorization. Only where there exists such statutory authority for the action in question does the constitutionality of the statutorily authorized action become an issue.

In reviewing the statutes for a municipal authority to engage in the business, industry, or enterprise of providing aid to hospitals, the most relevant provision appears to be N.D.C.C. § 40-05-02, which states as follows:

The city council in a city operating under the council form of government and the board of city commissioners in a city operating under the commission system of government . . . shall have power:

. . . .

10. Hospitals and medical dispensaries. To establish, control, and regulate hospitals and medical dispensaries.

See N.D.C.C. § 40-05-02(10).

In the present case, it does not appear that the city of Hillsboro would be involved in establishing, controlling, or regulating a hospital but would merely be making an unencumbered donation. As such, it is my opinion that the city of Hillsboro is not statutorily authorized to make the contemplated donation.

You also ask, in the alternative, whether it would be legal for the city to contribute funds to provide help, aid and comfort to the poor. I assume that this contribution would be made to the hospital for its use in providing medical care to the poor. Although N.D. Const. art. X, § 18 does not prohibit donations "for reasonable support of the poor," it is still necessary that such action have statutory authorization. The constitutional exception "for reasonable support of the poor" merely permits the Legislature to enact legislation to aid

the poor that might otherwise be invalid under N.D. Const. art. X, § 18. In our review of the North Dakota Century Code, we are unable to find statutory authorization permitting a city to make a donation to a hospital for the purpose of assisting the poor. Absent such statutory authorization, it is my opinion that the city may not lawfully make a donation to the hospital for the purpose of assisting the poor.

Based on my staff's phone conferences with you and other local governmental attorneys throughout the state, there appears to be a need for legislation addressing this issue. Hopefully, this matter will be presented to the 1989 Legislative Assembly for consideration.

Sincerely,

Nicholas J. Spaeth

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cc: John Juelson, Hillsboro City Attorney Robert A. Feder, Attorney at Law