

Date Issued: July 24, 1985 (AGO 85-26)

Requested by: Evan E. Lips
State Senator

- QUESTION PRESENTED -

Whether a city or county governing body may pass an ordinance or resolution establishing a percentage of gaming proceeds which must be donated to eligible uses within the jurisdiction of the city or county governing body.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a city or county governing body may not pass an ordinance or resolution establishing a percentage of gaming proceeds which must be donated to eligible uses within the jurisdiction of the city or county governing body.

- ANALYSIS -

Article VIII of the North Dakota Constitution provides for the establishment of political subdivisions within this state. Article VII, Section 2, provides as follows:

Section 2. The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law.

Prior to the creation of this new article to our Constitution, the former constitutional provisions contained similar language providing for the establishment of political subdivisions by the Legislative Assembly. In interpreting that constitutional provision, our Supreme Court has made it clear that cities enjoy only those powers expressly conferred upon them by the Legislature or such powers as necessarily may be implied from the power expressly granted. *Murphy v. City of Bismarck* 109 N.W.2d. 635 (N.D. 1961).

A municipal corporation is an agency of the state. It is purely a creature of statute . . . It takes its powers from the statutes which give it life, and has none which are not either expressly or impliedly conferred thereby or essential to effectuate the purposes of its creation. In defining its powers, the rule of strict construction applies, and any doubt as to their existence or extent must be resolved against the corporation. *Lang v. City of Cavalier* 228 N.W. 819, 822 (N.D. 1930).

North Dakota laws regulating charitable gambling are found in N.D.C.C. chapter 53-06.1, specifically, N.D.C.C. section 53-06.1-03(3)(b), states as follows:

53-06.1-03. LICENSURE - EXCEPTIONS FOR RAFFLES AND BINGO - CITY AND COUNTY LICENSURE - FEES - SUSPENSION AND REVOCATION.

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3. * * *

- b. Class B license applicants must first secure approval of the proposed site or sites on which it intends to conduct games of chance under this chapter from the governing body of the city, if within city limits, or the county, if outside city limits, where the site or sites are located. This approval or permit, which may be granted at the discretion of the governing body, must accompany the license application to the attorney general

The applicable Administrative Rule, N.D.A.C. section 10-04-04-06, provides as follows:

10-04-04-06. SITE APPROVALS. Site authorizations are issued at the discretion of the city or county governing body. An applicant has no absolute right to receive a site approval from the governing body. The governing body, therefore, may reject applications for a site approval or restrict a site approval in order to limit the amount of gaming activity within its jurisdiction.

Administrative Rules such as N.D.A.C. section 10-04-04-06, have the force and effect of law until amended or repealed by the administrative agency which issued the rules or until declared invalid by a final court decision. N.D.C.C. section 28-32-03(3).

N.D.A.C. section 10-04-04-06 allows a city or county governing body to place restrictions on a site approval "in order to limit the amount of gaming activity within its jurisdiction." There is no language in this rule or elsewhere in state law specifically allowing a city or county governing body to restrict a site authorization by setting a percentage or other amount of gaming proceeds which must be donated to eligible uses within the jurisdiction of that city or county.

Eligible uses for gaming funds are set forth in N.D.C.C. section 53-06.1-01(6). There is no language in that statute restricting eligible uses to only those in the State of North Dakota or allowing the cities to place any further restrictions on those particular uses.

Therefore, there is no authority given to cities or counties to restrict the use of funds by gaming organizations. Cities or county governing bodies may only restrict site authorizations "to limit the amount of gaming activity within its jurisdiction." It is my opinion that cities and counties may not pass an ordinance or resolution restricting the use of gaming net proceeds.

The powers of cities and counties are provided for by the North Dakota Legislature. Thus, those persons who are desirous of providing cities and counties with the ability to regulate the distribution of gaming proceeds within their jurisdictions must present their concerns to the 1987 Legislative Assembly.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 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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