

**LETTER OPINION
2003-L-22**

March 26, 2003

Mr. Howard D. Swanson
Grand Forks City Attorney
PO Box 12909
Grand Forks, ND 58208-2909

Dear Mr. Swanson:

Thank you for your letter asking whether the creation of an enterprise fund to grant monies to groups and organizations sponsoring special events and activities by Grand Forks is permissible under North Dakota law. According to information you supplied, the city council approved a budget of \$100,000 for the 2003 special events program. The program fund is derived from a portion of the city sales tax committed to economic development. The fund provides matching grants for conducting and sponsoring special cultural, historic, tourist, and recreational events as a component of the city's economic development activities.

Grand Forks is a home rule city. A home rule city can acquire the powers set out in N.D.C.C. § 40-05.1-06, including the right to control its finances and fiscal affairs; to levy and collect taxes; and 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(2) and (10). Those powers are set out in the Grand Forks city home rule charter. See Grand Forks Home Rule Charter, article III(b) and (j). The charter also specifically permits a 1% gross retail sales tax dedicated to a number of purposes, including economic development. Grand Forks Home Rule Charter, article III(p)(1).

The city has also enacted ordinances imposing sales and use taxes, part of the proceeds of which are allocated for economic development activities. See Grand Forks City Code §§ 22-0102, 22-0102.1, and 22-0123(1)(A). One of these ordinances describes and authorizes the use of tax revenues for economic development purposes. Grand Forks City Code § 22-0123(4) provides:

Any fees, taxes, penalties, or other charges imposed by this article and appropriated or allocated for economic development activities by the city council may be used directly or indirectly in the encouragement and/or

creation of new jobs, enhancement of economic climate, saving of existing jobs, creation of new wealth, enhancement of local property tax base, encouragement of public enterprises, private enterprises, public/private partnerships or enterprises, encouragement of capital investment, the improvement of the quality of life within the region, the encouragement of tourism and local events, and the diversification of the local economy. The city council may expend, advance or grant such fees, taxes, penalties, or other charges imposed by this article or may allocate such fees, taxes, penalties, or other charges imposed by this article to the Grand Forks Growth Fund, the Greater Grand Forks Convention and Visitors Bureau or such other entity as the city council may deem prudent, necessary or convenient for economic development activities.

You indicate that the city council has established goals and standards for groups seeking the grant funding.¹ These goals or standards also appear in the program documentation, including the application form you submitted, but apparently are not contained in any of the city implementing ordinances. You also indicate that the city council requires funding applicants to provide detailed information concerning their project or event.² These information requirements are also contained in the program documentation, including the application form, but again do not appear in any of the pertinent ordinances. You also indicate that the city council has established a program description, delegated the administration of the program to the city's Office of Urban Development, approved an application review process which includes a special city council review committee, defined eligible activities and applicants, and established reporting requirements and review criteria.

As noted in a recent opinion from this office:

Our office has previously determined that a home rule city with the authority "to engage in any utility, business, or enterprise" in its home rule charter may

¹ The goals and standards include attraction of visitors from outside the community and region; promotion of economic benefit and expansion of the tax base; promotion of the city as a trade, service, recreation, tourism, or manufacturing center; expansion of cultural opportunities in the city; promotion of health and safety of citizens; and promotion of the development or preservation of the city's cultural, natural, historic, or physical resources.

² The information required includes a description of the event; an outline of the project goals and intended results; a description of the economic impact of the event on the community; a project timetable; an explanation of how the outcome of the event will be evaluated; an explanation of the future of the event; a recitation of efforts to obtain other funding; and an explanation of how the city will benefit from the expenditure of funds for the event or activity.

donate funds to a private entity once it has implemented a properly drafted ordinance allowing such a donation. [N.D.A.G. 98-F-30]. See also [N.D.A.G. 93-F-06, N.D.A.G. 93-F-11].

N.D.A.G. 2002-L-72.

Further:

This office has previously explained that “[a] city may not engage in an enterprise unless it is for a public purpose.” [N.D.A.G. 93-F-40]. 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.

N.D.A.G. 98-F-30.

“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.

Id.

I generally concur with your analysis and conclusions, including that the city has properly adopted a home rule charter and ordinances with the authority to engage in any utility, business, or enterprise and to levy and collect taxes for the purpose of economic development, a recognized public purpose.³ I also concur that there are supervisory controls in place to ensure that the public purpose is met. See notes 1 and 2 above. As you state, the city council has established specific standards, requirements, goals, criteria, and processes for the implementation and administration of the special events grant program.

However, a question arises because these supervisory controls, while approved by the city council, apparently are not contained in any of the applicable city ordinances you have brought to my attention. See N.D.A.G. 93-F-06 (“The ordinance must also provide for supervisory controls to ensure that the public purposes are met.”); accord N.D.A.G.

³ “Economic development is generally recognized as a valid public use or purpose.” City of Jamestown v. Leever's Supermarkets, Inc., 552 N.W.2d 365, 369 (N.D. 1996).

2000-F-19. See also N.D.A.G. 93-F-11 (“the implementing ordinance must be sufficiently detailed so that the public is properly informed of the authority and limits of the enterprise”).

The source of the requirement for supervisory controls cited in the prior opinions is derived from Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965). In that case, in upholding a state loan of public funds to an electric cooperative for transmission of electric power generated for lignite coal, the North Dakota Supreme Court noted that

The safeguards provided for throughout the Act to insure the application of the proceeds of the loan to the purposes intended are unique in preventing the making of a loan for an unauthorized purpose. The Act provides for any supervisory controls to insure that the public objectives of the loan are realized.

Id. at 857. The Supreme Court has elsewhere noted that in construing the powers granted to a city, the rule of strict construction applies. Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980). However, once a city’s powers have been determined (as in the present case), the rule of strict construction no longer applies and the manner and means of exercising those powers are left to the discretion of the city. Haugland v. City of Bismarck, 429 N.W.2d 449, 453-54 (N.D. 1988). The court, in Haugland, went on to note that

Leaving the manner and means of exercising municipal powers to the discretion of municipal authorities implies a range of reasonableness within which a municipality’s exercise of discretion will not be interfered with or upset by the judiciary.

Id. at 454.

It is clear that the city-approved special events program provides for adequate supervisory controls through the city approval of a set amount of use of sales tax revenues earmarked for economic development, a detailed application process requiring, inter alia, a description of the economic impact on the community, measurements of outcome of the event, requirements for matching funding, and an explanation of the benefits of expenditure of funds. Similarly, the applicants must identify which economic development goals are being addressed, including attracting visitors from outside the community or region, promoting economic benefits and expansion of tax base, promotion of the city as a trade, service, recreation, tourism, or manufacturing center, etc. Furthermore, as you noted, the special events program details program administration, the application review process, eligible activities and applicants, reporting requirements, including semi-annual progress reports which include economic benefits accruing to the community, and review criteria. The process also includes a review by the city council review committee.

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While it may have been preferable to include the supervisory controls in the implementing ordinances, the fact remains that the controls are adequate to ensure that the public purpose is being met and are sufficiently detailed to inform the public of the authority and limits of the program. Therefore, it is my opinion that under the facts and circumstances present here, the supervisory controls, when considered in conjunction with the city's charter and ordinances, ensure that the public purpose of economic development is being met and, thus, the special event grants program enterprise fund authorized by the city's home rule charter and implemented through its ordinances is permissible under North Dakota law.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg