

The referenced enclosure on Page 2 has been misplaced and is not available at this time.

LETTER OPINION
96-L-126

June 26, 1996

Mr. R. Jon Fitzner
Valley City City Attorney
PO Box 330
Valley City, ND 58072-0330

Dear Mr. Fitzner:

Thank you for your letter concerning the investment options available to the city under N.D.C.C. § 40-33-12.

You focused on the language in N.D.C.C. § 40-33-12(1) which provides, in part:

When the governing body of the municipality shall determine that there is a cash surplus in the municipal utilities fund over and above any amount necessary to provide adequately for the operation, maintenance, repair, enlargement, alteration, improvement, and extension of the plant or plants, it, in its discretion, may invest the surplus or transfer it or a portion thereof as follows:

1. All or any part of the surplus may be invested by the governing body in interest-bearing bonds of the United States government, the state of North Dakota, or any bonds or special improvement district warrants of the municipality in which the municipal plant is located, . . .

(Emphasis supplied.)

Your question concerns the ability of a city to invest its municipal utility fund surplus in investments in the city other than "any bonds or special improvement district warrants of the municipality" as specifically provided in the statute.

The primary purpose of statutory construction is to determine the intent of the Legislature, which must initially be sought from the language of the statute. Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990); County of Stutsman v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985). "It must be presumed that the Legislature intended all that it said, and that it

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said all that it intended to say." City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940).

Furthermore, cities, including home rule cities, have no inherent power except as expressly conferred upon them by statute or such as may be necessarily implied from the powers expressly granted. Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D. 1980). "In defining a city's powers, the rule of strict construction applies and any doubt as to the existence or the extent of the powers must be resolved against the city." Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980). However, once the city's powers have been determined, the rule of strict construction no longer applies, and except where specifically prescribed by the Legislature, the manner and means of exercising those powers are left to the discretion of the municipal authority. Haugland v. City of Bismarck, 429 N.W.2d 449, 453-454 (N.D. 1988).

The aforementioned language in N.D.C.C. § 40-33-12(1) has been construed rather strictly in a prior letter issued by this office. See Letter from First Assistant Attorney General Paul M. Sand to Mr. William T. DePuy (September 14, 1972) (copy enclosed for your information) (the term bonds of the municipality as used in N.D.C.C. § 40-33-12(1) refers only to general obligation bonds authorized by N.D.C.C. ch. 21-03).

Based on the foregoing and a plain reading of the statute, it is my opinion that N.D.C.C. § 40-33-12(1) does not authorize a city to invest municipal utilities funds surpluses in any instruments of the municipality other than general obligation bonds or special assessment warrants and would not authorize a city to invest such funds in unsecured municipal loans.

You then asked if the city could supersede the restrictions on investments contained in N.D.C.C. § 40-33-12(1) by enacting an ordinance pursuant to its home rule charter.

The city of Valley City has adopted a home rule charter but, according to you, has not yet adopted an ordinance concerning the use of any surplus in its municipal utilities fund. A home rule city's ordinance may supersede state law in the subject areas listed in N.D.C.C. § 40-05.1-06 if those powers are included in the city's home rule charter and the ordinances properly implement the power. N.D.C.C. §§ 40-05.1-05, 40-05.1-06. Among the powers contained in N.D.C.C. § 40-05.1-06 are the powers "[t]o control its finances and fiscal affairs; to appropriate money for its purposes, and make payment of its debts and expenses; to levy and collect taxes, excises, fees, charges, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; to contract debts, borrow money, issue

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bonds, warrants, and other evidences of indebtedness; to establish charges for any city or other services. . . ." N.D.C.C. § 40-05.1-06(2).

These powers are included in Valley City's home rule charter. See City of Valley City, North Dakota, Home Rule Charter Article 3, Section 2(b).

Assuming that the city validly enacted an implementing ordinance under its home rule charter, it is my opinion that such ordinance could, as a proper exercise of N.D.C.C. § 40-05.1-06, expand the types of investments that could be made with a surplus in its municipal utilities fund to include unsecured loans to the city to be repaid at competitive interest rates from the city's general fund.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jjf/pg
Enclosure