

**OPINION**  
**72-457**

November 27, 1972            (OPINION)

Mr. Fred Saefke  
Assistant City Attorney  
Four Eleven Professional Center  
411 North Fourth Street  
Bismarck, North Dakota 58501

Dear Mr. Saefke:

This is in response to your letter in which you ask for an opinion whether or not the Bismarck Municipal Court has jurisdiction over apparent ordinances, violations occurring on the State Capitol Grounds within the City of Bismarck.

To assist in finding an answer to your question, you give us the following citations: Section 113 of the North Dakota Constitution, Sections 29-01-15, 39-03-09(11), 54-21-18, 40-06-01, and 40-20-05, of the North Dakota Century Code.

Basically, cities have only such authority as granted to them by the Constitution of the state or by the Legislature, and as may be necessary implied from the grant. The concept of two separate sovereign governments; namely, municipal and state, cannot be recognized or accepted. A municipality is a subdivision of the state. It exists only by authority under Section 130 of the North Dakota Constitution as implemented by the Legislature.

In 56 Am. Jur.2d. Municipal Corporations, Section 409, Page 451, it is stated that: "A municipal ordinance does not apply to the state, nor can it be enforced against officers of the state, as to do so would affect that performance of their public duties." The footnotes supporting this statement relate to ordinances pertaining to building codes and similarly related type ordinances. In 62 C.J.S. Municipal Corporations Section 157, Page 319, it is stated that the property of the state is exempt from the municipal regulation in the absence of waiver on the part of the state of its right to regulate its own property and such waiver will not be presumed. See also Hall vs. City of Taft, 302 P.2d. 574 and Board of Regents of Universities v. City of Tempe, 356 P.2d. 399, as well as Ex parte Means, 93 P.2d. 105.

Most of the cases that we found in our research pertain to the regulation of buildings and similarly related matters such as plumbing codes, qualification of personnel engaged in electrical or plumbing work, etc.

The general rule of law relied upon in most of these cases is that the state may not be subordinated to ordinances of a city. The state has the inherent power to regulate and control its own activities.

The regulation and control of state properties and buildings generally has been placed in the hands of the state Director of Institutions. See Section 54-21-18 of the North Dakota Century Code.

In furtherance of the concept that the state will regulate its own affairs, the Legislature enacted and amended Section 39-03-09 in which the Highway Patrol has been given the power and duty of a peace officer for enforcing the provisions of the North Dakota Century Code at and on the State Capitol Grounds.

After having examined the various authorities, and being mindful of the relation between the state and cities, it is our opinion that city ordinances of the city of Bismarck do not apply to any activity of the state in its governmental or proprietary capacity.

It is our further opinion that in matters not affecting the governmental or proprietary activities of the state, city ordinances may be enforced if there is no state law or regulation covering the same subject matter. Under this concept, persons who are not performing a governmental function who may be violating a city ordinance on the Capitol Grounds, could be prosecuted for such violation in the municipal court if it is not in conflict with a state law or regulation governing the acts in question.

No specific facts were given upon which the opinion was requested. Consequently, we were required to treat this matter on an abstract basis. Under certain specific facts, it is conceivable that there may be concurrent jurisdiction. In other instances, it might be necessary to examine the regulation promulgated by the Director of Institutions to determine if the regulation covers the same subject matter in the ordinance. It is also conceivable that where governmental activities are not involved under certain circumstances, the ordinance could be enforced under the concurrent jurisdiction concept.

Enclosed for your additional consideration is a letter dated January 26, 1959, addressed to H. H. Joos, as well as a letter dated August 14, 1958, to the same person.

Sincerely yours,

HELGI JOHANNESON

Attorney General