

Office of the Attorney General
State of North Dakota

Opinion No. 85-15

Date Issued: April 30, 1985

Requested by; Howard D. Swanson
Assistant City Attorney
City of Grand Forks

--QUESTION PRESENTED--

Whether cities, including home rule cities, may authorize a lottery or other games of chance within the city limits.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that cities, including home rule cities, may not authorize a lottery or other games of chance to be conducted within the city limits except as provided in N.D.C.C. Ch. 53-06.1.

--ANALYSIS--

Article VII of the North Dakota Constitution provides for the establishment of political subdivisions within this state. Article VII, § 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).

With respect to the subject of lotteries and other forms of games of chance, a review of N.D.C.C. Chs. 40-05 and 40-05.1 fails to discover any express legislative authority provided to cities or home rule cities to engage in or regulate such forms of gaming. Indeed, a review of the North Dakota Constitution finds a prohibition against lotteries and other games of chance although an exemption is provided for charitable gaming. Article XI, § 25, of the North Dakota Constitution states as follows:

SECTION 25. The legislative assembly shall not authorize any game of chance, lottery, or gift enterprises, under any pretense, or for any purpose whatever. However, the legislative assembly may authorize by law bona fide nonprofit veterans', charitable, educational, religious, or fraternal organizations, civic and service clubs, or such other public-spirited organizations as it may recognize, to conduct games of chance when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, fraternal, religious, or other public-spirited uses.

In implementing the authority provided to it by Article XI, § 25, the North Dakota Legislature has provided for charitable gaming in N.D.C.C. Ch. 53-06.1. Legislative authority has been provided to cities in the regulation of raffles and bingo under certain situations. N.D.C.C. §§ 53-06.1-03, 53-06.1-05. However, the legislature has not authorized cities to regulate other forms of games of chance.

In summary, the constitution and statutes of North Dakota do not provide cities with the necessary authority to conduct or authorize lotteries or other forms of games of chance except for limited forms of charitable gaming. Only charitable gaming is permitted by the constitution and the authority to regulate such forms of games of chance lies with the legislative assembly which, in turn, has delegated some of its regulatory authority to cities in specific areas. As cities do not have express constitutional or statutory authority to authorize or regulate lotteries or other forms of games of chance, except for raffles and bingo in limited circumstances, and as the constitution currently prohibits all lotteries or other forms of games of chance other than those specified for certain charitable purposes, cities in this state do not have the needed authority to authorize or conduct lotteries or other forms of games of chance.

This conclusion is in line with decisions of courts of various jurisdictions across the country. Generally, the rule is that ordinances as to forms of gambling, including lotteries, must conform and not conflict with state statutes except to the extent that such conflict is permitted by state law itself. 6 E. McQuillin, Municipal Corporations, § 24.127 (3rd Ed. 1980). City ordinances, including those passed by home rule cities, cannot circumvent general laws

regulating or prohibiting gaming nor can such ordinances allow forms of gaming which otherwise are prohibited under state law. Vick v. People, 445 P.2d 220 (Col. 1968); State v. Youngstown, 40 N.E.2d 477 (Ohio Ct. App. 1941). See also, Birmingham v. Richard, 203 So.2d 692 (Ala. Civ. App. 1967) (in the absence of an express grant of power to enact an ordinance regulating gaming, such an ordinance is inconsistent with state law and is void).

Therefore, it is my opinion that cities, including home rule cities, may not authorize lotteries or other games of chance. However, cities may implement the authority provided them by the legislature in the regulation of certain forms of charitable gaming as found in N.D.C.C. Ch. 53-06.1.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Nicholas J. Spaeth
Attorney General

Prepared by: Terry L. Adkins
Assistant Attorney General