

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-21

Date issued: September 11, 1990

Requested by: Representative W. C. Skjerven

- QUESTION PRESENTED -

Whether a county job development authority may be the subject of an initiated home rule county ordinance pursuant to N. D. C. C. ' 11-09.1-05(5).

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a county job development authority may be the subject of an initiated home rule county ordinance pursuant to N. D. C. C. ' 11-09.1-05(5) because it is not a state-regulated industry or activity.

- ANALYSIS -

The powers of a home rule county are provided for at N. D. C. C. ' 11-09.1-05. Generally, the powers enumerated in this list, so long as they have been included in the home rule charter and implemented by ordinances passed pursuant to the charter, supersede state law which may conflict on the particular subject. N. D. C. C. ' 11-09.1-04; Litten v. City of Fargo, 294 N. W. 2d 628 (N. D. 1980).

However, N. D. C. C. ' 11-09.1-05(5), which relates to home rule county ordinances, contains a restriction or limitation on the scope of that home rule county power. Subsection 5 concerns the adoption, amendment, repeal, initiative, referral, enforcement, and penalties for violations of ordinances carrying out a home rule county's governmental and proprietary powers. The second sentence of subsection 5 provides that "this subsection does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency." The term "regulate" is not defined within N. D. C. C. ch. 11-09.1.

The authority for a county job development authority is provided at N. D. C. C. ch. 11-11.1. The method whereby a job development authority may occur is discussed. N. D. C. C. ' 11-11.1-01. The manner in which members of the job development authority board of directors are appointed is also discussed. Id.; N. D. C. C. ' 11-11.1-02. The powers and duties of job development authorities are listed at N. D. C. C. ' 11-11.1-03 and a tax levy for job development authorities is provided for at N. D. C. C. ' 11-11.1-04.

State law addresses the subject of a county job development authority. Within N. D. C. C. ch. 11-11.1 there are provisions which limit the operation of a

county job development authority. However, it is not clear whether the state "regulates" a county job development authority. If state regulation of this activity exists, N.D.C.C. ' 11-09.1-05(5) forbids a home rule county from addressing this particular industry or activity by way of an ordinance. If no state regulation of this activity or industry exists, however, N.D.C.C. ' 11-09.1-05(5) would enable the home rule county to address the subject through a home rule county ordinance.

In 1985, the Legislature enacted House Bill No. 1083 which provided for county home rule within North Dakota. 1985 N.D. Sess. Laws ch. 152. The provisions on county home rule are now found within N.D.C.C. ch. 11-09.1. In its original form, House Bill No. 1083 did not include the second sentence now found at N.D.C.C. ' 11-09.1-05(5). It is this sentence which forbids a home rule county from regulating any industry or activity which is regulated by state law or rule. This sentence was added when House Bill No. 1083 was before the Senate Political Subdivisions Committee. The sentence, along with other amendments, were prepared by the Legislative Council in response to several concerns raised with respect to House Bill No. 1083. John Walstad, representing the Legislative Council, explained the addition of the second sentence to what is now N.D.C.C. ' 11-09.1-05(5) as follows:

The concern here was that the county could get into reclamation, siting, and things like that that are already regulated under state law. This would provide that home rule counties would have no authority in regulatory areas where state law or rules adopted by a state agency already govern the activity or industry.

Hearing on H. 1083 Before the Senate Political Subdivisions Comm., 49th Leg., (March 15, 1985) (statement of Mr. Walstad). No further legislative history surrounding the adoption of this second sentence to N.D.C.C. ' 11-09.1-05(5) is available.

Mr. Walstad's testimony before the Senate Political Subdivisions Committee concerning the addition of the second sentence to what is now N.D.C.C. ' 11-09.1-05(5) involves matters which are subject to substantial state management and control. Reclamation and siting matters are handled by the Public Service Commission and are subject to substantial state administrative regulation. Indeed, the ordinary sense definition of the term "regulate" is defined as bringing under the control of law or constituted authority a particular subject or industry. Webster's New Collegiate Dictionary at 974 (1975).

It is my opinion, based upon the use of the term "regulate" within N.D.C.C. ' 11-09.1-05(5) and the limited legislative history available concerning the addition of that language, that the Legislature only intended to prevent a home rule county from addressing an activity or industry which is subject to substantial state control, management, or supervision such as matters involving the Public Service Commission. By using the term "regulate" the Legislature did not intend to forbid a home rule county from regulating an industry or activity already addressed by state law.

This conclusion complies with the spirit of the home rule authority bestowed

upon a home rule county. The last paragraph to N. D. C. C. ' 11-09.1-05 declares that a home rule county should have "the full right of self-government in all matters within the powers enumerated in this chapter." If a home rule county cannot enact an ordinance which addresses a subject already discussed or addressed by state law, although it is not subject to substantial or significant regulation by state law or state administrative rules, the purpose of the home rule authority would be thwarted.

For example, state law addresses the transfer of county property (N. D. C. C. ch. 11-27), the county budget (N. D. C. C. ch. 11-23), and county zoning (N. D. C. C. ch. 11-33). None of these activities are subject to state regulation other than restrictions which may be found within the particular sections of law addressing these subjects. Yet, if the term "regulate" is given an expansive definition referring to any subject addressed by state law, a home rule county could not address any of these subjects by way of a home rule county ordinance. I am confident that the Legislature did not intend such a result by the inclusion of the second sentence to N. D. C. C. ' 11-09.1-05(5).

The primary goal of statutory construction and interpretation is to fulfill the objective and intent of the Legislature. Larson v. Wells County Water Resource Board, 385 N.W.2d 480 (N.D. 1986). To fulfill the objective and intent of the Legislature in establishing home rule counties and authorizing self-government over local matters, it is my opinion that a job development authority is not an activity or industry which is "regulated" by state law or rules adopted by a state agency. It is not an activity subject to substantial state control or supervision. As such, a home rule county ordinance may address the manner in which a job development authority is administered within that county so long as the power of initiative provided for by N. D. C. C. ' 11-09.1-05 is included within a home rule county charter and implemented by home rule county ordinance.

- 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.

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