

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-06

Date issued: June 2, 1993

Requested by: Douglas D. Sletten, Riverdale City Attorney

- QUESTIONS PRESENTED -

I.

Whether a city may make home improvement loans to its residents.

II.

Whether a city may deposit funds in a trust fund and receive periodic payments of principal and interest from the fund.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a city without home rule authority may not make home improvement loans to its residents unless the loans are made through the Community Development Block Grant Program. It is my further opinion that a home rule city may have the authority to make home improvement loans to its residents.

II.

It is my opinion that a city may not deposit funds in a trust fund and receive periodic payments of principal and interest from the fund unless it is a home rule city with the authority to do so.

- ANALYSIS -

I.

The question of whether a city may make home improvement loans to its residents implicates Article X, Section 18 of the North Dakota Constitution which provides:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business . . . , but neither the state nor any political subdivision thereof shall

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otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor . . . .

N. D. Const. art. X, ? 18. This provision "does not prohibit the making of loans or giving of credit or making donations in connection with a city's engaging in any industry, enterprise, or business . . . . What it does prohibit is for a city 'otherwise' to make loans or give its credit or make donations. In other words, making loans or giving credit may be done in connection with the city's engaging in any permissible industry, enterprise, or business, but not otherwise." Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-238 (N.D. 1964).

Cities have only those powers expressly conferred upon them by the Legislature or those necessarily implied from the powers expressly granted. Parker Hotel Co. v. City of Grand Forks, 177 N.W.2d 764, 768 (N.D. 1970). Thus, whether a city has the authority to make home improvement loans to its residents depends upon whether a city is authorized by statute to engage in an industry, enterprise, or business through which home improvement loans to its residents may be made.

The only statute that authorizes a city to engage in an industry, enterprise, or business through which the city may have the authority to make home improvement loans is N.D.C.C. ? 40-05-01(74). This statute authorizes a city to make home loans through the Community Development Block Grant Program. Such loans must be made in accordance with and for the purposes described in 42 U.S.C. 5301 et seq. Therefore, it is my opinion that a city without home rule authority may not make home improvement loans to its residents unless the home improvement loans are made through and authorized by the Community Development Block Grant Program.

A home rule city, however, is authorized to "engage in any . . . business, or enterprise permitted by the constitution or not prohibited by statute" if that authority is included in the home rule charter and properly implemented through ordinances.

N.D.C.C. ? 40-05.1-06(10). Article X, Section 18 of the North Dakota Constitution allows a city to make loans to private individuals, provided such loans are made pursuant to an industry, enterprise, or business authorized by statute. See Letter from Attorney General Heidi Heitkamp to Walter M. Lipp (April 12, 1993). N.D.C.C. ? 40-05.1-06(10) would allow home rule cities with proper authority in their charter and ordinances to make such loans. In addition, there is no statute which prohibits cities from creating an enterprise or

business through which the cities could make home improvement loans to private individuals. Therefore, it is my further opinion that a home rule city may make home improvement loans to its residents if the authority in N.D.C.C. ? 40-05.1-06(10) is included in the home rule charter and the city has passed an ordinance creating a business or enterprise through which the city may make home improvement loans. The city's engaging in such a business or enterprise, however, must be for a public purpose. See Green v. Frazier, 176 N.W. 11 (N.D. 1920); Ferch v. Housing Authority of Cass County, 59 N.W.2d 849 (N.D. 1953); Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965); 1991 N.D. Op. Att'y Gen 57. The ordinance must also provide for supervisory controls to ensure that the public purposes are met. See Kelly v. Guy, 133 N.W.2d 853 (N.D. 1953).

## II.

The trust fund proposed would work similar to an annuity. The city would deposit money raised by sale of land into the trust fund on a regular basis. This principal would draw interest, and, at regular intervals, payments of interest and principal would be made to the city. Moneys in the trust fund would be invested in accordance with state statutes.

A city must take into account its unencumbered cash on hand and its estimated income when determining the amount of money it needs to levy to meet its budget requirements. N.D.C.C. ?? 40-40-09, 40-40-08. There is no statute that authorizes a city to set up a trust fund allowing the money in or to go in the trust fund to be encumbered so that it need not be taken into account when determining the amount of money the city needs to levy to meet its budget requirements. Therefore, it is my opinion that a city without home rule authority may not create a trust fund and receive periodic payments of principal and interest from the fund.

However, if the city is a home rule city, it may have or acquire the authority to create a trust fund. If included in the home rule charter and properly implemented through an ordinance, a home rule city may "control its finances and fiscal affairs." N.D.C.C. ? 40-05.1-06(2). Therefore, it is my further opinion that a home rule city may create a trust fund and receive periodic payments of principal and interest from the fund if the authority in N.D.C.C. ? 40-05.1-06(2) is included in the home rule charter and the authority to create a trust fund as proposed is properly implemented through an ordinance.

- EFFECT -

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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 questions presented are decided by the courts.

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