STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-15

Date issued: April 19, 1994

Requested by: Jon Fitzner, Valley City City Attorney

- QUESTIONS PRESENTED -

I.

Whether a home rule city may enact an ordinance requiring the acquisition of a local retail license to sell tobacco products within the city.

II.

Whether the hearing process for suspension or nonrenewal of the local license as outlined in the proposed ordinance is legally sufficient.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a home rule city may enact an ordinance requiring the acquisition of a local retail license to sell tobacco products within the city.

II.

It is my further opinion that whether the hearing process for suspension or nonrenewal of the local license as outlined in the proposed ordinance is legally sufficient, is a question regarding the interpretation of a city ordinance and does not have statewide significance; therefore, I will refrain from issuing an opinion on this question.

- ANALYSES -

North Dakota cities, including home rule cities, are creatures of the Legislature and have only those powers expressly granted to them or necessarily implied from the grant. Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980); Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980). "In defining a city's powers the rule of strict construction

applies and any doubt as to the existence or extent of the powers must be resolved against the city." Roeders v. City of Washburn, 298 N.W.2d at 782.

> Once a municipality's powers have been determined, however, 'the rule of strict construction no longer applies, and the manner and means of exercising those powers where not prescribed by the Legislature are left to the discretion of the municipal authorities.' Leaving the manner and means of exercising municipal powers to the discretion of municipal authorities implies a range of reasonableness within which a municipality's exercise of discretion will not be interfered with or upset by the judiciary.

Haugland v. City of Bismarck, 429 N.W.2d 449, 453-54 (N.D. 1988) (citation omitted).

N.D.C.C. ch. 40-05.1 provides for home rule authority in cities. Under this chapter a city, pursuant to certain powers enumerated in statute and included in the city's home rule charter, may enact ordinances in matters of local concern which, unless preempted, supersede general state statutes on the matter.

The following are among the powers which may be provided for in a city's home rule charter:

> 3. To fix the fees, numbers, terms, conditions, duration, and manner of issuing and revoking licenses in the exercise of its governmental police powers.
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> . . . .
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> 7. To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof.
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> . . . .
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> 9. To define offenses against . . . the public

> health, safety, morals, and welfare, and provide penalties for violations thereof.
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> . . . .

N.D.C.C. ? 40-05.1-06. The foregoing powers are all included in Valley City's home rule charter. In my opinion these general provisions, when read together, give a home rule city the authority to require a local retail tobacco license as a regulatory measure in the exercise of its police powers to provide for the public health, safety, morals, and welfare unless such authority has otherwise been preempted by state law. C.f. 1982 N.D. Op. Att'y Gen. 202 (citing subsection 3 of N.D.C.C. ? 40-05.1-06 as authority for a home rule city to enact an ordinance fixing the fees for liquor licenses.)

North Dakota's Tobacco Products Tax Law requires that all persons selling tobacco products in this state must first acquire a license issued by the state. See N.D.C.C. ch. 57-36, ? 57-36-02. State law also provides for a criminal penalty for the sale or furnishing of tobacco products to minors. See N.D.C.C. ? 12.1-31-03.

"[M]unicipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state." State v. Gronna, 59 N.W.2d 514, 531 (N.D. 1953) (quoting 37 Am. Jur., pp. 787-88). The preemption doctrine is based upon the proposition that a city, as an agent of the state, cannot act contrary to the state. See C.I.C. Corp. v. East Brunswick Township, 628 A.2d 753, 756 (N.J. Super. Ct. App. Div. 1993). In general, preemption may be either expressed or implied.[1] Implied preemption occurs when a statute does not expressly state that its regulation is exclusive, but when nevertheless, an intent to preempt local regulatory authority is implied from the whole scope and purpose of the statutory scheme. See Bravo Vending v. City of Rancho Mirage, 20 Cal. Rptr.2d 164, 169 (Cal. App. 4th Dist. 1993). Ultimately, the question of preemption is one of legislative intent. See e.g., 1991 N.D. Op. Att'y Gen. 72 (concluding that the state intended to preempt, to a large extent, local governmental regulation of pesticides), and 1993 N.D. Op. Att'y Gen. 96 (concluding, in

[1]See N.D.C.C. ? 12.1-27.1-12 for an example of express preemption.

effect, that the state intended to preempt a home rule city's abolishment of its municipal court).

Thus, the issue becomes whether and to what extent the regulation and licensing of tobacco dealers has been preempted by state law. North Dakota's tobacco products tax law provides that each dealer and distributor of tobacco products must first be licensed by the Attorney General. See N.D.C.C. ch. 57-36. The clear purpose of this licensing requirement is to facilitate the state's cigarette excise tax scheme. Nothing in N.D.C.C. ch. 57-36 suggests that the licensing requirement is related in any way to the protection of the public health, safety, morals, or general welfare.

In my opinion, N.D.C.C. ch. 57-36 unmistakably reserves to the state the power to license and regulate tobacco products for the purposes outlined but does not purport to regulate every aspect of the sale or dispensing of tobacco products in North Dakota. See Take Five Vending v. Town of Provincetown, 615 N.E.2d 576 (Mass. 1993). Therefore, it is my opinion that N.D.C.C. ch. 57-36 does not preempt all local regulatory authority over the sale or dispensing of tobacco products.

As a general rule, the power to regulate includes the power to license as a means of regulation. See 9 McQuillin Municipal Corporations ? 26.27 (3rd ed. 1986); 51 Am. Jur.2d Licenses and Permits ? 93. A local licensing requirement is not inherently in conflict with a state license on the same trade or business. See 51 Am. Jur. 2d Licenses and Permits, ? 20; 9 McQuillin Municipal Corporations ? 26.23a; State v. Simpson, 49 N.W.2d 777, 788 (N.D. 1951). Further, a local licensing ordinance designed to discourage activities otherwise prohibited by a criminal statute (i.e., N.D.C.C. ? 12.1-31-03) is not by that fact transformed into an unauthorized criminal provision. See Bravo Vending v. City of Rancho Mirage, 20 Cal. Rptr.2d at 180.

Given the above it is my opinion that the city of Valley City may require a local retail tobacco license and revoke or suspend such license in the event it is determined that a licensee has sold or otherwise dispensed tobacco products to a minor.

II.

The proposed ordinance provides for the suspension or

revocation of the local license for the violation of any city ordinance or state law, including the proposed ordinance's prohibition against selling or otherwise dispensing of tobacco products to minors. As a matter of policy this office generally does not interpret and give legal opinions on city ordinances because they usually do not have statewide significance. However, I do offer the following discussion for your assistance.

The 14th Amendment to the United States constitution and its state counterpart, Article I, Section 12 of the North Dakota Constitution, protect against governmental deprivations of property or liberty without due process. "The inquiry in resolving due process claims is twofold: whether a constitutionally protected property or liberty interest is at stake and, if so, whether minimum due process requirements were met." Ennis v. Williams County Board of Commissioners, 493 N.W.2d 675, 678 (N.D. 1992).

Initially, it is important to note that property interests do not derive from the due process clause itself, but rather emanate from an independent source such as state law. Id. "The hallmark of a property right is an individual entitlement, grounded in state law which cannot be removed except for cause." Id. A license which can be revoked or suspended only upon a showing of cause is a protected property interest. Barry v. Barchi, 443 U.S. 55, 64 (1979). The proposed local retail tobacco license in this case would constitute a protected property interest.

"An essential principal of due process is that a deprivation of . . . property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Froysland v. North Dakota Workers Compensation Bureau, 432 N.W.2d 883, 892 (N.D. 1988) quoting Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985). The notice and type of hearing required are determined by the competing interests involved. Goss v. Lopez, 419 U.S. 565, 579 (1975).

At a minimum, due process requires that parties be given notice of the general nature of the action and the opportunity to prepare and present their objections. Estate of Robertson v. Cass County, 492 N.W.2d 599, 602 (N.D. 1992). The notice should adequately apprise the parties of the issues to be determined so there is no unfair surprise. Id.

With respect to what type of hearing is required, the United States Supreme Court has instructed that due process does not require a full blown evidentiary hearing akin to a trial in court prior to the deprivation of a property interest in all cases. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Id. quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

In Mathews the United States Supreme Court explained the factors to be considered in determining the timing and nature of the hearing required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. See also Powell v. Hjelle, 408 N.W.2d 737, 738 (N.D. 1987).

"Due process is flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. at 334, quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Accordingly, resolving the issue of whether the procedures outlined in the proposed ordinance are sufficient requires an analysis of the private and governmental interests affected.

- 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.

ATTORNEY GENERAL'S OPINION 94-15
April 19, 1994

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