LETTER OPINION
94-L-123

April 15, 1994

Mr. Charles C. Whitman
Bismarck City Attorney
P.O. Box 5503
Bismarck, ND 58502-5503

Dear Mr. Whitman:

Thank you for your letter asking whether a home rule city can charge a fee to the federal and state governments and to tax exempt charitable or nonprofit entities for fire and police services, where the services to be charged for are generally available to both tax exempt and nonexempt entities alike but where only the tax exempt entities will be charged.

The North Dakota Constitution provides:

> **Section 6.** The legislative assembly shall provide by law for the establishment and exercise of home rule in counties and cities. No home rule charter shall become operative in any county or city until submitted to the electors thereof and approved by a majority of those voting thereon. In granting home rule powers to cities, the legislative assembly shall not be restricted by city debt limitations contained in this constitution.

N.D. Const. art. VII, ? 6.

With respect to home rule city powers, the Legislature has provided:

> **40-05.1-06. Powers.** From and after the filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this chapter, such city, and the citizens thereof, shall, if included in the charter and implemented through ordinances, have the following powers set out in this chapter:
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> . . . .
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> 2. To control its finances and fiscal affairs; to appropriate money for its purposes, and make payment of its debts and expenses; to levy and collect taxes, excises, fees, charges, and

special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; to contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; to establish charges for any city or other services, and to establish debt and mill levy limitations, provided that all real and personal property in order to be subject to the assessment provisions of this subsection shall be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments.

. . . .

The statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters.

N.D.C.C. ? 40-05.1-06.

With respect to these sections, our Supreme Court has stated:

It necessarily follows that in order to determine what broad powers are given to home rule cities we must examine the various provisions of ? 40-05.1-06. If the authority or power to enact an ordinance on a specific subject is not found in ? 40-05.1-06 or in ch. 40-05.1, or some other comparable statute, then a strong presumption exists that the city will be governed by the laws generally applicable to cities. . . .

In our view, to permit a conclusion that an ordinance supersedes a state law, providing the charter and implementing ordinance requirements have been met, it is not only essential that the power given to the city by the legislature is clearly expressed or necessarily implied from the grant but also that it conflicts with the laws generally applicable to cities.

Litten v. City of Fargo, 294 N.W.2d 629, 632, 634 (N.D. 1980).

A home rule city may therefore enact ordinances that supersede state statutes only if the subject matter is dealt with as part of home rule city powers under

N.D.C.C. ? 40-05.1-06, and if the power is contained in the city's charter and implemented by ordinance. Id. This power to supersede statute does not extend to superseding constitutional provisions, except on the subject specifically stated in Article VII, Section 6 of the North Dakota Constitution, with respect to city debt limitations. Cf. 1976 N.D. Op. Att'y Gen. 17; see Mollner v. City of Omaha, 98 N.W.2d 33, 37 (Neb. 1959). Consequently, a home rule city would not have the authority to supersede the provisions of Article X, Section 5 of the North Dakota Constitution exempting from taxation the property of the federal and state governments and of other tax exempt charitable or nonprofit entities.

"Whether an exaction is called a 'fee' or a 'tax' is of little weight in determining what it really is." Scott v. Donnelly, 133 N.W.2d 418, 423 (N.D. 1965). It is the nature of the charge rather than its designation that is controlling. Id. "A 'tax' is an enforced contribution for public purposes which in no way is dependent upon the will or consent of the person taxed." Ralston Purina Company v. Hagemeister, 188 N.W.2d 405, 409 (N.D. 1971). "[A]ny payment exacted by the State as a contribution toward the cost of maintaining governmental functions, where special benefits derived from their performance are merged in the general benefit, is a tax." Menz v. Coyle, 117 N.W.2d 290, 297 (N.D. 1962). The theory of the Menz case would apply equally to cities.

Conversely, fees "are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society,' they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (citations omitted). See also 1993 N.D. Op. Att'y Gen. 25.

Your query relates to a charge for services generally available to all entities in the city. The entities cannot choose to receive the services nor decline them and they do not benefit the party paying the charge in a manner not shared by other members of society within the city. Rather, the charges would appear to be an enforced contribution for public purposes not based on the will or consent of the entity being charged.

Therefore, regardless of how the charge was imposed, that is, on an annual premium basis or on a per occurrence basis, the charge you are contemplating would be a compelled charge to support general (or core) government services and not to reimburse the city for certain specified expenses in providing an individual service. See U.S. v. City of Huntington, 999 F.2d 71, 73-74 (4th Cir. 1993). Further, the fact that the contemplated charge would only be applied to tax exempt property is another indication that the charge is a tax to support core government services and not a fee to cover the costs of a service rendered.

Therefore, it is my opinion that a home rule city may not charge a fee to the federal or state governments nor to tax exempt charitable or nonprofit entities for fire and police services where the services to be charged for are generally available to all entities within the city, tax exempt or non-tax exempt alike, and where only tax exempt entities would actually be charged, because the charge imposed would be a tax and the entities you propose to charge are tax exempt under the constitution of North Dakota. See N.D. Const. art. X, ? 5.

For your information, I am attaching a copy of a 1987 letter opinion from this office concerning a special fee imposed by the city of Grand Forks for fire department operations against state and federal installations and fraternal organizations. (Letter from Attorney General Nicholas J. Spaeth to State Senator Wayne Stenehjem (March 6, 1987)). You will note that the opinion to Senator Stenehjem distinguished the fire protection services charge as not being a tax but rather a service fee imposed on the University for costs of providing a specific service in addition to its traditional fire protection obligations. Through a conversation with the Grand Forks city fire department, my staff has learned that the Grand Forks city ordinance in question in that opinion has been repealed, at least partly due to difficulties in actually collecting the fee.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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Enclosure