STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-03

Date Issued: February 27, 1996

Requested by: Representative James Boehm

- QUESTIONS PRESENTED -

I.

Whether a city may regulate unimproved or gravel parking lots and prohibit driving vehicles from such a parking lot to a paved street without a permit.

II.

Whether the status of a roadway within a city as part of the state highway system or the interstate or national highway system prohibits city regulation of traffic upon that roadway.

III.

Whether a city may compel a property owner to pave a parking lot.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a city may regulate unimproved or gravel parking lots and restrict direct access from an unimproved or gravel parking lot onto a hard surfaced paved street or road within that city’s jurisdiction.

II.

It is my further opinion that a city may regulate traffic upon a roadway within the city's jurisdiction which is part of the state highway system or the interstate or national highway system, except that speed limits must be set with the consent of the director of the State Department of Transportation.

III.

It is my further opinion that a city may require a property owner to pave a parking lot without compensation to protect the public’s health, safety, morals, or welfare with certain restrictions.

- ANALYSES -

I.

This opinion involves certain ordinances of the City of Mandan. The Mandan ordinances prohibit driving motor vehicles from unimproved or gravel parking lots to paved roadways within industrial and commercial districts of the city without a permit from the city for each vehicle. Mandan Municipal Code (M.M.C.) §§ 10-07-03, 10-07-04. Although some commercial or industrial businesses could license all vehicles, including those of employees, the practical effect of this ordinance is to require retail businesses to pave their parking lots due to the impossibility of licensing all customers. The purpose of this prohibition is to prevent a public nuisance by motor vehicles which drag dirt, mud, gravel or debris from the parking lot to the paved street because this debris clogs gutters and sewers; increases the cost of street maintenance; creates dangerous conditions which may cause vehicles to skid or be unable to brake quickly; and causes injury to people or property damage to vehicles on the road from thrown gravel. M.M.C. § 10-07-01.

Cities are agencies of the state and only have the powers expressly conferred upon them by statute or such as may be necessarily implied from the powers expressly granted. Roeders v. City of Washburn, 298 N.W.2d 779, 782 (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." Id. However, once a city's powers have been determined, the rule of strict construction no longer applies, and except where specifically prescribed by the Legislature, the manner and means of exercising those powers are left to the discretion of the municipal authorities. Haugland v. City of Bismarck, 429 N.W.2d 449, 453-54 (N.D. 1988). "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." Id. at 454. A city may provide the details necessary for full exercise of any power conferred by statute when the manner of exercising the power is not otherwise specified. N.D.C.C. § 40-06-07. After it is determined that a regulation is within the subject matter of a city's authority, a party challenging the ordinance must show how the city exceeded its authority. A & H. Services v. City of Wahpeton, 514 N.W.2d 855, 857 (N.D. 1994). The ordinance is presumed valid and a court will not hold otherwise unless the ordinance is clearly arbitrary,

unreasonable, and without relation to public health, safety, morals, or welfare. Id.

The governing bodies of all cities are granted authority:

> (8) To lay out, establish, open, alter, repair, clean, widen, vacate, grade, pave, park, or otherwise improve and regulate the use of streets, alleys, avenues, sidewalks, crossings, and public grounds, and to acquire, construct, maintain, and operate parking lots and facilities for motor vehicles; to regulate or prevent any practice having a tendency to annoy persons frequenting the same; and to prevent and regulate obstructions and encroachments upon the same.
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> (14) To regulate and prevent the throwing or depositing of ashes, offal, dirt, garbage, or any offensive matter in, and to prevent injury to, any street, avenue, alley, or public ground.
>
> (15) To provide for and regulate curbs and gutters.
>
> (17) To regulate traffic and sales upon the streets, sidewalks, and public places.
>
> (24) To fix the amount, terms, and manner of issuing and revoking licenses.
>
> (44) To declare what shall constitute a nuisance and to prevent, abate, and remove the same.

N.D.C.C. § 40-05-01. In addition, the city council in a city operating under the council form of government and the board of city commissioners in a city operating under the commission system of government have the power:

> . . . To regulate, control, or restrict within designated zones, or congested traffic districts, except that the speed limit for vehicles on those streets designated as part of any state highway must be as determined by mutual agreement with the director of the department of transportation, the use of streets, alleys, or other public ways by various classes of traffic.

N.D.C.C. § 40-05-02(14). The power to regulate includes the power to license. See Tayloe v. City of Wahpeton, 62 N.W.2d 31, 35 (N.D. 1953) (statute granting city power to regulate for promotion of health or suppression of disease includes power to license garbage collection and disposal).

Additionally, it is a class A misdemeanor to maintain a public nuisance. N.D.C.C. § 42-01-15. Annoying or endangering the health or safety of others, or interfering with, obstructing, or rendering a street or roadway dangerous for travel is a nuisance. N.D.C.C. § 42-01-01. A public nuisance is a nuisance which affects a considerable number of people or the public generally. Frandsen v. Mayer, 155 N.W.2d 294, 298 (N.D. 1967); N.D.C.C. § 42-01-06.

Therefore, it is my opinion that a city may regulate unimproved or gravel parking lots and restrict direct access from an unimproved or gravel parking lot onto a hard surface paved street or road within that city's jurisdiction.

II.

The Legislature has determined that an adequate and integrated system of roads and streets is essential to the general welfare of the state because they provide for the free flow of traffic, result in low costs of motor vehicle operation, protect the health and safety of the citizens of the state, increase property value, and generally promote economic and social progress. N.D.C.C. § 24-01-01. The director of the state Department of Transportation is responsible for the state highway system. N.D.C.C. § 24-01-03. However, this responsibility is limited:

> The jurisdiction, control, and duty of the state and municipality with respect to such urban connecting streets must be as follows:
> 1. The director has no authority to change or establish any grade of any such street without approval of the governing body of such municipality.
> 2. The municipality shall at its own expense maintain all underground facilities in such streets, and has the right to construct such additional underground facilities as may be necessary in such streets.
> 3. The municipality has the right to grant the privilege to open the surface of any such street, but all damage occasioned thereby must promptly be repaired by said municipality at its direction and without cost to the department.

4. The municipality has exclusive right to grant franchises over, beneath, and upon such streets.

N.D.C.C. § 24-01-03.

The North Dakota Supreme Court has interpreted this statute in light of a city's authority under N.D.C.C. § 40-05-02(14) to regulate traffic use upon roadways within the city. Ebach v. Ralston, 469 N.W.2d 801 (N.D. 1981). Traffic means "pedestrians, ridden or herded animals, vehicles, street cars, and other conveyances either singly or together while using any highway for purpose of travel." N.D.C.C. § 39-01-01(80). Although the director of the state Department of Transportation has control over the construction of the state highway system, including the design or alteration of a state highway, the Supreme Court has interpreted "section 40-05-02(14) as authorizing the city to regulate the use of state highways by people, animals, and vehicles within cities, except that the setting of speed limits requires the consent of the director [of the state Department of Transportation]." Ebach, 469 N.W.2d at 806.

A city street or road may be designated as an interstate business loop. According to an official from the state Department of Transportation, roads may be designated as an interstate business loop if they connect with an interstate. This designation would be made to obtain federal funding for part of the construction costs. See Balf Co., Inc. v. Gaitor, 534 F.Supp. 600, 601 (D. Conn. 1982). Although an interstate business loop is a part of the Dwight D. Eisenhower National System of Interstate and Defense Highways and the National Highway System, 23 U.S.C. 103(b), it is subject to federal construction standards but not interstate limited access highway construction standards, according to the state Department of Transportation. See 23 U.S.C. § 109(c). Federal regulations address standards and control of access in the context of construction or right-of-way, but not from a traffic control standard. See 23 C.F.R. § 620.203. See also Balf at 605. There are no applicable federal statutes or regulations which prohibit, or are inconsistent with, a city's regulation of traffic from parking lots to an interstate business loop.

Therefore, it is my further opinion that a city may regulate traffic upon a roadway within the city's jurisdiction which is part of the state highway system or the interstate or national highway system, except that speed limits must be set with the consent of the director of the State Department of Transportation.

III.

Article I, Section 16 of the North Dakota Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation . . . for the owner." This provision, which is broader than the Fifth Amendment to the United States Constitution, was intended to protect the possession of property and also to protect those rights which render possession valuable. Grand Forks-Traill Water Users v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987). A government acting through its police power has broad authority to regulate land use without compensating landowners for restrictions placed upon their property, and a land use regulation does not constitute a taking for which compensation must be paid merely because it diminishes the value of the regulated property or disallows the highest valued use of the property. Rippley v. City of Lincoln, 330 N.W.2d 505, 507 (N.D. 1983). However, a landowner is entitled to just compensation through an inverse condemnation action when a governmental regulation prohibits all or substantially all reasonable use of the regulated property. Id. A regulation affecting one particular use of property but which does not prohibit all or substantially all reasonable uses of the regulated property will be enforced without compensation to the property owner where the regulation is not clearly arbitrary and unreasonable with no substantial relation to the public health, safety, morals, or public welfare, and the property has not been materially diminished in value or usefulness as a whole. Grand Forks-Traill Water Users, 413 N.W.2d at 347.

"Eminent domain is the right to take private property for public use," N.D.C.C. § 32-15-01(1). Even where there is no physical taking of land, a substantial interference with the means of ingress and egress may be compensable. Boehm v. Backes, 493 N.W.2d 671, 673-674 (N.D. 1992). However, the Mandan ordinances in question do not take private property for public use, but instead are an exercise of the police power to prevent a private landowner from creating or continuing a nuisance and safety hazard. See Grand Forks-Traill Water Users, 413 N.W.2d at 347. See generally, N.D.C.C. tit. 42, Nuisances. "[I]t is well settled that the government's exercise of its police power to abate a public nuisance hazardous to the public health, safety, or welfare does not entitle the property owner to compensation. City of Minot v. Freelander, 426 N.W.2d 556, 560 (N.D. 1988). See also Loyer Educational Trust v. Wayne County Road Commission, 425 N.W.2d 189 (Mich. Ct. App. 1988) (granting of driveway permit properly conditioned on landowner’s improvement of public road to accommodate increased traffic).

"[A] landowner who has made substantial expenditures in reliance upon existing zoning or otherwise committed himself to his substantial disadvantage before the zoning change may be protected" by Article I, Section 16 of the North Dakota Constitution. Minch v. City of Fargo, 332 N.W.2d 71, 74 (N.D. 1983), quoting City of Fargo, Cass County. v. Harwood Township, 256 N.W.2d 694, 700 (N.D. 1977). However, where there is no substantial expenditure in reliance on a changed ordinance, there can be no recovery for the property owner. Minch, 332 N.W.2d at 75.

This office is not authorized to determine fact issues in making a legal opinion. 1995 N.D. Op. Att'y Gen. L-121 [Attorney General Heitkamp to Ann Mahoney (May 19, 1995)]. It is a fact question beyond the scope of this opinion whether any particular property owner had made a substantial expenditure in reliance on an unchanged ordinance. It must be noted that the Mandan ordinances in question were enacted in 1970. No property owner could have relied on the absence of these ordinances since their enactment. See Grand Forks-Traill Water Users, 413 N.W.2d at 347 (pipeline owner cannot argue that statutory requirement to move a pipeline at its own cost if placed in a particular location constituted a compensable taking where the regulation preexisted placement of the pipeline in the restricted location).

Any determination concerning whether the burden of an imposed cost on a property owner due to the exercise of a city's police power would invalidate the ordinance involves a question of fact which is beyond the scope of this opinion. Therefore, it is my further opinion that a city may require a property owner to pave a parking lot without compensation to protect the public's health, safety, morals, or welfare, within the above restrictions.

- 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 questions presented are decided by the courts.

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