

**OPINION
60-198**

February 25, 1960 (OPINION)

MUNICIPAL GOVERNMENT

RE: Powers of - Exchange of Realty

This office is in receipt of your opinion request of February 16, 1960.

You state: (1) that several years ago the City of Mandan, which operates under the commission form of government, purchased a substantial amount of real property in what is known as the Henke Flats, for the purpose of storing and ponding the flood waters of the Heat River and as a future site for a sewage lagoon; (2) that the subsequently created Lower Heart River Water Conservation and Flood Control District encompasses the whole of the City of Mandan and the Henke Flats; (3) That the City of Mandan granted to said district a perpetual easement over and across the Henke Flats for the purpose of storing and ponding the flood waters of the Heart River; (4) that said easement precludes the construction of a sewage lagoon on the Henke Flats in that its flood water storage capacity would be reduced; (5) that, therefore, the Henke Flat area is not available to the City of Mandan as a sewage lagoon site; and (6) that "The City now has an opportunity to exchange a portion of Henke Flat lands for an equal number of acres of land (which you state is of 'like value') which lie outside of the levee system of the lower Heart Flood project and are adaptable to use as a sewage lagoon."

You request this office's opinion as to whether "the City of Mandan (has) the power to exchange the Henke Flat lands which are subject to the perpetual easement above described for a like amount of land of like value, lying outside the levee system and not subject to such easement?"

Those provisions of the North Dakota Revised Code of 1943 which are involved are:

40-0106. BONDS, CONTRACTS, AND CONVEYANCES; HOW SIGNED AND COUNTERSIGNED. All . . . conveyances of a municipality, except as otherwise provided, shall be signed by the executive officer and countersigned by the auditor or clerk, as the case may be, who shall affix the seal of the municipality thereto." 40-0501(1), as amended, provides that the city shall have the power "To enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the Constitution and Laws of this state, as may be proper and necessary to carry into effect the powers granted to such municipality or as the general welfare of the municipality may require, and to repeal, alter, or amend the same . . ."

40-0501(55) REAL AND PERSONAL PROPERTY. To acquire by lease, purchase, gift, condemnation, or other lawful means and to hold in its corporate name for use and control as provided by law, both real and personal property and easements and rights-of-way within or without the corporate limits for all purposes authorized by law or necessary to the exercise of any power granted."

40-0501(56) TRANSFER OF PROPERTY. To convey, sell, dispose of, or lease personal and real property of the municipality as provided by this title."

40-0911 (as amended) "MEETINGS OF BOARD; REGULAR AND SPECIAL; ACTION ON DEPARTMENTAL MATTERS. The board of city commissioners No action of the board shall be effective unless upon a vote of a majority of a quorum of the members of such board. . . ."

A survey of the statutes and of the constitution reveals no provision specifically authorizing the exchange of realty by a municipality, nor any provision requiring a public offering or advertisement for bids with regard to the sale of property owned by a municipality. North Dakota case law in regard to the exchange of realty by a municipality also is wanting.

The question of the legality of exchange of realty by a municipality has arisen in other jurisdictions. In those jurisdictions where, as in North Dakota, the municipality is authorized to purchase and to sell realty, the courts subscribe to the proposition that the authority to purchase and to sell implies the existence of the power to exchange. In this regard see: *Carter v. City of Greenville* 178 S.E. 508, 511 (S.C.); *Bobo v. City of Spartansburg* 96 S.E. 2d. 67 (S.C.); *East Chicago Co. v. City of East Chicago* 87 N.E. 17 (111.); *Chitwood v. City and County of Denver* 201 P. 2d. 605, 608 (Colo.); and 3 *McQuillin Municipal Corporations* (2d. Ed.) section 1242. See also, for an extensive review of the subject, 60 A.L.R. 2d. 220, "Municipality - Exchange of Realty."

An opinion of this office, dated August 22, 1946, a copy of which is attached, ruled that it is within the power of a municipality to exchange realty. Also attached is an opinion of this office to the effect that no statute requires that competitive bids for the property be called for. (Opinion dated August 17, 1949)

Regarding the matter of the vote margin required to authorize the exchange of real property: As you noted in your opinion request, section 40-1104 of the N.D.R.C. of 1943 provides that a two-thirds vote of all the members of the governing body in cities operating under the council system is necessary for the sale of property belonging to the municipality. You stated further that the City of Mandan operates under the commission form of government, and that "you have been unable to find any specific provisions in our statutes governing the sale of property in cities having the commission system." You then noted that section 2-0206 of the Mandan Revised Ordinances of

1957 provides that "a three-fifths vote of all the members of the Board shall be necessary for the sale of any property belonging to the City."

Section 40-0911 of the 1957 Supplement to the N.D.R.C. of 1943 provides, in part, that ". . . . No action of the board shall be effective unless upon a vote of a majority of a quorum of the members of such board. . . ." Said section apparently is the sole statutory provision pertaining to the vote margin necessary to give effect to the action of the board in commission system municipalities.

As to the vote margin, then the requirements of section 40-0911 of the 1957 Supplement to the N.D.R.C. of 1943 and of section 2-0206 of the Mandan Ordinances, as long as said ordinance is in full force and effect, must satisfied.

In summary, it is the opinion of this office that the contemplated exchange by the city of Mandan, for the purpose of acquiring a site suitable for use as a sewage lagoon, of a portion of the city-owned Henke Flats land for an equal number of acres of land of like value is lawful.

LESLIE R. BURGUM
Attorney General