

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 97-F-05

Date issued: July 25, 1997

Requested by: Dr. Jon R. Rice, State Health Officer

- QUESTIONS PRESENTED -

I.

Whether a non-home rule city may regulate the sale, marketing, or use of tobacco products, including licensing tobacco merchants under N.D.C.C. § 40-05-01(24).

II.

Whether a local board of health may regulate the sale, marketing, or use of tobacco products, including licensing tobacco merchants under N.D.C.C. § 40-05-01(24).

III.

Whether a non-home rule county may regulate the sale, marketing or use of tobacco products, including licensing tobacco merchants under N.D.C.C. § 40-05-01(24).

IV.

Whether a home-rule county may regulate the sale, marketing or use of tobacco products, including licensing tobacco merchants under N.D.C.C. § 40-05-01(24).

- ATTORNEY GENERAL'S OPINIONS -

I.

A non-home rule city may regulate the sale, marketing, or use of tobacco products, including licensing tobacco merchants.

II.

A local board of health may not regulate the sale, marketing, or use of tobacco products, but may recommend ordinances regarding the sale, marketing, or use of tobacco products to cities or counties with authority to adopt such ordinances.

III.

A non-home rule county may not regulate the sale, marketing or use of tobacco products.

IV.

A home-rule county may regulate the marketing or use of tobacco products, but may not regulate the sale of tobacco products or license tobacco merchants.

- ANALYSES -

I.

North Dakota cities are creatures of the Legislature and have only those power 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, 632 (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, 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. §§ 40-05-01 and 40-05-02 provide the powers of non-home rule cities. Those powers included in N.D.C.C. § 40-05-01 provide:

1. Ordinances. 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. . .

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24. Licenses. To fix the amount, terms, and manner of issuing and revoking licenses.

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45. Health regulations. To make regulations necessary or expedient for the promotion of health or for the suppression of disease.

. . .

Subsection 45 of N.D.C.C. § 40-05-01 authorizes cities to make regulations expedient for the promotion of health. "Expedient" means "[a]ppropriate to a particular purpose" or "[s]erving to promote one's interest." The American Heritage Dictionary 477 (2d coll. ed. 1991). "Promote" means to "contribute to the progress or growth of; further." Id. at 991. Accordingly, cities may adopt regulations that serve the purpose of improving health. Thus, it is my opinion a city may regulate the sale, marketing, or use of tobacco products if the regulations serve the purpose of improving health and are not otherwise preempted by state law. Because the power to regulate includes the power to license as a means of regulation, 1994 N.D. Op. Att'y Gen. 64, 67, a city's authority to regulate the sale, marketing, or use of tobacco products includes authority to license tobacco merchants unless otherwise preempted by state law.

North Dakota Tobacco Products Tax Law requires all persons selling tobacco products in this state to first acquire a license issued by the state. N.D.C.C. ch. 57-36, § 57-36-02. In an earlier opinion, I concluded "[t]he 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." 1994 N.D. Op. Att'y Gen. 64, 66-67. Accordingly, I opined "N.D.C.C. ch. 57-36 does not preempt all local regulatory authority over the sale or dispensing of tobacco products." Id. at 67.

State law requires that smoking in places of public assembly, such as restaurants and theaters, must be restricted to specified areas. N.D.C.C. § 23-12-10. Authorities other than state agencies may enforce smoking policies, rules, or ordinances more protective of citizen's rights than N.D.C.C. § 23-12-10. N.D.C.C. § 23-12-10.2. The weight of scientific evidence is overwhelming that environmental tobacco smoke is harmful to non-smokers, which justifies laws prohibiting smoking in public places or private places accessible to the public, and also laws restricting smoking in workplaces. Fagan v. Axelrod, 550 N.Y.S.2d 552, 554-558 (Sup.1990). Accordingly, a non-home rule city is not preempted from regulating the use of tobacco products by state law and such restrictions are within a city's express regulatory authority to promote health or to suppress disease.

It may be argued that the specific grants of authority under N.D.C.C. § 40-05-01 to a city for the regulation of several products or services with an impact on public health implies that a city may not regulate a specific product, such as tobacco, unless that product is specifically mentioned. Little v. Tracy, 497 N.W.2d 700, 705 (N.D.1993). However, the rule that expression of one thing excludes all others should be used only where it appears to point to legislative intent. Juhl v. Well, 116 N.W.2d 625, 628 (N.D.1962). The North Dakota Supreme Court held this rule did not imply that a statute giving specific authority to regulate dogs running at large meant that a city may not license dogs or regulate keeping dogs under the general licensing and health statutes. City of Dickinson v. Thress, 290 N.W. 653, 656-657 (N.D.1940). Likewise, the specific grants of authority to regulate several products or businesses in N.D.C.C. § 40-05-01 does not point to a legislative intent to exclude regulation of other products or businesses when those products or businesses impact public health, safety, morals or welfare.

Given the above, it is my opinion a non-home rule city may regulate the sale, marketing, or use of tobacco products, including licensing tobacco merchants under N.D.C.C. § 40-05-01(24).

II.

Like cities, local boards of health are creatures of the Legislature and have only those powers expressly or impliedly granted to them. The powers and duties of local boards of health are found in N.D.C.C. § 23-05-01. N.D.C.C. § 23-05-02 identifies additional powers of county boards of health.

A reading of N.D.C.C. §§ 23-05-01 and 23-05-02 demonstrates the Legislature has not granted local boards of health authority to regulate the sale, marketing, or use of tobacco products. However, local boards of health are granted the power "[t]o make rules in district health units and county health departments and to recommend to city councils or city commissions, as the case may be, ordinances for the protection of public health and safety." N.D.C.C. § 23-05-01(5). The power to make rules "in" health units or departments is for the governance of the health unit or department. Legislative authority is reserved to cities to pass ordinances while the health unit or district is restricted to recommending ordinances. See Cookie's Diner v. Columbus Bd. of Health, 640 N.E.2d 1231 (Ohio Mun.1994) (health board has regulatory authority but no legislative authority).

It is my opinion local boards of health lack authority to regulate the sale, marketing, or use of tobacco products. It is my further opinion local boards of health may recommend ordinances regarding the sale, marketing, or use of tobacco products to cities or counties with authority to adopt such ordinances.

III.

"Counties are creatures of the North Dakota Constitution and may act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to constitutional authority. As a political subdivision of the State, its rights and powers are determined and defined by law." McKenzie County v. Hodel, 467 N.W.2d 701, 707-08 (N.D. 1991) (Vande Walle, J., concurring) (citations omitted); see also Stutsman County v. State Historical Soc'y, 371 N.W.2d 321 (N.D. 1985); Hart v. Bye, 76 N.W.2d 139 (N.D. 1956).

N.D.C.C. § 11-11-14 defines the general powers of board of county commissioners. Neither N.D.C.C. § 11-11-14 nor the other statutes defining the powers and duties of counties authorize counties to adopt regulations for the public health, safety, morals, and welfare. It is, therefore, my opinion a non-home rule county may not regulate the sale, marketing or use of tobacco products.

IV.

The Legislature has enabled counties to acquire certain powers of self-government if those powers are included in an approved home-rule charter and are implemented through ordinances. Home-rule counties have the power to enact ordinances to provide for "public health,

safety, morals, and welfare". N.D.C.C. § 11-09.1-05(5) provides home-rule counties may:

Provide for the adoption, amendment, repeal, initiative, referral, enforcement, and penalties for violation of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare. However, this subsection does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.

The first sentence of subsection 5 of N.D.C.C. § 11-09.1-05 is almost identical to the power granted home-rule cities in N.D.C.C. § 40-05.1-06(7). Based upon the authority provided home-rule cities in N.D.C.C. § 40-05.1-06(7), I previously concluded a home-rule 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." 1994 N.D. Op. Att'y Gen. 64, 67. Based upon the analysis in that opinion, N.D.C.C. § 11-09.1-05(5) grants home-rule counties authority to regulate the sale, marketing or use of tobacco products unless the activity is "regulated by state law or by rules adopted by a state agency." N.D.C.C. § 11-09.1-05(5).

North Dakota state law regulates the sale of tobacco products, specifically requiring distributors and dealers of tobacco products to be licensed by the state. N.D.C.C. § 57-36-02. North Dakota state law also regulates the activity of smoking by restricting the places in which a person is allowed to smoke. N.D.C.C. §§ 23-12-09 through 23-12-11. Accordingly, the limiting language in N.D.C.C. § 11-09.1-05(5), language not found in N.D.C.C. § 40-05.1-06(7), precludes home-rule counties from adopting ordinances licensing tobacco products, regulating the sale of tobacco products, or limiting the use of tobacco products in buildings not owned or leased by the county. Because state law does not regulate the marketing of tobacco products, home-rule counties may do so.

It is my opinion a home-rule county may regulate the marketing of tobacco products to promote the public health, safety, morals, or welfare, but may not regulate the sale or use of tobacco products, nor license tobacco merchants.

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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 question presented is decided by the courts.

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