

**LETTER OPINION  
2009-L-19**

December 28, 2009

Mr. Fritz Fremgen  
Stutsman County State's Attorney  
511 2nd Avenue SE  
Jamestown, ND 58401-4210

Dear Mr. Fremgen:

Thank you for your letter regarding a proposed home rule county weight restriction ordinance. You raise several questions about implementing such an ordinance and whether it may be utilized in conjunction with a joint powers agreement between Stutsman County and one or more non-home rule counties. It is necessary however, to consider the threshold issue of whether the county may enact a weight restriction home rule ordinance which shifts revenue from the state treasury to any county. For the reasons indicated below, it is my opinion that while a home rule county may enact a weight restriction ordinance which essentially duplicates N.D.C.C. ch. 39-12, it may not contain any provisions which would divert any revenue raised through enforcement of the ordinance from the state treasury to any county.

**ANALYSIS**

You indicate in your letter that as a home rule county, Stutsman County is proposing to enact a weight restriction ordinance. Although you state that the county's primary goal is to protect its roads, you do indicate several times that the county and any other county that is a party to a possible joint powers agreement hope to retain any revenue generated through enforcement of the ordinance. You enclosed the proposed ordinance with your letter. An examination of the proposed ordinance reveals that it is essentially the same as N.D.C.C. ch. 39-12, one notable exception being that any road use fees or permit fees generated under the ordinance and the proceeds of any sale following vehicle impoundment would be retained by the county, rather than being remitted to the state treasury.<sup>1</sup>

---

<sup>1</sup> See Proposed Stutsman County Ordinance #2006-1, §§ 2(3), 5(4), 14.1, and 20. Cf. N.D.C.C. §§ 39-12-02(3), 39-12-14.1, and 39-12-20.

You raise questions about implementing such an ordinance as well as questions related to entering into a joint powers agreement with non-home rule counties to enforce the Stutsman County home rule weight restriction ordinance. However, it is necessary to examine the threshold issue of whether enactment of an ordinance with such fee-shifting features would be lawful.

State law provides that a county and its citizens may, if included in its charter and implemented through ordinances:

Provide for the adoption, amendment, repeal, initiative, referral, enforcement, and civil and criminal 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.<sup>2</sup>

Stutsman County has implemented a similar, although not verbatim, provision in its home rule charter.<sup>3</sup>

The proposed ordinance would be enacted under N.D.C.C. § 11-09.1-05(5) and its home rule charter counterpart.<sup>4</sup> However, the county home rule law "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."<sup>5</sup> Chapter 39-12, N.D.C.C., containing 25 detailed sections, regulates the size, width, and height restrictions for state highways and other public roads. This chapter provides concurrent authority both for the state and the counties to exercise power in their respective jurisdictions over classifying highways as to weight and load capacities, issuing special permits for vehicles of excessive size and weight, limiting use of certain vehicles on highways, and imposing restrictions as to the weight of such vehicles, among other things.<sup>6</sup> Any police officer, including any member of the state Highway Patrol, is authorized to weigh a vehicle if the officer believes a vehicle may be over the legal weight limit.<sup>7</sup> Overweight vehicles may be impounded by any peace officer and

<sup>2</sup> N.D.C.C. § 11-09.1-05(5) (emphasis added).

<sup>3</sup> See Stutsman County, N.D., Home Rule Charter, art. 2, § 5 (2000), indicating the county has the authority to "provide for 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, and welfare. However, this subsection does not confer any authority to regulate any industry or activity that is exclusively regulated by state or federal law or by rules adopted by a state or federal agency."

<sup>4</sup> Id.

<sup>5</sup> N.D.C.C. § 11-09.1-05(5). Enforcement of size and weight restrictions is also authorized under N.D.C.C. § 24-01-13. Movement of oversized and overweight vehicles and loads is similarly regulated by state administrative rules. See N.D.A.C. art. 38-06.

<sup>6</sup> See N.D.C.C. §§ 39-12-01, 39-12-02, 39-12-03, and 39-12-05.3.

<sup>7</sup> See N.D.C.C. § 39-12-07.



LETTER OPINION 2009-L-19

December 28, 2009

Page 3

taken to a storage area.<sup>8</sup> The state's attorney of a county where such vehicles are impounded may file a civil complaint "on behalf of the authority having jurisdiction of the road whereon the violation occurred, for the purpose of recovering charges for the extraordinary use of the highways, streets, or roads of this state."<sup>9</sup>

The county home rule law quoted above, N.D.C.C. § 11-09.1-05(5), has been construed both by the North Dakota Supreme Court and this office. The court, citing with approval N.D.A.G. 90-21, concluded that:

N.D.C.C. § 11-09.1-05(5) limits the county's authority to enact ordinances in two instances: (1) when there is an explicit state law or rule restraining the county's authority, *see, e.g.*, N.D.C.C. § 11-09.1-05(2) (county ordinances may not supersede state law in certain taxation matters); *see also Sauby v. City of Fargo*, 2008 ND 60, ¶ 10, 747 N.W.2d 65; or (2) when the industry or activity involved is already subject to substantial state control through broad, encompassing statutes or rules.<sup>10</sup>

The analysis in N.D.A.G. 90-21 discussed the somewhat sparse legislative history regarding the second sentence of N.D.C.C. § 11-09.1-05(5). The history indicated that the second sentence of the statute was intended to relate to matters in which there is substantial state management and control, citing, for example, reclamation and siting issues handled by the Public Service Commission which are subject to substantial state administrative regulation.<sup>11</sup> The opinion concluded that the Legislature only intended to prevent a home rule county from addressing an activity or industry which "is subject to substantial state control, management, or supervision."<sup>12</sup>

"This office has . . . summarized the steps utilized by the North Dakota Supreme Court and this office to resolve questions regarding home rule authority."<sup>13</sup>

<sup>8</sup> N.D.C.C. § 39-12-11.

<sup>9</sup> N.D.C.C. § 39-12-14.

<sup>10</sup> *State v. Brown*, 771 N.W.2d 267, 275 (N.D. 2009).

<sup>11</sup> N.D.A.G. 90-21.

<sup>12</sup> *Id.* Later opinions issued by this office have determined that a state-regulated activity or industry may prevent a home rule county from engaging in its own regulation. For example, the activity of building construction was noted to be regulated by N.D.C.C. ch. 54-21.3, the law establishing the state building code. Thus, a home rule county was subject to the provisions of that law and was required to adopt the state building code if it chose to administer and enforce a building code. *See* N.D.A.G. 95-F-11. Similarly, North Dakota state law regulates the sale of tobacco products by specifically requiring distributors and dealers to be licensed by the state, and also regulates the activity of smoking by restricting the places where a person is allowed to smoke. Accordingly, it was determined that home rule counties may not adopt 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. *See* N.D.A.G. 97-F-05.

<sup>13</sup> N.D.A.G. 2000-F-06.

A home rule political subdivision may exercise powers not allowed under state law if: (1) the Legislature granted it that power [as a home rule political subdivision]; (2) the political subdivision included that power in its home rule charter; (3) the political subdivision properly implemented the power through an ordinance; and (4) the power concerns only local, rather than statewide, matters. See Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980); Letter from Attorney General Heidi Heitkamp to Stephen M. McLean (Sep. 26, 1997).<sup>14</sup>

One noted author has stated that:

It is a general rule that a charter provision, whether of a home-rule or other municipality, does not supersede or prevail over conflicting general law dealing with affairs purely of statewide concern, even though they may pertain to municipal corporations; on the contrary, the charter provision is superseded and prevailed over by such general law.<sup>15</sup>

"Whether an ordinance implementing a home rule power concerns a statewide matter is not always clear."<sup>16</sup> However, an opinion issued by this office dealing with a home rule city's ordinance for disposal of abandoned motor vehicles is instructive. In that instance, N.D.C.C. ch. 39-26, pertaining to abandoned motor vehicles, was analyzed.<sup>17</sup> The opinion noted that "[b]ecause ch. 39-26 is not expressly the exclusive means of dealing with the problem of abandoned motor vehicles, it does not preempt local regulation. Some portions of this chapter, however, do require statewide compliance to comport with statewide concerns."<sup>18</sup> The opinion determined that while there may be some inconsistencies between a home rule ordinance and N.D.C.C. ch. 39-26, the local ordinances may not disregard, among other things, payment of unclaimed net sale proceeds to the state.<sup>19</sup> "While the city . . . could have relied on the provisions under N.D.C.C. ch. 39-26 for disposal of abandoned vehicles rather than implementing a duplicative ordinance, any city ordinance adopted regarding abandoned vehicles must provide the right to reclaim the net proceeds following the sale and the deposit of the net proceeds with the state treasurer in compliance with N.D.C.C. ch. 39-26."<sup>20</sup> In that case, the city ordinance in question provided for delivery of the proceeds of the sale to the city auditor to be deposited in the city general fund.<sup>21</sup>

Even though the state statutes that regulate the weight and load of trucks and other vehicles on public roads in this state grant part of that authority concurrently to both state

<sup>14</sup> Id. (quoting N.D.A.G. 98-L-117) (emphasis added).

<sup>15</sup> 6 Eugene McQuillin, The Law of Municipal Corporations § 21:30 (3d ed. 2007).

<sup>16</sup> N.D.A.G. 2000-F-06.

<sup>17</sup> N.D.A.G. 97-L-155.

<sup>18</sup> Id. (emphasis added).

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

LETTER OPINION 2009-L-19

December 28, 2009

Page 5

and local officials, there remains, in part, substantial state control, management, or supervision of that activity, particularly as it relates to the disposition of any enforcement fees.

In the present case, N.D.C.C. ch. 39-12 is not the exclusive means of dealing with the problem of overweight vehicles and does not preempt all local regulation. However, N.D.C.C. §§ 39-12-02(3), 39-12-14.1, and 39-12-20 require permit and road use fees to be remitted to the state treasury for credit to the state highway fund, and proceeds of the sale of impounded vehicles to be remitted to the state treasury for deposit in the highway fund, after paying any costs to the county.<sup>22</sup> As noted above, certain provisions in the proposed county home rule ordinance would direct those funds to the county treasury rather than to the state. Consistent with N.D.A.G. 97-L-155, the statewide application of the payment of the permit and road use fees and net proceeds of any sale into the state treasury "is a matter of statewide concern which can not be altered by conflicting ordinances under . . . home rule authority."<sup>23</sup>

Based on the foregoing, it is my opinion that while a home rule county may enact a weight restriction ordinance which essentially duplicates N.D.C.C. ch. 39-12, it may not contain any provisions which would divert any revenue raised through enforcement of the ordinance from the state treasury to any county. Because it is apparent from your correspondence that one of the primary reasons for passage of this county home rule ordinance would be to allow Stutsman County (or another county under a joint powers agreement) to retain any enforcement fees generated, and because I have determined that diverting the fees from the state treasury to the county treasury would not be lawful, it is unnecessary to address the remainder of your questions.

Sincerely,

Wayne Stenehjem  
Attorney General

jjf/pg

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.<sup>24</sup>

<sup>22</sup> See N.D.C.C. §§ 39-12-02(3), 39-12-14.1 and 39-12-20.

<sup>23</sup> N.D.A.G. 97-L-155; see also N.D.A.G. 2002-L-38 (provisions for county home rule patterned after existing city home rule provisions; it is therefore reasonable to look to city home rule precedent for county home rule matters).

<sup>24</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).



## ARTICLE IX

### TRUST LANDS

**Section 1.** All proceeds of the public lands that have been, or may be granted by the United States for the support of the common schools in this state; all such per centum as may be granted by the United States on the sale of public lands; the proceeds of property that fall to the state by escheat; all gifts, donations, or the proceeds thereof that come to the state for support of the common schools, or not otherwise appropriated by the terms of the gift, and all other property otherwise acquired for common schools, must be and remain a perpetual trust fund for the maintenance of the common schools of the state. All property, real or personal, received by the state from whatever source, for any specific educational or charitable institution, unless otherwise designated by the donor, must be and remain a perpetual trust fund for the creation and maintenance of such institution, and may be commingled only with similar funds for the same institution. If a gift is made to an institution for a specific purpose, without designating a trustee, the gift may be placed in the institution's fund; provided that such a donation may be expended as the terms of the gift provide. Revenues earned by a perpetual trust fund must be deposited in the fund. The costs of administering a perpetual trust fund may be paid out of the fund. The perpetual trust funds must be managed to preserve their purchasing power and to maintain stable distributions to fund beneficiaries.

**Section 2.** Distributions from the common schools trust fund, together with the net proceeds of all fines for violation of state laws and all other sums which may be added by law, must be faithfully used and applied each year for the benefit of the common schools of the state and no part of the fund must ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of common schools as provided by law. Distributions from an educational or charitable institution's trust fund must be faithfully used and applied each year for the benefit of the institution and no part of the fund may ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of the institution, as provided by law.

For the biennium during which this amendment takes effect, distributions from the perpetual trust funds must be the greater of the amount distributed in the preceding biennium or ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. Thereafter, biennial distributions from the perpetual trust funds must be ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. The average value of trust assets is determined by using the assets' ending value for the fiscal year that ends one year before the beginning of the biennium and the assets' ending value for the four preceding fiscal years. Equal amounts must be distributed during each year of the biennium.

**Section 3.** The superintendent of public instruction, governor, attorney general, secretary of state and state treasurer comprise a board of commissioners, to be denominated the "board of university and school lands". Subject to the provisions of this article and any law that may be passed by the legislative assembly, the board has control of the appraisal, sale, rental, and disposal of all school and university lands, and the proceeds from the sale of such lands shall be invested as provided by law.

**Section 4.** The public officers designated by law shall constitute boards of appraisal and under the authority of the state board of university and school lands shall appraise all school lands within their respective counties which they may from time to time recommend for sale at their actual value under the prescribed terms and shall first select and designate for sale the most valuable lands.

**Section 5.** After one year from the assembling of the first legislative assembly the lands granted to the state from the United States for the support of the common schools, may be sold upon the following conditions and no other: No more than one-fourth of all such lands shall be sold within the first five years after the same become salable by virtue of this section. No more than one-half of the remainder within ten years after the same become salable as aforesaid. The residue may be sold at any time after the expiration of said ten years. The legislative assembly



## **CHAPTER 29-27 EXECUTION**

### **29-27-01. Execution to officer.**

When a judgment imposing a penalty other than a fine only has been pronounced, a certified copy of the entry thereof upon the minutes must be furnished forthwith to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution.

### **29-27-02. Judgment for fine or costs.**

If the judgment mentioned in section 29-27-01 imposes a fine or assesses costs and the judgment has been docketed in the judgment docket by order of the court, the judgment is enforceable by execution in the same manner as provided for a judgment for money in a civil action.

#### **29-27-02.1. Disposition of statutory fees, fines, forfeitures, pecuniary penalties, and bond forfeitures.**

Except as otherwise provided by law, all statutory fees, fines, forfeitures, and pecuniary penalties prescribed for a violation of state laws, when collected, must be paid into the treasury of the proper county to be added to the state school fund. When any bail bond or other property or money deposited as bail is forfeited to the state, the proceeds collected therefrom must be paid over to the proper state official and credited to the state general fund.

### **29-27-03. Judgment for imprisonment or as response to nonpayment of fine.**

If a judgment is for imprisonment, initially or as response to nonpayment of a fine in accordance with section 12.1-32-05, the defendant forthwith must be committed to the custody of the proper officer and be detained by that officer until the judgment is complied with.

### **29-27-04. Judgment - By what officer executed.**

When the judgment in a criminal action or proceeding under section 12.1-32-05 is imprisonment in the county jail, the judgment must be executed by the sheriff of the county. In all other cases when the sentence is imprisonment, the sheriff of the county shall deliver the defendant to the proper officer in execution of the judgment.

### **29-27-05. Judgment of imprisonment in department of corrections and rehabilitation.**

If the judgment is for commitment to the legal and physical custody of the department of corrections and rehabilitation, the sheriff of the county, upon receipt of a certified copy thereof, shall take and deliver the defendant to the correctional facility designated by the department. The sheriff also shall deliver to the department a certified copy of the judgment and take from the department a receipt for the defendant and make return thereof to the court.

### **29-27-06. Authority of sheriff while conveying defendant.**

Repealed by S.L. 1975, ch. 106, § 673.

### **29-27-07. Commitment of offenders to department of corrections and rehabilitation - Place of confinement.**

1. If a judge of the district court imposes a term of imprisonment to a state correctional facility upon conviction of a felony or a class A misdemeanor, the judge may not designate a state correctional facility in which the offender is to be confined but shall commit the offender to the legal and physical custody of the department of corrections and rehabilitation.
2. After assuming custody of the convicted person, the department of corrections and rehabilitation may transfer the inmate from one correctional facility to another for the purposes of safety, security, discipline, medical care, or if the department determines it is in the best interest of the public, the inmate, or the department.

Sixty-second  
Legislative Assembly  
of North Dakota

**HOUSE BILL NO. 1042**

Introduced by

Legislative Management

(Public Safety and Transportation Committee)

1 A BILL for an Act to amend and reenact sections 39-12-14.1 and 39-12-20 of the North Dakota  
2 Century Code, relating to extraordinary road use fees; and to provide a continuing  
3 appropriation.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Section 39-12-14.1 of the North Dakota Century Code is  
6 amended and reenacted as follows:

7 **39-12-14.1. Voluntary settlement of extraordinary road use fee charges.**

8 Before the complaint is issued ~~pursuant to~~under section 39-12-14, the owner, or the owner's  
9 driver or agent, may ~~voluntarily~~ pay the amount of the extraordinary road use fee, or may  
10 provide proof of surety coverage to ensure payment of the extraordinary road use fee, ~~provided~~  
11 under section 39-12-17, plus any towing or storage costs. Any settlement, whether made by the  
12 owner, or the owner's driver or agent, ~~must be~~is presumed to be of a voluntary nature. A peace  
13 officer or a peace officer's designee is authorized to receive the settlement payment on behalf  
14 of the authority having jurisdiction ~~of~~over the road ~~whereon~~on which the violation occurred. The  
15 extraordinary road use fees for violation on an interstate or on a state highway must be remitted  
16 to the state treasurer to be credited to the state highway fund. Extraordinary road use fees for a  
17 violation that did not occur on an interstate or state highway must be deposited in the county  
18 general fund in the county of the violation.

19 **SECTION 2. AMENDMENT.** Section 39-12-20 of the North Dakota Century Code is  
20 amended and reenacted as follows:

21 **39-12-20. Proceeds of sale - Continuing appropriation.**

22 The proceeds of sale must be deposited with the state treasurer. ~~The~~For a violation on an  
23 interstate or state highway the state treasurer shall deposit in the state highway fund an amount  
24 equal to the amount of the charges assessed ~~pursuant to~~under section 39-12-17 after paying



Sixty-second  
Legislative Assembly

1 the costs to the county. ~~An~~For any violation, an amount equal to the costs of the proceedings,  
2 including attorney's and witness fees and costs, is appropriated on a continuing basis out of the  
3 funds collected to the county in which the ~~of~~ prosecution took place for the purpose of defraying  
4 the costs of prosecution. From the proceeds of sale for a violation that did not occur on an  
5 interstate or state highway, the amount of charges assessed under section 39-12-17 is  
6 appropriated on a continuing basis and must be deposited in the county general fund in the  
7 county of prosecution. The balance of the proceeds of any sale after the payment of costs and  
8 charges is appropriated on a continuing basis out of the funds collected to be paid to the person  
9 entitled ~~thereto~~ to the proceeds as determined by the court or must be deposited with the clerk  
10 of court for ~~such~~ payment to that person.