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OVERWEIGHT VEHICLES - PERMITTING BY LOCAL JURISDICTIONS

A recent Attorney General's Letter Opinion, 2009-L-19, has raised a number of questions relating to the permitting of overweight vehicles by local jurisdictions. Although the local jurisdiction could be a township, city, or county, this memorandum focuses on counties. In particular, this memorandum addresses whether counties may keep fees relating to a permitting system.

The letter opinion in question examined whether a home rule county could adopt an ordinance that is substantially similar to North Dakota Century Code Chapter 39-12, which relates to size, width, and height restrictions on vehicles operated on highways in this state. There was one exception to being similar to state law in the county ordinance. That exception was that the any road use fees or permit fees and proceeds from the sale of any impounded vehicle would be retained by the county, rather than being remitted to the state treasury.

In determining whether the fee shifting from the state to county treasury was lawful, the Attorney General reviewed Section 11-09.1-05(5). This section states that a home rule charter may:

5. 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.

The last sentence contains the limit on county home rule authority. This sentence has been interpreted by the North Dakota Supreme Court to limit county authority in two instances:

1. When there is an explicit state law or rule restraining the county's authority; or
2. When the industry or activity involved is already subject to substantial state control through broad encompassing statutes or rules.

To state the rule in the converse, a political subdivision may exercise a home rule power if the power concerns only local, rather than statewide, matters.

In determining whether a matter is of statewide concern, the letter opinion reviewed a previous opinion on a home rule city's ordinance for the disposal of abandoned motor vehicles. In that instance, state law did not preempt local regulation, but portions of the law did require statewide compliance to comport with statewide concerns. The opinion stated the local ordinance may not disregard payment of unclaimed net sale proceeds to the state.

The letter opinion at issue for purposes of this memorandum stated that even though the state statutes that regulate the weight of vehicles on highways in this state grant part of the authority concurrently to both state 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.**" (emphasis supplied) State law does not preempt all local regulation but Sections 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. The letter opinion determined that the statewide application of 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 cannot be altered by conflicting ordinances under home rule authority.

The letter opinion focused on Sections 39-12-02(3), 39-12-14.1, and 39-12-20. Section 39-12-02(3) requires all fees for permits charged by the Highway Patrol to be deposited in the state highway fund. These fees are for the 10 percent weight exemption, a non-self-issuing interstate permit, for special mobile equipment, for engineering, for faxing, for a single trip permit, for a bridge length permit, for a longer combination vehicle permit, and for an overwidth vehicle permit. Section 39-12-14.1 relates to the voluntary settlement of extraordinary road use fees. These fees are contained in a detailed table and must be assessed by a court in an action brought by the state's attorney against a vehicle impounded for being overweight. Section 39-12-20 provides that if the extraordinary road use fees and other costs are not paid, the vehicle is sold and the proceeds of the sale are deposited with the State Treasurer. The last two sections relate to the unique civil procedure created in the transportation code for assessing a fee and collecting a fee through a civil action of the state's attorney for overweight vehicles. These sections specifically provide for the fees and proceeds to go to the state treasury. Section 39-12-02(3) does relate to permits; however, it specifically relates to permits the Highway Patrol has the authority to issue.

Local permitting of the use of local roads is local. The local authority controls what vehicles may operate on local roads. The authority to create limitations as to weight of vehicles is with the entity having control over the road under Sections 39-12-01 and 39-12-03. The local authority may issue permits. Under Section 39-12-02, the jurisdiction with control over the road may issue a special written permit authorizing the

applicant to operate or move a vehicle exceeding the maximum upon a highway under the jurisdiction of the body granting the permit. Although the permit may be inspected by any peace officer, including the Highway Patrol, and violation of the permit is a violation of Chapter 39-12, there is no specific language stating the fees from the permit must go to the state treasury, as was done for permits made and funds collected by the Highway Patrol. In addition, the local authority may set the permit fee. For example, under Section 39-12-05.3, local jurisdictions are authorized to issue 10 percent permits and establish an appropriate fee for the permits.

It appears the fees relating to permits contemplate a system of concurrent jurisdiction under which local jurisdictions issue permits for local roads and the Highway Patrol issues permits for the interstate and state highway system. There is strong evidence that the local authority may set and keep permit fees. Permit fees are for the administrative function of issuing permits and are different than extraordinary road use fees issued under a state-created civil procedure. Historically, for the last 20 years some counties have been issuing permits and keeping the permit fees.

It appears less clear whether fees for violation of a local permit belong to the local jurisdiction. Under Section 39-12-08, a violation of operating without a permit is punishable by a fee of \$100. A violation of any other provision of the chapter for which a specific penalty is not provided must be assessed a fee of \$20.

For the violation fee to go to the local authority, there would need to be a violation of an ordinance of a local authority. As a general rule, state traffic law is enforced by the Highway Patrol and county sheriffs. Generally, cities adopt ordinances and enforce those ordinances, not state traffic law. Although counties generally do not adopt county traffic ordinances, under Section 11-09.1-05(5), it is possible for a home rule county to adopt traffic ordinances. The limitation on the ordinances by cities and counties is that the ordinances may not supersede state law. Under Section 40-05-06 for non-home rule cities and under Section 12.1-01-05 for home rule cities, this means that the fee may not be higher than provided for in state law.

Another difference between cities and counties is that cities have municipal courts for the hearings on traffic violations. Counties no longer have county courts. In 2003, Section 27-05-06 was amended to include within the jurisdiction of district courts the power to hear and determine actions and proceedings from the violation of county home rule charter ordinances. District courts are state courts.

The violation of state traffic offenses is used as a funding mechanism for schools. Under Article IX,

Section 2, of the Constitution of North Dakota, the net proceeds of all fines for violation of state laws must be added to the common schools trust fund. This has been implemented through Section 29-27-02.1, which provides:

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.

Under Section 40-11-13, all fines and penalties for offenses against the ordinances of a city must be paid to the city's treasury. There does not appear to be a corresponding statute for the deposit of fines and penalties for the violation of county home rule ordinances in the county general fund.

In short, there is not a fact-specific statute that states where the fee should go for home rule counties. However, there is broad language under Section 39-12-08 creating state fees for permit violations. Non-home rule counties do not have the authority to keep the violation fees because the fees are for a violation of state law. Historically, counties have enforced state law for the benefit of the schools. This provides for consistency of the law throughout the state with enforcement for which there is not financial gain for the entity doing the enforcement. Historically, there was a narrow exception created for cities for relatively small crimes and offenses that occurred within the city. A similar exception was not extended to counties, and only home rule counties, until 2003. The 2003 legislation does not directly address noncriminal traffic offenses and focuses on criminal penalties, and the court with jurisdiction over county ordinance violations is a state court.

Presently, non-home rule counties treat the violation fees as a matter of statewide concern, but the issuance and fee for the permit as a local concern. Whether an action is local or part of a statewide system should be able to be determined without needing to know the type of county in which the action occurs. The issue is whether the violation fees are part of a local permitting system or are part of a statewide traffic regulation system. There are strong arguments on either side.

In summary, any county or city may enact a weight restriction ordinance. Any county or city may issue permits under an ordinance. Any county or city may keep the fees for a permit issued under the ordinance. With respect to keeping the fees for a violation of the permit, any city can, a non-home rule county cannot, and it is unclear whether a home rule county can.