

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-06

Date issued: January 31, 2000

Requested by: Charlie Whitman, Bismarck City Attorney

- QUESTION PRESENTED -

Whether a home rule city can modify N.D.C.C. §§ 43-09-13.2 and 43-18-11.4 through ordinance.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a home rule city may not adopt qualifications for city plumbing and electrical inspectors through city ordinance which are less restrictive than the qualifications required under N.D.C.C. §§ 43-09-13.2 and 43-18-11.4.

- ANALYSIS -

The question presented involves the authority of a home rule city to adopt an ordinance which supersedes state law under N.D.C.C. § 40-05.1-05.

North Dakota law provides:

A person employed by the state electrical board or a political subdivision to inspect electrical installations must be licensed as a journeyman or master electrician. This section does not apply to an inspector employed by the electrical board or a political subdivision as of July 2, 1989.

N.D.C.C. § 43-09-13.2.

A person employed by the state board of plumbing or a political subdivision to inspect plumbing installations must be licensed as a journeyman or a master plumber. This section does not apply to an inspector employed by the board of plumbing or a political subdivision as of July 2, 1989.

N.D.C.C. § 43-18-11.4.

The city of Bismarck enacted ordinances that conflict with these sections of state law. Specifically, the ordinances provide:

Electrical Inspectors. A person employed by the City of Bismarck to inspect electrical installations must be licensed as a journeyman or master electrician or be certified as an electrical inspector through testing conducted by either the International Conference of Building Officials or the International Association of Electrical Inspectors. This section does not apply to an inspector employed by the City of Bismarck as of July 2, 1989.

Plumbing Inspectors. A person employed by the City of Bismarck to inspect plumbing installations must be licensed as a journeyman or master plumber or be certified as a plumbing inspector through testing conducted by the International Conference of Building Officials. This section does not apply to an inspector employed by the City of Bismarck as of July 2, 1989.

(Emphasis added).

North Dakota cities, including home rule cities, are creatures of the Legislature and have only those powers expressly granted to them or necessarily implied from the grant. Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D. 1980). "The power and authority of a city must be found either in a constitutional or statutory provision." Id. The Legislature has provided for the power that may be implemented through home rule and the procedures to implement them. N.D.C.C. ch. 40-05.1.

This office has recently summarized the steps utilized by the North Dakota Supreme Court and this office to resolve questions regarding home rule authority.

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).

1998 N.D. Op. Att'y Gen. L-117, L-118 (Aug. 25 letter to Peterson). See also 1993 N.D. Op. Att'y Gen. 96, 101, quoting 6 McQuillin, Municipal Corporations § 21.30 (1988) ("a city's implementation of

home rule may not 'supersede or prevail over conflicting general law dealing with affairs purely of statewide concern . . .').

"No part of Section 40-05.1-06, N.D.C.C., authorizes home rule cities to specifically adopt ordinances in regard to plumbers and plumbing business." Letter from Attorney General Robert Wefald to E. F. Welch (Nov. 14, 1984). However, in this situation, two home rule powers expressly listed in N.D.C.C. § 40-05.1-06 authorize the city ordinances discussed in this opinion regarding the qualifications of city personnel.

To provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation. . . .

. . . .

To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof.

N.D.C.C. § 40-05.1-06(4), (7) (emphasis added).

The current home rule charter for the City of Bismarck contains all of the home rule authorities listed in N.D.C.C. § 40-05.1-06. In addition, the powers claimed by the City are implemented through the ordinances quoted above. As a result, the sole remaining question is whether the lesser, alternative qualifications for city plumbing and electrical inspectors in the city ordinances concern local or statewide matters.

Whether an ordinance implementing a home rule power concerns a statewide matter is not always clear. For example, a home rule city cannot abolish its municipal court, 1993 N.D. Op. Att'y Gen. 96, but can provide for municipal jury trials. 1996 N.D. Op. Att'y Gen. 32, 34. In the one case, the abolition of a municipal court would burden the state court system. In the other, the additional burden of conducting a jury trial was solely on the municipality. In another situation, a home rule city's ordinance affected a statewide concern because it shortened the applicable time period for retaining the proceeds of the sale of abandoned vehicles and required the proceeds of the sale to be deposited into the city general fund rather than the state treasury. 1997 N.D. Op. Att'y Gen. L-155, L-157 (Sept. 26 letter to McLean).

In deciding whether the ordinances discussed in this opinion concern a local or statewide matter, it is helpful to note what the ordinances

do not provide. The ordinances do not replace the state plumbing code with a local code, do not remove the requirement that plumbing installations be inspected, and do not authorize unlicensed persons to engage in the business of plumbing or to do electrical work. Nor do the ordinances eliminate all required qualifications for city inspectors. Rather, the ordinances authorize less-restrictive qualifications for local officials performing inspections on behalf of local government.

"[T]he rule is that whether or not a general statute supersedes a prior special charter power of municipalities is really a question of intention, and where the legislative intent is manifest or apparent it must prevail." 6 Eugene McQuillin, The Law of Municipal Corporations § 21.29 (1988). There is no mention in either chapter 43-09 or 43-18 of home rule authority. N.D.C.C. §§ 43-09-13.2 and 43-18-11.4 were enacted in the same bill, which appears to have been addressed specifically to Bismarck's practice of employing unlicensed individuals as city inspectors. See 1989 N.D. Sess. Laws ch. 511. Unfortunately, there is no indication in the legislative history whether the Legislature intended the new licensing provisions to apply to home rule cities. At the time, the city of Bismarck had limited home rule powers which did not include the powers invoked by the city under its current home rule charter.

By considering and enacting a bill which specifically addressed the qualifications of local electrical and plumbing inspectors, the Legislature apparently was making those qualifications a state concern. The same could be said of all laws generally applying to cities, which would defeat the purpose of exercising home rule authority under N.D.C.C. ch. 40-05.1.

However, this situation is unique. Not only was the original law specifically addressed to the lesser qualifications required by the City of Bismarck, two subsequent efforts to reduce those qualifications were soundly defeated. See 1991 Senate Bill 2518, 1997 Senate Bill 2161. In particular, the 1997 bill was introduced at the request of the City of Bismarck and was proposed roughly two years after the adoption of the home rule ordinances which are the subject of this opinion.<sup>1</sup> Hearing on S. 2161 Before the Senate Business, Industry and Labor Comm. 55<sup>th</sup> N.D. Leg. (Feb. 5, 1997) (Written testimony of Jack Hegedus). None of the witnesses at the legislative hearings on these bills, including the City of Bismarck, mentioned the possible effect of the bills or current statutory requirements on a home rule city.

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<sup>1</sup> The Bismarck home rule charter was amended in 1992 to invoke all the authorities listed in N.D.C.C. § 40-05.1-06.

Although it would be better for the Legislature to specify whether it intends a law regarding cities to apply to home rule cities, such a specification is not always necessary to support the conclusion that a statute applies equally to home rule and non-home rule cities. See, e.g., 1997 N.D. Op. Att'y Gen. L-155 (Sept. 26 letter to McLean); 1993 N.D. Op. Att'y Gen. 96.

In conclusion, the minimum qualifications of local electrical and plumbing inspectors have been considered during no less than three of the last six legislative sessions. Each legislative action resulted in favor of the requirements imposed under N.D.C.C. §§ 43-09-13.2 and 43-18-11.4. The City of Bismarck was a main opponent of the requirements of those statutes each time the question was considered by the Legislature, yet now argues that it is not subject to those statutes because it is a home rule city. These positions are not completely consistent.

Considering that the extent of home rule authority is ultimately a question of legislative intent, these facts demonstrate a legislative determination that the qualifications of local inspectors is a matter of statewide concern. Accordingly, it is my opinion that a home rule city may not adopt qualifications for city inspectors which are less restrictive than the qualifications required under N.D.C.C. §§ 43-09-13.2 and 43-18-11.4, notwithstanding the authority of a home rule city to supersede state laws under N.D.C.C. § 40-05.1-05. If the Legislature intended a different result, the statutes can be clarified in the next legislative session to specifically exclude home rule cities.

- 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 question presented decided by the courts.

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