

LETTER OPINION
2003-L-43

October 8, 2003

Mr. Howard D. Swanson
Grand Forks City Attorney
PO Box 12909
Grand Forks, ND 58208-2909

Dear Mr. Swanson:

Thank you for your letter asking whether the city of Grand Forks may postpone or cancel a special election that has been called for October 28, 2003, to consider proposed amendments to the Grand Forks home rule charter. Notice of the special election has already been published, but members of the city council have asked whether the election could be postponed or canceled.

In a telephone conversation with a member of my staff, you indicated that the call for the election was made by passing a resolution by the city council. You stated that the city is acting under N.D.C.C. §§ 40-05.1-07 and 40-05.1-04 to amend the home rule charter. The amendments would permit the city to increase the city sales tax to finance a water slide.

Section 40-05.1-07, N.D.C.C., provides, in part:

The home rule charter adopted by any city may be amended or repealed by proposals submitted to and ratified by the qualified electors of the city in the same general manner provided in section 40-05.1-02 and section 40-05.1-04 for the adoption of the charter. Amendments may be proposed by the governing body of the city or by petition of the number of electors provided in section 40-05.1-02 and submitted to the voters at the same election. The voters may at their option accept or reject any or all of the amendments by a majority vote of qualified electors voting on the question at the election.

Section 40-05.1-04, N.D.C.C., provides for adopting a proposed charter by submitting it to a "vote of the qualified electors of the city at a regular or special city election, or at any

statewide election . . . or at a special city election held concurrently with any statewide election.” Grand Forks has chosen to submit the home rule charter amendments to the qualified electors at a special election.

Section 40-05.1-06, N.D.C.C., provides broad powers for home rule cities. These include power “[t]o provide for all matters pertaining to city elections” and “for the adoption, amendment, and repeal of ordinances, resolutions,¹ and regulations to carry out its governmental and proprietary powers.” N.D.C.C. § 40-05.1-06(6) and (7). Those powers are contained in the Grand Forks city charter. See Grand Forks Home Rule Charter, Article III(f) and (g).

Special elections are specifically permitted for cities “to fill vacancies or for any other purpose” under N.D.C.C. § 40-21-16. “By the use of the phrase ‘or for any other purpose,’ the Legislature clearly intended to allow municipalities to hold special elections whenever they so desire. Whether a special election is needed or is appropriate is a matter for determination by the appropriate governing body.” N.D.A.G. 83-34.

While cities have broad authority to call special elections, you indicate in your letter that you have found no North Dakota statute or case law addressing whether a city council may postpone or cancel a special election. I, too, have uncovered no such general North Dakota authority.² In the present case, the special election was called by the passage of a resolution by the city council. “There is no question but that municipalities possess the unquestioned power to rescind prior acts and votes at any time thereafter. However, such action cannot violate vested rights in individuals.” Id., citing 5 Eugene McQuillin, Municipal Corporations § 13.49 (3d ed. 1981). “The power to adopt a resolution carries with it the power to rescind it unless irrevocable rights and obligations have been created by the original resolution. . . . a municipality clearly has the authority to amend, alter, or repeal a resolution as previously approved. . . . In no case, however, may the resolution apply retroactively where it would act to illegally and unconstitutionally deprive a person of rights

¹ Similar authority exists in N.D.C.C. § 40-05-01(1).

² However, special elections held under N.D.C.C. ch. 40-12 for the purpose of voting on municipal initiated or referred measures submitted by electors appear to be mandatory and do not contemplate postponement or cancellation. See N.D.C.C. § 40-12-06 (“After receiving the petition for the initiation of a proposed ordinance, the governing body of the municipality shall: . . . 2. Call a special election . . . and submit to the vote of the qualified electors of the municipality the initiated ordinance without alteration.”) and N.D.C.C. § 40-12-09 (“When a referendum petition is filed . . . the governing body shall submit it to the vote of the qualified electors of the municipality at the next regular municipal election or at a special election to be called for that purpose as provided in section 40-12-06.”).

and obligations which have been acquired under the original resolution.” Id. See also Russell v. Harwood, 188 N.Y.S.2d 288 (N.Y. Sup. Ct. 1959) (town had authority under municipal law to rescind prior resolution proposing a town project which was scheduled for special election as a result of a petition, and to pass a new resolution scheduling a new special election on the proposed project).

You indicated that no contracts are in place with regard to the proposed sales tax increase to be voted on at the special election, nor was it your belief that anyone would be prejudiced by postponing or canceling the election. Consequently, it is my opinion that a home rule city has the authority to postpone or cancel a special election called at the request of the city council for the purposes of considering discretionary amendments to its home rule charter by amending or revoking the resolution calling for the election. It is, of course, advisable to publicize the cancellation or postponement.

I would note that if any qualified electors were aggrieved by the cancellation of the special election, they could initiate a petition drive to amend the home rule charter and submit the amendments to the voters. See N.D.C.C. § 40-05.1-07. The petition would be filed with the governing body and would have to be signed by not less than 15% of the qualified electors of the city voting in the last city election. See N.D.C.C. § 40-05.1-02.

It is also possible that an aggrieved elector might attempt to bring an action to compel a special election. There is some case law in other jurisdictions to the effect that when a petition is filed with a public official with jurisdiction to order an election and the official does order the election, the official may not thereafter attempt to revoke the order for election. See, e.g., Perkins v. Ingalsbe, 347 S.W.2d 926 (Tex. 1961). One noted author described the circumstances where the courts compel a city to hold an election: “[i]f necessary conditions precedent have been complied with, mandamus will be granted to compel the municipal council, or other proper corporate authorities to call and provide for an election required by law, where the duty is plain and no exercise of judgment or discretion is involved.” 17 Eugene McQuillin, The Law of Municipal Corporations § 51.49 (3d ed. 1993). “[T]he writ will lie to compel a city council to refer to the voters an amendment of an ordinance or a charter which had been proposed as prescribed by law, to require the submission of a proposition to referendum, to compel the calling of a special aldermanic election, and to compel an election pursuant to a law relating to changing the form of municipal government.” Id. Cases like Perkins are distinguishable in that they involve situations where there is a clear legal duty to call an election and no authority to revoke the call.

In the present situation, the city council had no plain duty to amend the home rule charter; rather, the amendment involved the exercise of discretion as to whether the proposed charter amendment to provide for an increase in the sales tax should be placed before the

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electors. Consequently, under those circumstances, if the city council determines that it is prudent to postpone or cancel a special election called by resolution, it may amend or revoke the resolution thereby postponing or canceling the election.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg