

**LETTER OPINION
2008-L-02**

February 27, 2008

Mr. Erik Johnson
Fargo City Attorney
505 Broadway St N Ste 206
Fargo, ND 58102-4489

Dear Mr. Johnson:

Thank you for your letter requesting my opinion on whether the provision in Fargo's home rule charter that allows the city commission to modify an initiated ordinance, supersedes the state law that allows modification of an initiated ordinance only by a vote of the people. You also ask whether the Fargo city commission may, under its home rule powers, enact an ordinance allowing the city commission to submit proposed ordinances to the city's voters for approval or rejection. For the reasons explained below, it is my opinion that the provision in Fargo's home rule charter that allows the city commission to modify an initiated ordinance, supersedes the state law that allows modification of an initiated ordinance only by a vote of the people. It is my further opinion that the Fargo city commission may, under its home rule powers, enact an ordinance allowing the city commission to submit proposed ordinances to the city's voters for approval or rejection.

ANALYSIS

The Legislature has provided by law for the establishment and exercise of home rule in cities.¹ The Legislature has specified certain powers a city can acquire if those powers are included in the city's home rule charter and the charter has been approved by a majority of the city's voters.² Home rule authority gives the people in a home rule city the full right of self-government in all matters that fall within the powers enumerated in the home rule charter.³ The charter, and the ordinances made pursuant to the charter, in local and city

¹ See N.D. Const. art. VII, § 6 and N.D.C.C. ch. 40-05.1.

² See N.D.C.C. §§ 40-05.1-06 and 40-05.1-05.

³ See N.D.C.C. § 40-05.1-06.

matters, supersede any state law in conflict with the charter and the ordinances, and must be liberally construed for such purposes.⁴

The city of Fargo operates under a home rule charter approved by a majority of its voters. Article 4 of Fargo's home rule charter secures the rights of initiative and referendum to the people of Fargo and specifies the procedures to be used when initiating or referring a city ordinance.⁵ Article 4 of Fargo's home rule charter includes the following provision:

Initiated or referred ordinances approved by the voters may be repealed or amended by a two-thirds majority of all the members of the governing body within one year of their effective date. After one year, such ordinances may be amended or repealed by a majority of the full governing body. This article is self-executing and all of its provisions are mandatory. Ordinances may be enacted to facilitate and safeguard, but not to hamper, restrict or impair these powers.⁶

This provision in Fargo's home rule charter would allow a majority of the full city commission to, after one year, amend or repeal an ordinance that had previously been initiated and approved by the city's voters.

North Dakota state law has a chapter regarding the initiative and referendum procedures that applies to cities operating under the commission form of government,⁷ like the city of Fargo.⁸ Within that chapter, the law provides that any initiated ordinance proposed by a petition and adopted by a vote of the people "cannot be repealed or amended except by a

⁴ See N.D.C.C. §§ 40-05.1-05 and 40-05.1-06.

⁵ See City of Fargo Home Rule Charter art. 4. Because article 4 of Fargo's home rule charter is very detailed regarding the initiative and referendum, an implementing ordinance does not appear to be necessary. See N.D.A.G. 2005-L-47. Cf. McCallum v. City Comm'rs. of City of Bismarck, 393 N.W.2d 263 (N.D. 1986) (because state law, under N.D.C.C. ch. 40-12, provides the necessary mechanism for implementing the referral right provided under the city's home rule charter, the absence of an implementing ordinance does not render the referral right inoperative), and Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980) (if the legislature and city home rule charter had authorized the city to change its form of government, it would have been necessary for the city to pass an implementing ordinance specifying the procedures to be followed and the forms of government that may be used).

⁶ City of Fargo Home Rule Charter art. 4 F.

⁷ See N.D.C.C. ch. 40-12 and N.D.C.C. § 40-12-01.

⁸ See City of Fargo Home Rule Charter art. 2 A.1.

vote of the people so long as the municipality remains under the commission system of government.”⁹

The issue here is whether Fargo’s home rule charter provision that allows an initiated ordinance to be modified by the city commission supersedes the state law that allows modification only by a vote of the people.

One of the powers a home rule city may acquire and which is included in Fargo’s home rule charter is the power:

To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers¹⁰

This power allows a home rule city to provide for the initiative and referendum of ordinances.¹¹ The North Dakota Supreme Court has stated that if a home rule charter provision conflicts with a section in N.D.C.C. ch. 40-12, regarding the initiative and referendum procedures, “the peoples’ will, as expressed through the charter, supersedes the state statute. . . .”¹² North Dakota Attorney General opinions have concluded the same: “Any conflicting charter provisions dealing with initiative and referendum of ordinances would . . . supersede North Dakota Century Code [ch.] 40-12. . . .”¹³ Also, previous North Dakota Attorney General opinions have held that a home rule charter or ordinance can supersede voter approval requirements in state law.¹⁴ Thus, it is my

⁹ N.D.C.C. § 40-12-07.

¹⁰ N.D.C.C. § 40-05.1-06(7) and City of Fargo Home Rule Charter art. 3 G.

¹¹ See N.D.A.G. 77-11, N.D.A.G. 81-141, N.D.A.G. 82-11, and N.D.A.G. 2005-L-47. See also Pelkey v. City of Fargo, 453 N.W.2d 801 (N.D. 1990) (authority to provide for initiative and referral of local ordinances is not limited by the people’s reserved powers of initiative and referendum under Article III, § 1 of the North Dakota Constitution because the constitutional provision applies to the initiative or referral of state laws and not local ordinances.)

¹² McCallum v. City Comm’rs of City of Bismarck, 393 N.W.2d 263, 264 (N.D. 1986).

¹³ N.D.A.G. 77-11. See also N.D.A.G. 94-L-20, N.D.A.G. 2005-L-47, and Pelkey v. City of Fargo cited in footnote 11 above.

¹⁴ See N.D.A.G. 2006-L-07, N.D.A.G. 2005-L-43, and N.D.A.G. 2003-L-25. Cf. Windham Taxpayers Ass’n v. Bd. of Selectmen of Town of Windham, 662 A.2d 1281 (Conn. 1995) (state law requiring a town meeting to be held upon petition of 20 or more voters is superseded by town’s home rule charter, which limits the situations in which a town meeting is required to be held), N.D.A.G. 95-L-48 (home rule county may supersede state laws regarding special assessments, including the 60 percent landowner petition requirements of N.D.C.C. § 11-11-55.1 and the majority protest bar in N.D.C.C.

opinion that the provisions in Fargo's home rule charter that allow the city commission to modify an initiated ordinance, supersedes the state law that allows modification of an initiated ordinance only by a vote of the people.

The remaining issue is whether the Fargo city commission may, under its home rule powers, enact an ordinance allowing the city commission to submit proposed ordinances to the city's voters for approval or rejection, similar to the right of the public to initiate ordinances and have them submitted to the voters for approval or rejection. The ordinance would provide that if the proposed ordinance received a majority of "yes" votes, the proposed ordinance would be deemed enacted by the city commission and would become effective at a specific date after the election.¹⁵

Generally, all cities in North Dakota may obtain advisory votes from their electorate.¹⁶ Also, under N.D.C.C. ch. 40-12, regarding the initiative and referendum procedures, a city governing body may submit to the voters a proposition for the repeal of or an amendment to an ordinance adopted by the initiative process.¹⁷

As stated previously, under its home rule charter, the city of Fargo has the power:

To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers¹⁸

Enacting an ordinance allowing the city commission to submit proposed ordinances to the city's voters for approval or rejection certainly falls within the power under Fargo's home rule charter for the city "[t]o provide for the adoption . . . of ordinances", especially considering that these powers are to be "liberally construed."¹⁹

§ 40-22-18; state law was later amended to prohibit home rule counties from superseding these requirements; see N.D.C.C. § 11-09.1-05(2)), and N.D.A.G. 2004-L-28 (a proposed home rule charter amendment requiring a 60 percent majority vote to increase taxes would be valid and binding on the city governing body and its citizens).

¹⁵ You indicated that the ordinance would become effective ten days after the election results are certified, except that an ordinance imposing any penalty, fine, imprisonment, or forfeiture for a violation of its provisions would become effective after publication of the title and penalty clause.

¹⁶ See N.D.C.C. § 40-21-16, N.D.A.G. 83-34, and N.D.A.G. Letter to Kringlie (Apr. 8, 1992).

¹⁷ See N.D.C.C. § 40-12-13.

¹⁸ N.D.C.C. § 40-05.1-06(7) and City of Fargo Home Rule Charter art. 3 G.

¹⁹ N.D.C.C. § 40-05.1-05.

It was suggested that the authority of a home rule city to submit proposed ordinances to the city's voters must be provided for in the city's home rule charter. As long as a city's home rule charter includes the general power to "provide for the adoption, amendment, and repeal of ordinances" as authorized by N.D.C.C. § 40-05.1-06(7), specifying the details of the manner in which ordinances are to be adopted, amended, or repealed could be included in either the charter itself or in ordinances adopted to implement this general power in the charter.

It was also suggested that the city commission, by enacting an ordinance giving itself the power to, in effect, initiate an ordinance, would be unlawfully interfering with the voters' rights of initiative and referral. The city commission's submission of its own proposed ordinances to the city's voters for approval or rejection in no way limits or diminishes the initiative or referral rights of the city's voters.²⁰

Thus, it is my further opinion that the Fargo city commission may, under its home rule powers, enact an ordinance allowing the city commission to submit proposed ordinances to the city's voters for approval or rejection.

Sincerely,

Wayne Stenehjem
Attorney General

las/vkk

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.²¹

²⁰ Compare N.D. Const. art. IV, § 16 (allowing the state legislature to submit a proposed constitutional amendment to the voters) with N.D. Const. Art. III, § 9 (allowing the people to initiate a constitutional amendment). Cf. Pelkey v. City of Fargo cited in footnote 11 above.

²¹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).