

N.D.A.G. Letter to Strate (July 2, 1986)

July 2, 1986

Mr. William L. Strate
Watford City Attorney
P.O. Box 494
Watford City, ND 58854

Dear Mr. Strate:

Thank you for your letter of June 23, 1986, requesting an opinion as to the ability of the citizens of a city utilizing a council form of government to refer ordinances passed by the city council. As you accurately state in your letter, N.D.C.C. § 40-12-01 clearly limits the authority to initiate and refer municipal ordinances only to cities operating under the commission and modern council system of government except cities adopting the eleven-member council form of government. Your letter makes it clear that the city of Watford City does not fall within one of these permissible forms of government which apparently enjoy the authority to initiate and refer municipal ordinances.

Enclosed please find a copy of an opinion issued by this office on October 27, 1969, precisely in response to the question you have raised in your letter. As you will note from this opinion, addressed to Rolla City Attorney J. Howard Stormon, the authority to initiate and refer city ordinances does not apply to cities which utilize forms of government not provided for in N.D.C.C. §40-12-01.

Your letter suggests a possible conflict between N.D.C.C. §40-12-01 and N.D. Const. Art. III, §1. The last sentence of this particular constitutional section states as follows:

Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers.

The subject matter of N.D. Const. Art. III, § 1, concerns a reservation of power to the people for the purpose of proposing and enacting laws by the initiative and to approve or reject the legislative acts, or parts thereof, by the referendum. The argument proceeds on the theory that an attempt to legislatively preclude certain cities from enjoying the powers of initiative and referendum act to hamper, restrict, or impair the powers of initiative and referendum. Such a restrictive effect would appear to be in violation of the constitutional provision quoted above.

This particular suggestion has gained some recognition by my predecessor. Enclosed you will find a copy of a letter and an opinion issued by my predecessor on February 17, 1982, wherein the suggestion is strongly made that N.D.C.C. § 40-12-01, so far as it prohibits the power to initiate and to refer municipal ordinances in certain cities, is unconstitutional as it violates N.D. Const. Art. III, §1.

However, I believe this conclusion is in error. In examining N.D. Const. Art. III, §1, it is quite clear that the discussion concerns the legislative power of the state being vested in the legislative assembly consisting of two houses. In vesting their legislative power in a legislative assembly, the people have reserved the power to propose and to reject laws by the initiative and referendum. Clearly, the focus of this article is with respect to state legislative authority as opposed to municipal legislative authority. The authority cited by the October 27, 1969, opinion of this office clearly indicates that a municipality is without authority to authorize the powers of initiative and referendum unless authorized by the constitution or by a statute. Clearly, N.D.C.C. § 40-12-01 is the only legislative authority providing for the power of initiative and referendum. It is my opinion that N.D. Const. Art. III, § 1, speaks only in terms of statewide legislative authority and is inapplicable to municipal legislative authority.

Therefore, it is my opinion that N.D.C.C. §40-12-01 is not unconstitutional in light of N.D. Const. Art. III, §1. Obviously, should those who desire the power of referendum and initiative be extended to other cities not listed in this statute, the appropriate remedy is to seek legislative change accomplishing this goal.

Sincerely,

Nicholas J. Spaeth

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Enclosure