Date Issued: June 11, 1985 (AGO 85-22)

Requested by: Richard P. Gallagher
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- QUESTION PRESENTED -

Whether a city ordinance annexing territory to the city may be referred to the electors of the city.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a city ordinance annexing territory to the city may not be referred to the electors of the city.

- ANALYSIS -

North Dakota law, N.D.C.C. chapter 40-51.2, provides for the annexation of territory to a city. One of the methods provided to accomplish such annexation is a written petition signed by not less than three-fourths of the qualified electors or by the owners of not less than three-fourths in assessed value of the property which is contiguous or adjacent to any city. N.D.C.C. section 40-51.2-03. Where such a petition is presented, the governing body of the city, by ordinance, may annex such territory to the city.

North Dakota law also provides for the referral of a city ordinance to the electors of that city upon the filing of a petition protesting the ordinance. This authority is found in N.D.C.C. section 40-12-08 which states, in part, as follows:

> An ordinance which has been adopted by the governing body of a municipality may be referred to the electors of the municipality by a petition protesting against such ordinance.

There are several Attorney General opinions which have concluded that not all city ordinances are subject to the referral provided for in N.D.C.C. section 40-12-08. See, e.g., 1981 N.D. Attorney General's Opinion 1; 1983 N.D. Attorney General's Opinion 103; N.D. Attorney General's Opinion 85-8. The basis for determining which ordinances were subject to the referendum and which were not was whether the ordinance was legislative or administrative in character.

Ordinances which originated a permanent law or established a rule of conduct or course of policy for guidance of citizens have been determined to be legislative in character and referable as such. Otherwise, ordinances which placed into execution previously declared policies or laws are administrative or executive in character and not referable. 42 Am. Jur.2d. Initiative and Referendum section 12 (1969).

> The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature

> if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. Similarly, an act or resolution constituting a declaration of public purpose and making provision for ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body. 5 E. McQuillin, Municipal Corporations section 16.55 at 194-5 (3d Rev. Ed. 1969).

In reviewing the characteristics of a particular ordinance in determining whether it would be subject to a referendum, this office has concluded that zoning ordinances (1981 N.D. Attorney General's Opinion 1), resolutions approving a tax exemption of property (1983 N.D. Attorney General's Opinion 103), and cable television franchise ordinances (N.D. Attorney General's Opinion 85-8) may not be referred to the electors of the city. In such cases, the ordinance or resolution in question was administrative in character, rather than legislative, as it placed into execution that which had already been provided for by the body itself if not by a superior legislative body.

An ordinance annexing territory to a city implements the authority specifically provided by the Legislature to cities upon receipt of the appropriate petitions. Such an ordinance does not declare rules of conduct or establish courses of policy to be followed by the city and its citizens. Furthermore, an annexation ordinance does not establish a procedure whereby annexations may be accomplished as such a procedure is already provided for by state law. Instead, such an ordinance acts to implement previously declared policies and authority from a higher legislative body; namely, the Legislative Assembly of the State of North Dakota. The annexation ordinance is specifically required by North Dakota law in order to accomplish that which the petitioners by their written petition have sought through processes and methods specifically established by statute. The annexation ordinance is thus seen as one of many steps in a statutorily outlined procedure whereby property may be annexed to a city.

In further support of the conclusion that the ordinance enacted to annex property to a city is administrative in character, one should note that the city may decide, by ordinance, to not annex property to the city as requested by the petition. The last sentence of N.D.C.C. section 40-51.2-06 states as follows:

> If the governing body determines to exclude the area petitioned for, it may do so by ordinance adopted and recorded as in case of annexation. (Emphasis supplied).

Obviously, the Legislature has commanded the enactment of an ordinance by the city in its consideration of a petition for the annexation of property to a city. However, the ordinance is nothing more than an indication of whether the city governing body grants or denies the request for annexation. The enactment of such an ordinance is mandatory and is nothing more than a reflection of the governing body's decision as to whether the annexation petition should be granted or denied.

> Since such action is mandatory ›enactment of an ordinance granting a franchise!, the adoption of such an ordinance does not lie within the legislative discretion of the board. It is purely administrative, in compliance with the direction of the General Assembly. Seaton v. Lackey 182 S.W.2d. 336, 339 (Ky. 1944).

The Washington Supreme Court has addressed the very issue at hand. In State v. Kruegel 409 P.2d. 458 (Wash. 1965), the Court concluded that an annexation ordinance may not be the subject of a referendum. Two arguments were presented by the Court in support of its conclusion. First, the ultimate power of annexation has been placed by the Legislature with the city governing body and not with the city electorate.

> And though the power of referendum in annexation cases is nowhere prohibited, neither is such power anywhere conferred upon the city electorate . . . . No power of annexation existing in the cities except that delegated to it by the state, any annexation undertaken by the city must be in the manner prescribed and pursuant to the conditions imposed by the legislature. Id. at 460-3.

Second, an annexation ordinance is an exercise of the city's administrative authority bestowed upon it by the superior legislative body (i.e., the state legislature). Such ordinances, in the state of Washington and elsewhere, are not subject to the referendum.

Viewed from these perspectives, it is my opinion that a city ordinance annexing territory to a city in furtherance of a written petition as provided for in N.D.C.C. section 40-51.2-03 is administrative in character and, thus, not subject to a referendum.

The authority to initiate and refer city ordinances is one provided by the Legislative Assembly of the State of North Dakota. Should there be a desire to have the statutes amended so as to specifically provide for the initiative or referral of ordinances whereby a property is annexed to or excluded from a city, including those administrative in character, the Legislature need only pass a specific statute providing for such authority within N.D.C.C. chapter 40-51.2.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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Attorney General

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