



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

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LETTER OPINION
2024-L-04

Ms. Janelle Combs
Bismarck City Attorney
221 N. 5th St.
P.O. Box 5503
Bismarck, ND 58501

Dear Ms. Combs:

Thank you for your letter requesting an opinion on whether a petition to initiate an ordinance pursuant to art. 5 of the City of Bismarck's Home Rule Charter (Home Rule Charter) is subject to the time limit for the filing or presentation of a petition set forth in North Dakota Century Code (N.D.C.C.) § 1-01-50, and, if so, whether this time limitation violates the constitutional right of the people to initiate a petition under N.D. Const. art. III, § 1. For the reasons that follow, it is my opinion that, because art. 5 of the Home Rule Charter does not contain a provision related to time limits for the filing or presentation of a petition to initiate an ordinance, the time limitations of N.D.C.C. § 1-01-50 apply. Furthermore, it is my opinion that the constitutional right of the people to initiate a petition under N.D. Const. art. III, § 1, applies only to state laws and "does not include a reserved power to initiate or refer local laws or ordinances." For that reason, the application of N.D.C.C. § 1-01-50 to the initiation of local ordinances does not encumber the constitutional rights reserved to the people under N.D. Const. art. III, § 1.¹

ANALYSIS

"The Legislature has provided by law for the establishment and exercise of home rule in cities."² Section 40-05.1-06, N.D.C.C., specifies certain powers a city may 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 qualified voters.³ Home rule authority gives the people in a home rule city "the full right of self-government in both local and city matters within the powers enumerated [in N.D.C.C. ch. 40-05.1]."⁴ While the home rule charter and the implementing ordinances supersede any

¹ *Pelkey v. City of Fargo*, 453 N.W.2d 801, 805 (N.D. 1990).

² N.D.A.G. 2008-L-02, *citing* N.D. Const. art. VII, § 6 and N.D.C.C. ch. 40-05.1.

³ *See* N.D.C.C. §§ 40-05.1-06 and 40-05.1-05; N.D.A.G. 2008-L-02.

⁴ N.D.C.C. § 40-05.1-06.

conflicting state law, all other “statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities.”⁵

The city of Bismarck adopted a home rule charter on January 14, 1986, and operates under a commission form of government.⁶ One of the powers a home rule city may acquire, which is included in the Home Rule Charter at art. 3(7), is the power:

To provide for the adoption, amendment, and repeal of the 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.⁷

This office has previously opined that “[t]his power allows a home rule city to provide for the initi[ation] and refer[ral] of ordinances.”⁸ Article 5 of the Home Rule Charter specifies the procedures to be used when initiating a city ordinance.⁹ While art. 5 of the Home Rule Charter addresses initiative procedures similar to the procedures for municipal initiatives and referendums included in N.D.C.C. ch. 40-12, the Home Rule Charter does not specifically address a time limit for the filing or presentation of a petition to initiate an ordinance. Nor does it express an intention to preclude such a time limitation.¹⁰

⁵ N.D.C.C. § 40-05.1-06; N.D.C.C. § 40-05.1-05, N.D.A.G. 2008-L-02; *McCallum v. City Comm’rs of City of Bismarck*, 393 N.W.2d 263, 264.

⁶ See City of Bismarck Home Rule Charter; Bismarck Mun. Ordinance § 2-02-04.

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

⁸ N.D.A.G. 2008-L-02; citing 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) (the “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.”).

⁹ City of Bismarck Home Rule Charter art. 5. Because art. 5 of the City of Bismarck Home Rule Charter is very detailed regarding the initiative process, an implementing ordinance does not appear to be necessary. See N.D.A.G. 2008-L-02, n. 5, “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).”

¹⁰ See N.D.C.C. ch. 40-12 and City of Bismarck Home Rule Charter, art. 5 (procedures addressed include number of signatures, location of filing or presentation of the petition, requirements of the format of the petition, action of the city commission upon receipt of the petition, and publication requirements).

The Supreme Court has established a general rule regarding when a home rule ordinance supersedes state law:

In our view, to permit a conclusion that an ordinance supersedes a state law, providing the charter and implementing ordinance requirements have been met, it is not only essential that the power given to the city by the legislature is clearly expressed or necessarily implied from the grant but also that it conflicts with the laws generally applicable to cities.¹¹

Subsection 10, Section 40-05.1-06, N.D.C.C., allows a home rule city, which validly adopted the power through a home rule charter and enacted an implementing ordinance, to provide for the initiation and referral of ordinances. Despite having the option, the city of Bismarck did not include a time limitation for the filing or presentation of a petition for the initiation of an ordinance in its implementing language located at art. 5 of the Home Rule Charter. Therefore, the implementing home rule charter language does not conflict with N.D.C.C. § 1-01-50, the state statute governing the time limits for the filing or presentation of petitions applicable to cities.¹² For this reason, it is my opinion that, because art. 5 of the Home Rule Charter does not contain a provision related to time limits for the filing or presentation of a petition to initiate an ordinance, the time limitations of N.D.C.C. § 1-01-50 apply.

Because I have determined that the time limitations of N.D.C.C. § 1-01-50 apply to the filing of a petition to initiate an ordinance in the city of Bismarck, your subsequent inquiry focuses on whether this time frame, in effect, unlawfully interferes with the constitutional right of the people to initiate a petition under N.D. Const. art. III, § 1. The North Dakota Supreme Court in *Pelkey v. City of Fargo* spoke clearly with regard to whether there is a constitutional right to initiate or refer ordinances:

Article III, N.D. Const., clearly does not encompass initiative or referendum of local laws or ordinances. It speaks directly and specifically of the legislative power of this ‘state,’ vested in our state legislative assembly, but reserving to the people the power to initiate and refer state laws to be voted upon in a statewide election . . . [w]e hold that the power of the people to initiate and refer legislation under Article III, § 1, N.D. Const., does not include a reserved power to initiate or refer local laws or ordinances.¹³

Based on the Court’s holding in *Pelkey*, it is my opinion that N.D. Const. art. III, § 1 applies only to the initiation and referral of state laws, and a time limit to file or present a petition to initiate a

¹¹ *Litten v. City of Fargo*, 294 N.W. 2d 628, 634 (N.D. 1980); *see also* N.D.A.G. 82-67.

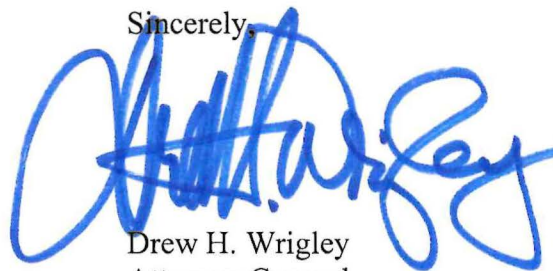
¹² *See* N.D.C.C. § 1-01-50.

¹³ *Pelkey v. City of Fargo*, 453 N.W.2d 801, 805 (N.D. 1990).

local ordinance does not unlawfully interfere with constitutional rights reserved to the people under N.D. Const. art. III, § 1.¹⁴

In summary, because art. 5 of the Home Rule Charter does not contain a provision related to time limits for the filing or presentation of a petition to initiate an ordinance, it is my opinion that the time limitations set forth in N.D.C.C. § 1-01-50 apply. Additionally, the power reserved for the people to initiate and refer legislation under N.D. Const. art. III, § 1 does not apply to local ordinances, and the application of N.D.C.C. § 1-01-50 to the initiation or referral of ordinances does not unlawfully encumber constitutional rights reserved to the people under N.D. Const. art. III, § 1.

Sincerely,



Drew H. Wrigley
Attorney General

AMH

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.¹⁵

¹⁴ *Id.*

¹⁵ *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).