



STATE OF NORTH DAKOTA  
**OFFICE OF ATTORNEY GENERAL**

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**Drew H. Wrigley**  
ATTORNEY GENERAL

**LETTER OPINION**  
**2024-L-05**

Ms. Christina M. Wenko  
Dickinson City Attorney  
Mackoff Kellogg Law Firm  
38 Second Ave. E.  
Dickinson, ND 58601

Dear Ms. Wenko:

Thank you for your letter requesting my opinion on whether a home rule charter city may modify the elected official recall process enumerated in North Dakota Century Code (N.D.C.C.) § 44-08-21. Because the rule of strict construction applies in defining municipal powers and any doubt as to the existence of municipal powers must be resolved against the municipality, it is my opinion that N.D.C.C. § 40-05.1-06 does not grant home rule charter cities the power to devise a process for the recall of city officials separate from that provided in N.D.C.C. § 44-08-21.

ANALYSIS

Article VII, § 2, N.D. Const., requires the Legislature to provide by law for the establishment and government of all political subdivisions.<sup>1</sup> “The Legislature also has the constitutional authority ‘to provide by law for the establishment and exercise of home rule in counties and cities’ . . . and has provided for home rule cities by enacting N.D.C.C. ch. 40-05.1.”<sup>2</sup> Pursuant to N.D.C.C. § 40-05.1-05, home rule charters allow cities to enact ordinances which are contrary to those of the state.<sup>3</sup> However, “a home rule city’s ability to enact ordinances that supersede state law is not without limitation, because ‘[w]hatever powers a home rule city may have are based upon statutory provisions.’”<sup>4</sup> Section 40-05.1-06, N.D.C.C., specifies 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.<sup>5</sup> These powers include the power “[t]o provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation.

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<sup>1</sup> Art. VII, § 2, N.D. Const; see also *City of Fargo v. Malme*, 2007 ND 137, ¶ 9, 737 N.W.2d 390; *Pelkey v. City of Fargo*, 453 N.W.2d 801, 803 (N.D. 1990).

<sup>2</sup> *City of Fargo v. Malme*, 2007 ND 137 ¶ 9, 737 N.W.2d 390, quoting N.D. Const. art. VII.

<sup>3</sup> See *City of Bismarck v. Fettig*, 601 N.W.2d 247 (N.D. 1999), n. 1; see also N.D.C.C. § 40-05.1-05.

<sup>4</sup> *City of Fargo v. Malme*, 2007 ND 137 ¶ 10, 737 N.W.2d 390, quoting *Pelkey v. City of Fargo*, 453 N.W.2d 801, 805 (N.D. 1990).

<sup>5</sup> See N.D.C.C. §§ 40-05.1-05, 40-05.1-06; N.D.A.G. 2008-L-02.

To provide for change, selection, or creation of its form and structure of government, including its governing body, executive officer, and city officers.”<sup>6</sup> “[T]he supersession provision in N.D.C.C. § 40-05.1-05 applies only to those powers enumerated in N.D.C.C. § 40-05.1-06, and those powers must also be included in the charter and be implemented by ordinance.”<sup>7</sup>

The city of Dickinson is a municipal corporation which operates under a Home Rule Charter approved by a majority of its voters on May 22, 1990 (Home Rule Charter).<sup>8</sup> Article 3 of the Home Rule Charter includes the power “[t]o provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation. To provide for change, selection, or creation of its form and structure of government, including its governing body, executive officer, and city officers.”<sup>9</sup> The Home Rule Charter also includes Article 8, which governs the recall of elected officers or officials, including three detailed, separate sections governing the form of the petition; the filing, certification and submission of the recall petition; and the election procedure and filing of any resulting vacancies.<sup>10</sup> A fourth section states the article is self-executing.<sup>11</sup> These provisions, including signature requirements<sup>12</sup> and deadlines,<sup>13</sup> conflict with the requirements of

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<sup>6</sup> N.D.C.C. § 40-05.1-06(7).

<sup>7</sup> *City of Fargo v. Malme*, 2007 ND 137 ¶ 11, 737 N.W.2d 390, citing *Litten v. City of Fargo*, 294 N.W.2d 628, 632 (N.D. 1980).

<sup>8</sup> It should be noted that the powers included in N.D.C.C. § 40-05.1-06 have been legislatively modified since the City Dickinson’s Home Rule Charter was adopted in 1990, however, the language of powers at issue in this opinion, currently N.D.C.C. §§ 40-05.1-06(7) and (9) remain unchanged. In 1990, however, the legal citation for the current N.D.C.C. § 40-05.1-06(7) was N.D.C.C. § 40-05.1-06(4), and the legal citation for the current N.D.C.C. § 40-05.1-06(9) was N.D.C.C. § 40-05.1-06(6). *See* S.B. 2326, 65th Legis. Assemb. (N.D. 2017).

<sup>9</sup> City of Dickinson Home Rule Charter, art. 3.

<sup>10</sup> City of Dickinson Home Rule Charter, art. 8. Because art. 8 of the Home Rule Charter is very detailed regarding the recall process, an implementing ordinance does not appear to be necessary. *See* N.D.A.G. 2008-L-02, n.5; N.D.A.G. 2005-L-47. It is unknown, however, whether a subsequent ordinance regarding recall of elected officers or officials was adopted by the city of Dickinson; no implementing ordinances for this particular article were included in the request for opinion.

<sup>11</sup> City of Dickinson Home Rule Charter, art. 8, §4.

<sup>12</sup> N.D.C.C. § 44-08-21(1) requires the recall petition to be signed by “twenty-five percent of the voters who voted in the most recent election,” while art. 8 § 1(a) of the Home Rule Charter requires “fifteen percent (15%) of the total votes cast in the most recent City election.”

<sup>13</sup> N.D.C.C. § 44-08-21(3) requires the recall petition to be reviewed for sufficiency pursuant to 16.1-01-09.1(8) within a “reasonable period, not to exceed thirty days,” while art. 8, § 2(a) of the Home Rule Charter requires the petition to be reviewed for sufficiency within “fifteen (15) days.” Additionally, N.D.C.C. § 44-08-21(3) indicates that a special election shall be held “not sooner than ninety-five days nor later than one-hundred five days” after the certification of the petition, while

N.D.C.C. § 44-08-21, which ordinarily governs the recall of the elected officials of political subdivisions. While it is not clear which statutory home rule charter power Article 8 intends to implement, the requestor suggests that the authority to recall elected city officials may lie within N.D.C.C. § 40-05.1-06(7).<sup>14</sup>

“The rule of strict construction applies in defining municipal powers.”<sup>15</sup> “Any doubt as to the existence or extent of municipal powers must be resolved against the municipality.”<sup>16</sup> Section 40-05.1-06(7), N.D.C.C., broadly gives home rule charter cities authority over the “*selection*, terms, powers, duties, qualifications, and compensation” of city officers, agencies, and employees.<sup>17</sup> This provision, however, does *not* expressly address or authorize the adoption of a method of recall of elected city officers contrary to that provided by state law. “Words used in any statute are to be understood in their ordinary sense.”<sup>18</sup> “Selection” has a plain language meaning of the “process of selecting” with “select” being defined as “chosen from a number or group by fitness or preference.”<sup>19</sup> A recall of an elected official is the procedure by which a city official is *removed* from office by a vote of the people.<sup>20</sup> Selection and removal of elected officials are inherently antipodal processes, and the power to modify the manner of the selection of city officials does not include the power to modify the manner of the removal of city officials. Because the rule of strict construction requires that any doubt regarding the existence of a municipal power be resolved against the municipality, the power to adopt a recall process contrary to the process set forth in N.D.C.C. § 44-08-21 cannot be implied from the unambiguous plain language of N.D.C.C. § 40-05.1-06(7).

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art. 8, § 2(b) of the Home Rule Charter requires a special election be held “not less than forty (40) days nor more than sixty (60) days” from the date the petition is certified.

<sup>14</sup> See Letter from Christina Wenko, City Attorney, City of Dickinson, to Allyson M. Hicks, Assistant Att’y Gen., Off. of Att’y Gen. (Aug. 13, 2024).

<sup>15</sup> *City of Fargo v. Malme*, 2007 ND 137 ¶ 13, 737 N.W.2d 390, citing *GO Comm. ex rel. Hale v. City of Minot*, 2005 ND 136, ¶ 8, 701 N.W.2d 865; *City of Bismarck v. Fettig*, 1999 ND 193, ¶ 4, 601 N.W.2d 247; *Ebach v. Ralston*, 469 N.W.2d 801, 804 (N.D. 1991); *Haugland v. City of Bismarck*, 429 N.W.2d 449, 453 (N.D. 1988).

<sup>16</sup> *City of Fargo v. Malme*, 2007 ND 137 ¶ 13, 737 N.W.2d 390, 395, citing *Meyer v. City of Dickinson*, 451 N.W.2d 113, 115 (N.D.1990); *Dacotah Hotel Co. v. City of Grand Forks*, 111 N.W.2d 513, 515 (N.D. 1961); *Lang v. City of Cavalier*, 228 N.W. 819, Syll. 3 (N.D. 1930).

<sup>17</sup> N.D.C.C. § 40-05.1-06(7) (emphasis added). See N.D.A.G. 2011-L-03 (a home rule city has authority to modify the number of board members and term length of board members of a municipal library board); N.D.A.G. 2004-L-62 (a home rule city has authority to adopt an ordinance providing for the appointment, rather than election, of a municipal judge); N.D.A.G. 2000-F-18 (a home rule city has authority to adopt its own civil service system).

<sup>18</sup> N.D.C.C. § 1-02-02.

<sup>19</sup> *Selection, select*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/>; (last visited Nov. 4, 2024).

<sup>20</sup> See N.D.C.C. § 44-08-21.

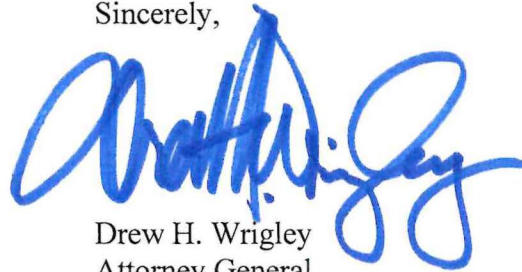
LETTER OPINION 2024-L-05

November 5, 2024

Page 4

Based upon the foregoing analysis, it is my opinion that N.D.C.C. § 40-05.1-06 does not grant home rule charter cities the authority to adopt a process for the recall of elected city officials which conflicts with the process set forth in state law at N.D.C.C. § 44-08-21.

Sincerely,

A handwritten signature in blue ink, appearing to read "Drew H. Wrigley". The signature is fluid and cursive, with the first name "Drew" being the most prominent.

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.<sup>21</sup>

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