

OFFICE OF THE ATTORNEY GENERAL
STATE OF NORTH DAKOTA

OPINION NO. 81-141

Date issued: December 30, 1981

Requested by: Wayne O. Solberg
Fargo City Attorney

--QUESTIONS PRESENTED--

I.

Whether the citizens of a home rule city, having a commission form of government, possess the power of initiative and referendum as provided in Chapter 40-12 of the North Dakota Century Code where that city has no ordinance implementing that power.

II.

Whether a home rule city, which has adopted the eleven-member council form of government, has the power to provide for the initiative and referendum of its ordinances despite the prohibition contained in Section 40-12-01, N.D.C.C.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the citizens of a home rule city, having a commission form of government, do possess the power of initiative and referendum as provided in Chapter 40-12, N.D.C.C., where that city has no ordinance implementing that power.

II.

It is my further opinion that a home rule city, which has adopted the eleven-member council form of government, does have the power to provide for the initiative and referendum of its ordinances despite the prohibition contained in Section 40-12-01, N.D.C.C.

--ANALYSIS--

I.

Section 40-12-01, N.D.C.C., provides that Chapter 40-12, N.D.C.C., dealing with the initiating and referring of municipal ordinances applies to all cities operating under the

commission and modern council system of government except those cities adopting the eleven-member council form of government. There is no requirement that a city must pass an ordinance implementing the power of initiative and referendum before it can take advantage of those powers provided by Chapter 40-12, N.D.C.C. Furthermore, Section 40-01-19, N.D.C.C., provides that all of the provisions of Title 40 apply to all cities in the state. Finally, Section 40-05.1-12, N.D.C.C., provides that all powers conferred upon cities generally are also given to home rule cities.

All cities, including home rule cities, may provide for the initiating and referring of municipal ordinances as provided for under Chapter 40-12, N.D.C.C., without need of an ordinance implementing that authority.

II.

Section 40-12-01, N.D.C.C., prohibits cities operating under the eleven-member council form of government from initiating and referring its municipal ordinances. A home rule city which adopts an eleven-member council form of government and which has implemented the power of initiative and referendum would appear to be in conflict with state law. However, Section 40-05.1-05, N.D.C.C., provides for the supersession of existing home rule charter powers over state laws which may be in conflict. That section states in part as follows:

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of the city any law of the state in conflict therewith, and shall be liberally construed for such purposes.

In Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980), our Supreme Court stated that the language in Section 40-05.1-05, N.D.C.C., permitting a home rule city ordinance to supersede state law where there is a conflict between the two, has reference only to those specific powers given to the home rule city under Section 40-05.1-06, N.D.C.C. Where a home rule city ordinance conflicts with state law, but has no basis in Section 40-05.1-06, N.D.C.C., the city ordinance will not supersede state law.

Section 40-05.1-06(7), N.D.C.C., states that home rule cities have the authority to provide 'for the adoption, amendment, and repeal of ordinances, resolutions, and regulations. . . .' To initiate or refer a municipal ordinance is to provide for the adoption, amendment, or repeal of that ordinance. Therefore, the charter of a home rule city providing for initiative and referendum does have a legal basis in Section 40-05.1-06, N.D.C.C. Accordingly, the supersession provision of Section 40-05.1-05 applies to override the provisions of Section 40-12-01, N.D.C.C.

Home rule cities have the authority to provide for the initiative and referendum of its municipal ordinances. Where a home rule city adopts the eleven-member council form of government and provides for the power of initiative and referendum, its home rule authority

will supersede the prohibition contained in state law preventing eleven-member council forms of government from adopting the authority to initiate or refer municipal ordinances.

--EFFECT--

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

Robert O. Wefald
Attorney General

Prepared by: Terry L. Adkins
Assistant Attorney General