

**LETTER OPINION
2002-L-38**

June 27, 2002

Mr. Fritz Fremgen
Stutsman County State's Attorney
511 2nd Avenue SE
Jamestown, ND 58401

Dear Mr. Fremgen:

Thank you for your letter asking whether a county with a home rule charter is authorized to pass an ordinance providing for a criminal charge or criminal penalty.

Counties without a home rule charter do not have general authority to enact a criminal ordinance, and may only enact a criminal ordinance where there is a specific state law providing a criminal penalty for violation of a county ordinance. 1999 N.D. Op. Att'y Gen. L-33, 1984 N.D. Op. Att'y Gen. F-14. Whether a county with a home rule charter may enact a criminal ordinance in the absence of a statute providing for a criminal penalty depends on whether the powers granted to home rule counties include a general power to create and enforce criminal ordinances.

Once a county has adopted a home rule charter in conformity with N.D.C.C. ch. 11-09.1 and filed it with the Secretary of State, the county has the powers enumerated in N.D.C.C. § 11-09.1-05 if they are included in the charter and implemented through ordinances. The only relevant enumerated power is that contained in subsection 5, which allows a home rule county to:

[p]rovide for the adoption, amendment, repeal, initiative, referral, enforcement, and penalties for violation of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare. However, this subsection does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.

N.D.C.C. § 11-09.1-05(5). The term "penalties" in the subsection above is not defined in terms of whether it would include criminal penalties as well as civil penalties for violation of county ordinances. The laws concerning county home rule do not provide any guidance on topics necessary to a criminal charge or a criminal prosecution. Specifically, there is no statement concerning what criminal penalties may be assessed, such as imprisonment or

a fine. Also, there are no provisions discussing procedures to be followed in charging the case. This lack of limitations and procedures makes it questionable whether the Legislature intended to include criminal penalties in N.D.C.C. §11-09.1-05(5). “If the language of a statute is ambiguous or of doubtful meaning, extrinsic aids may be used to interpret the statute.” Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). The circumstances under which a statute was enacted and its legislative history may be considered in determining the meaning of an ambiguous statute. N.D.C.C. § 1-02-39(2), (3).

County home rule was passed as 1985 House Bill 1083. 1985 N.D. Sess. Laws ch. 152. The bill resulted from a study during the 1984 interim. Report of the North Dakota Legislative Council, at 183 (1985). The interim committee recommended that House Bill 1083 “provide for county home rule patterned after existing city home rule provisions.” Id. at 184. The bill also provided that county home rule provisions, like city home rule provisions, “do not supersede provisions of state law which define crimes or provide criminal penalties.”¹ Id. at 184; see also N.D.C.C. § 12.1-01-05.

Because county home rule is modeled after city home rule, it is reasonable to examine whether city home rule provides for criminal penalties to determine whether the legislature intended counties to provide for criminal penalties. City home rule allows cities to establish city courts with jurisdiction and powers over ordinance violations, to provide for penalties for violations of ordinances, to define offenses against private persons and property or the public health, safety, morals, and welfare, and to provide penalties for violations of these ordinances. N.D.C.C. § 40-05.1-06(5), (7), and (9). However, a home rule city’s authority to charge a criminal violation is not derived from its home rule powers. All cities in North Dakota have the power to establish and maintain a jail “for the confinement of persons charged with or convicted of the violation of any ordinance.” N.D.C.C. §40-05-01(41). City fines and penalties are limited to a fine of one thousand dollars or imprisonment not to exceed 30 days for one offense. N.D.C.C. § 40-05-06(1). Therefore, all cities in North Dakota have statutory authority to imprison a person for a violation of a city ordinance.

“Counties are creatures of the North Dakota Constitution and may act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to constitutional authority. As a political subdivision of the State, a county’s rights and powers are determined and defined by law.” McKenzie County v. Hodel, 467 N.W.2d 701, 707-08 (N.D. 1991) (VandeWalle, J., concurring) (citations omitted). See also Stutsman County v. State Historical Society, 371 N.W.2d 321 (N.D. 1985); Hart v. Bye, 76 N.W.2d 139 (N.D. 1956). Although the North Dakota constitution calls for county home rule, the

¹ This provision does not, however, provide a grant of authority to pass criminal ordinances because it is in response to a concern that home rule authority could be used to legalize activities that are not legal under state law. Hearing Before the Political Subdivisions B Committee 1983-85 Interim (June 27, 1983) (Statement of Rep. Conmy).

powers to be granted a county under home rule are to be defined by the Legislative Assembly. N.D. Const. Art. VII, §6. Home rule authority is limited to those powers granted by the Legislature by statute. Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D. 1980).

The Supreme Court of North Dakota has not addressed this issue, but courts of other states have addressed the issue of county criminal ordinances. When a state legislature intended a local government to create criminal ordinances under its home rule charter, that power was explicitly stated in law together with a limitation on the amount of fines and the duration of imprisonment. Commonweath v. Cabell, 185 A.2d 611, 613 (Pa. Super. 1962). Language similar to what North Dakota provides for county home rule, including the power to make and enforce police regulations, was held not to delegate authority to counties to pass and enforce criminal legislation. Associated Dairy Products Co. v. Page, 206 P.2d 1041, 1044-46 (Ariz. 1949). The Supreme Court of Wisconsin has gone so far as to hold that, because the sovereign alone can create a crime, a law purporting to delegate power to the counties to create a crime is void as an attempt to confer sovereignty upon the counties. State ex rel. Keefe v. Schmiedege, 28 N.W.2d 345, 348 (Wis. 1947).²

Therefore, it is my opinion that the Legislature has not granted home rule counties the authority to provide a criminal punishment for violation of county ordinances. A grant of this authority must be explicit and include relevant limitations on the scope of any fine or imprisonment allowed under a county ordinance.³ If this authority is desired, the Legislature would need to provide a clear grant of authority and address numerous issues such as the maximum term of imprisonment or fine that could be imposed against an individual.

You have also asked about the meaning of the last sentence in N.D.C.C. § 11-09.1-05(5), which provides that this subsection “does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.” The purpose of home rule authority would be thwarted if a home rule county could not address any subject that state law already addresses. 1990 N.D. Op. Att’y Gen. F-21 at p. 84.

² While counties were held not to have the power to impose criminal punishment for violation of county ordinances under Keefe, a county is allowed to bring a civil action to recover a fine under county ordinances which regulate local affairs to provide for good order in the community. State ex rel. Teunas v. County of Kenosha, 418 N.W.2d 833, 836-7 (Wis. 1988). Other states have disagreed with Keefe and explicitly held that a legislature may delegate the power to create a crime to local government. Dunn v. Mayor of Wilmington, 219 A.2d 153, 155 (Del. 1966).

³ The Keefe opinion from Wisconsin appears unique in its holding that a state legislature cannot constitutionally delegate the authority to create criminal ordinances. The case criticizing Keefe is better reasoned, and is relied on in this opinion. See Dunn, 219 A.2d at 155.

This office determined “that the Legislature only intended to prevent a home rule county from addressing an activity or industry which is subject to substantial state control, management, or supervision such as matters involving the Public Service Commission. By using the term ‘regulate’ the Legislature did not intend to forbid a home rule county from regulating an industry or activity already addressed by state law.” Id. at p. 84.

Your actual question involves a proposed county ordinance dealing with dogs running at large. Chapters 36-11, N.D.C.C., regarding trespass of livestock and 36-13 regarding estrays generally apply to livestock. It is my opinion that these two chapters do not regulate the running at large of dogs, and neither chapter would limit a home rule county’s authority to establish its own regulations on this subject.

If the proposed home rule ordinance attempts to address the health and diseases of dogs or the humane treatment of dogs, care should be taken not to supersede the authority of the State Board of Animal Health. It is my opinion these subject areas are regulated by state law and the State Board of Animal Health and home rule counties may not supersede such regulation. See N.D.C.C. § 36-01-08, 36-01-12, and ch. 36-21.1, and N.D.A.C. arts. 48-02, 48-04, and 48-12 regarding health and diseases; see N.D.C.C. §36-21.1-12 and N.D.A.C. § 48-12-01-01 and § 48-12-01-15 regarding the humane treatment of animals.

Also, care should be taken that the home rule ordinance does not supersede state laws defining criminal offenses. See N.D.C.C. § 12.1-01-05. See also City of Fargo v. Little Brown Jug, 468 N.W.2d 392 (N.D. 1991) (discussing supersession and equal protection).⁴

Sincerely,

Wayne Stenehjem
Attorney General

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⁴ The state laws defining criminal offenses that are relevant are found at N.D.C.C. §§ 42-01-15 (a violation of ch. 42-03, Dogs as Public Nuisance, is a class A misdemeanor), 36-21.1-03.1 (leaving a dog unattended in a vehicle is an infraction) 36-21.1-07 (involvement in dogfighting is a class C felony or a class A misdemeanor), and 36-21.1-11 (violation of State Board of Animal Health rules or other provisions of N.D.C.C. ch. 36-21.1 is a class A misdemeanor).