LETTER OPINION
2005-L-17

June 29, 2005

Mr. Nicholas B. Hall
Grafton City Attorney
PO Box 578
Grafton, ND 58237-0578

Dear Mr. Hall:

Thank you for your letter asking my opinion on several issues relating to how Senate Bill 2300, 2005 N.D. Leg., which restricts smoking in most public places and places of employment, affects an initiated ordinance adopted by the residents of Grafton which also restricts smoking in public places and places of employment. It is my opinion the portion of Grafton's ordinance providing for a penalty is less stringent than state law, and is therefore preempted for those acts prohibited by state law. It is my further opinion the absence in Grafton's ordinance of one prohibition found in Senate Bill 2300 does not make Grafton's ordinance ineffective. It is my further opinion that previously enacted, less stringent city or county smoking ordinances are not "grandfathered in" and are preempted by Senate Bill 2300. Finally, if Grafton amends its initiated ordinance, it must follow the process required by its home rule charter.

ANALYSIS

Subject to certain exceptions, Senate Bill 2300 restricts smoking in all public places and places of employment. S.B. 2300, 2005 N.D. Leg. Senate Bill 2300 also prohibits a city or county ordinance, including an ordinance adopted under a home rule charter, from providing "for less stringent provisions than those provided" in Senate Bill 2300. Id. However, nothing in Senate Bill 2300 "shall preempt or otherwise affect any other state or local tobacco control law that provides more stringent protection from the hazards of environmental tobacco smoke." Id. Thus, the act preempts all city or county ordinances that provide less protection from environmental tobacco smoke than Senate Bill 2300, but permits city or county ordinances providing more protection.

At a special election on April 19, 2005, the citizens of Grafton adopted an initiated ordinance banning smoking in certain areas and providing a penalty. You are concerned that several of those provisions may be less stringent than provisions in Senate Bill 2300, and ask this office's opinion on whether those provisions are preempted.

Your first question is whether the penalty provisions of the Grafton ordinance are less stringent than those provided in Senate Bill 2300, and are therefore preempted. The Grafton ordinance provides penalties as follows: an individual who smokes in a prohibited area is guilty of an infraction, punishable by a fine of fifty dollars; and an owner of premises

on which illegal smoking is permitted is guilty of an infraction, punishable by a fine of one hundred dollars.

Senate Bill 2300 also makes an individual or owner guilty of an infraction, but does not limit the fines in the manner Grafton's ordinances do. The amount of fine an individual may face for an infraction is a maximum of $500. See N.D.C.C. § 12.1-32-01(7). Senate Bill 2300 also gives the following graduated fine limits for owners: "a fine not to exceed one hundred dollars for the first violation, . . . a fine not to exceed two hundred dollars for a second violation within one year, and a fine not to exceed five hundred dollars for each additional violation within one year of the preceding violation."

Thus, the possible fines under Senate Bill 2300 are much greater than are possible under the Grafton penalty ordinances. Mandatory fines imposing penalties much less than state law imposes may provide less of a deterrent to violate the law. As such, the probability that an individual would intentionally violate the law is increased under the Grafton penalty ordinances, and therefore the Grafton penalty ordinances provide less protection from environmental tobacco smoke than Senate Bill 2300. Accordingly, it is my opinion the Grafton penalty ordinances are less stringent than the penalties provided by Senate Bill 2300. Since N.D.C.C. § 23-12-10.2(2), as amended by section 3 of Senate Bill 2300, specifically prohibits less stringent penalties, it is my opinion the Grafton penalty ordinances are expressly preempted by the penalty provisions in Senate Bill 2300 for those acts prohibited by Senate Bill 2300.

The North Dakota Supreme Court has previously addressed the effect of a city ordinance providing a lesser penalty than state law provided in City of Fargo v. Little Brown Jug, 468 N.W.2d 392 (N.D. 1991). In that case, state law provided for a maximum fine of $1,000 and imprisonment of up to one year, while the city ordinance had a maximum fine of $500 and imprisonment of up to thirty days for the identically defined offense. The Court held as follows:

> In order to harmonize the statutes granting and limiting the power of a municipality with section 12.1-01-05, N.D.C.C., and to avoid an implicit repeal of that power to regulate the use and sale of alcoholic beverages, we conclude that the prohibition in section 12.1-01-05, N.D.C.C., against a municipal ordinance superseding state law, does not prevent a municipality from enacting an ordinance with a penalty which differs from the penalty which could be imposed under similar state law when, as here, the city has enacted an ordinance authorizing imposition of up to the maximum penalty the city may impose under state law, and the enactment is in an area of law in which the city is authorized to engage in regulation through the enactment of an ordinance.
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> Although we conclude that the penalty of a municipal ordinance may differ

> from the penalty imposed by the state law, our decision in this case is limited to those situations in which the municipality authorizes imposition of up to the maximum allowable municipal penalty which is lesser than the state law penalty for an equivalent statute.

468 N.W.2d at 395-96.

In this case, Grafton does have the authority to adopt smoking ordinances and to provide for penalties for violations of those ordinances. S.B. 2300, 2005 N.D. Leg. However, Grafton's penalties are well below those provided by Senate Bill 2300, and also below the maximum it is authorized to impose by statute. See N.D.C.C. § 40-05-06. Accordingly, Little Brown Jug could not be read as approval of Grafton's lesser penalty ordinance.

What is the effect of the invalidity of Grafton's penalty provisions on the remaining ordinances? There is authority suggesting that the invalidity of a penalty clause does not invalidate the rest of an ordinance, but only if the rest of the ordinance is not dependent on the penalty provisions and is otherwise a complete act. 6 Eugene McQuillin, The Law of Municipal Corporations § 20.66 (3d rev. ed. 1998). This well respected treatise on municipal corporations provides:

> The view has been taken that if the penal section is void, the entire ordinance is void. Unquestionably, where the clause defining the offense is inseverably connected with the penal clause, the invalidity of the latter invalidates the whole ordinance. If the ordinance prohibiting the doing of an act attaches to a single provision as to the penalty, the invalidity of the penalty section invalidates the entire ordinance, inasmuch as the severing of the sanction renders the ordinance futile and ineffective.

Id.

It would appear that severing the penalty provisions of the ordinance would render that portion of the ordinance prohibiting acts prohibited by state law "futile and ineffective." If there is no penalty for smoking in prohibited areas, the ordinance would create no deterrent to smoking, and it would thus be ineffective. In any event, because I concluded the penalty provision is preempted, the lack of penalty makes the ordinance, with regard to those acts prohibited by state law, less stringent than state law. In other words, to the extent Grafton's ordinance has the same prohibitions as provided in state law (i.e., Senate Bill 2300), the ordinance is preempted and the state law and state penalty apply. To the extent Grafton's ordinance provides more stringent protection from smoke than the state law, the ordinance, along with its penalty, applies.

Your second question is whether Grafton's ordinance is less stringent and, therefore, preempted, because Grafton's ordinance does not contain a provision included in Senate

Bill 2300 prohibiting an employer from discharging an employee for reporting or attempting to prosecute a violation of the anti-smoking laws. The question boils down to whether Grafton's entire ordinance is preempted because it fails to incorporate one prohibition provided by Senate Bill 2300.

If Grafton's entire ordinance was preempted merely because it failed to incorporate a single prohibition provided by Senate Bill 2300, then any city or county that wanted to make a single provision in Senate Bill 2300 more stringent would have to adopt Senate Bill 2300 in its entirety, and then add the language the entity wanted to adopt in the first place. I do not believe the legislative intent behind the preemption language in Senate Bill 2300 was to require a city or county to adopt state law that would otherwise control anything the city or county would pass merely to add a provision more stringent than state law. I do not believe Grafton's anti-smoking ordinance is void merely because it fails to incorporate one of Senate Bill 2300's prohibitions. In the absence of that provision in Grafton's ordinance, state law will control, and the conduct prohibited by Senate Bill 2300 remains unlawful.

Your third question is whether Grafton's ordinance is "grandfathered" in, or not subject to the preemption language of Senate Bill 2300, because Grafton's ordinance was adopted prior to Senate Bill 2300's effective date. "[C]ities are agencies of the state and have only the powers expressly conferred upon them by the legislative branch of government or such as may be necessarily implied from the powers expressly granted." City of Dickinson v. Gresz, 450 N.W.2d 216, 217 (N.D. 1989). Even prior to Senate Bill 2300, cities had the authority to regulate smoking. N.D.A.G. 97-F-05. However, with the passage of Senate Bill 2300, the Legislative Assembly set standards regulating smoking below which cities are specifically prohibited from wandering. As noted in McQuillin's on Municipal Corporations:

> Undoubtedly a subsequent statute supersedes an earlier charter provision or ordinance, where the repugnancy between them makes it impossible that they both can stand and where there is nothing in the constitution or statutes giving the charter provision or ordinance continued force and effect locally despite the repugnancy. That is to say, a general statute that complies with constitutional requirements pertaining to general and special legislation repeals all inconsistent provisions of municipal charters, whether or not the general statute contains express words of repeal.

6 Eugene McQuillin, The Law of Municipal Corporations, § 21.28. There is nothing in Senate Bill 2300 allowing previously enacted, less stringent city ordinances to survive Senate Bill 2300's specific preemption provisions. Accordingly, it is my opinion that previously enacted, less stringent city or county smoking ordinances are preempted by Senate Bill 2300.

Finally, you question whether Grafton's home rule charter allows Grafton's city council to unilaterally amend or revise its anti-smoking ordinance in order to make it comply with Senate Bill 2300. You state that Grafton's charter states that "when an ordinance is adopted by initiative, it cannot be amended or repealed except by a vote of the people in a referendum." Because part of the city's anti-smoking ordinance, which was adopted by initiative, is preempted by state law, you believe it may not be a proper question to put to the people of Grafton.

We were unable to locate any authority addressing this particular situation. Generally, however, where the legislative power of a council is restricted by a provision that an ordinance or amendment to an ordinance adopted by the electors may not be repealed or amended by the council, the ordinance or amendments to the ordinance can be repealed or amended only by a vote of the electorate in the same manner in which it was adopted. 6 Eugene McQuillin, The Law of Municipal Corporations, § 21.03. As I indicated earlier in this opinion, to the extent Grafton's ordinance provides more stringent protection from smoke than the state law, the ordinance, along with its penalty, applies. However, if Grafton wants to amend its initiated ordinance, it is my opinion it must follow the process required by its home rule charter. The possibility that the electors might refuse to appropriately amend the ordinance is irrelevant; in this office's opinion, the provisions that are preempted by state law remain so regardless of whether the electors agree to amend those provisions.

Sincerely,

Wayne Stenehjem
Attorney General

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