

**LETTER OPINION  
2005-L-47**

December 19, 2005

Mr. Stephen M. McLean  
Oakes City Attorney  
115 South 5th Street  
Oakes, ND 58474

Dear Mr. McLean:

Thank you for your letter asking whether an initiated measure which has been revised by the petition sponsors to remove language determined to violate the city's home rule charter may be put to a vote of the people without recirculating the revised initiated measure petition. It is my opinion that an initiated measure which has been revised by the petition sponsors to remove language determined to violate the city's home rule charter may not be put to a vote of the people without the revised initiated measure petition being recirculated and then resubmitted to the city.

ANALYSIS

You indicate that a petition for an initiated resolution was submitted to the city auditor to require a specific type of water treatment in order to meet certain drinking water environmental standards. The initiated measure provided for the issuance of bonds to finance the construction of water treatment facilities to be repaid by special assessments levied against benefited property or by user fees charged to customers. You indicate that you advised the city auditor to reject the measure because it violated article 4, section 1 of the city's home rule charter.<sup>1</sup> The initiated petition was returned to the sponsors. Subsequently, the sponsors resubmitted the initiated measure with the offending language regarding special assessments removed. You indicate that the sponsoring committee did not recirculate the petition with the changed language. You then ask whether the sponsoring committee may resubmit the initiated measure without first recirculating the petition for the initiated measure to the public.

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<sup>1</sup> Article 4, section 1 of the Oakes Home Rule Charter provides: "The voters of the City of Oakes shall have the power to refer and initiate ordinances and resolutions, except that the power of initiative and referendum shall not extend to the annual appropriations ordinance, nor to those ordinances or resolutions implementing public projects upon which an election has previously been held, nor shall the power of initiative and referendum extend to special improvement projects under which the law provides for protest procedures or to special assessment projects carried out under the provision of the North Dakota Century Code." (Emphasis added.) Your determination that language in the measure violated this provision of the city's home rule charter will not be addressed in this letter. See N.D.A.G. 97-L-172 (the Office of Attorney General does not, as a general matter, interpret local ordinances or charter language).

Generally, municipal initiated and referred measures are governed by N.D.C.C. ch. 40-12. These statutory provisions may even apply to home rule cities unless otherwise provided in the home rule charter and implementing ordinances.<sup>2</sup> However, N.D.C.C. ch. 40-12 is not directly applicable in this case because it is restricted to municipal ordinances, not to municipal resolutions.<sup>3</sup>

Home rule powers are set out in N.D.C.C. ch. 40-05.1. As noted in N.D.A.G. 2003-L-43: “Section 40-05.1-06, N.D.C.C., provides broad powers for home rule cities. These include power ‘[t]o provide for all matters pertaining to city elections’ and ‘for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers.’ N.D.C.C. § 40-05.1-06(6) and (7).” This language has been construed by this office to authorize a home rule city to provide for initiative and referendum.<sup>4</sup> The home rule charter for the city of Oakes includes an entire article on referendum and initiative containing 14 separate, detailed sections.<sup>5</sup> Section 40-05.1-05, N.D.C.C., provides in part that “[t]he charter and the ordinances made pursuant to the charter in such matters supersede within the territorial limits and other jurisdiction of the city any law of the state in conflict with the charter and ordinances and must be liberally construed for such purposes.”

In this instance, the city auditor, as the filing officer, refused to accept the original initiated petition because of a conflict with a provision in the city’s home rule charter.<sup>6</sup> In this case, the sponsoring committee apparently did not dispute the determination that the measure as originally submitted was in conflict with the home rule charter and not subject to initiative or referendum; rather, it merely excised the offending language and resubmitted the measure without recirculating the petition to the public. A 1983 letter from this office suggests that if a municipal initiated petition is rejected for failure to comply with applicable legal requirements, it would have to be resubmitted as a new petition in order to be acted upon.<sup>7</sup>

Moreover, the city’s home rule charter provides that upon submission of an initiated ordinance or resolution, if the commission fails to adopt the proposed ordinance or resolution within a 60-day period, the governing body must submit the measure to a

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<sup>2</sup> See N.D.A.G. 94-L-20.

<sup>3</sup> N.D.A.G. 83-34.

<sup>4</sup> N.D.A.G. 81-141.

<sup>5</sup> It is unknown whether implementing ordinances were ever enacted; you did not submit any implementing ordinances for this particular article nor did you refer to any in your letter.

<sup>6</sup> Whether a filing officer may reject a petition under these circumstances is not clear. While generally a filing officer may not pass on the merit, wisdom, or policy of the law to be initiated, it has been recognized by some authorities that the filing officer sometimes may do so if a proposed initiated petition is invalid or unconstitutional on its face. See 42 Am. Jur. 2d Initiative and Referendum § 33 (2d ed. 2000); see also 5 Eugene McQuillin, The Law of Municipal Corporations § 16:64 (3d ed. 2004).

<sup>7</sup> N.D.A.G. Letter to Schimmelpfennig (Dec. 28, 1983); cf. 82 C.J.S. Statutes § 123 (1999) (a supplemental petition is separate and distinct from the original).

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vote of the people without any change in substance from that proposed.<sup>8</sup> Cf. N.D.C.C. § 40-12-06 (referred or initiated ordinance must be passed by the governing body or submitted to a vote of the qualified electors of the municipality “without alteration”). Thus, under the home rule charter (and state law in the case of certain referred or initiated municipal ordinances), a proposed initiated measure must be submitted without any change or alteration. The initiated measure as resubmitted to the city was changed in that the language regarding the use of special assessments to repay bonds was deleted.

Based on the foregoing, it is my opinion that an initiated measure which has been revised to remove language determined to violate the city’s home rule charter may not be put to a vote of the people without the petition for the initiated measure being recirculated and then resubmitted to the city as a new petition.

You also ask whether the revised initiated measure could be rejected as a violation of another provision in the home rule charter and two city ordinances you submitted. However, the Office of Attorney General does not generally interpret local ordinances or charter language unless it is of statewide concern or significance.<sup>9</sup> Consequently, I must respectfully decline to interpret those provisions of your home rule charter and city ordinances.

Sincerely,

Wayne Stenehjem  
Attorney General

jjf/pg

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>10</sup>

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<sup>8</sup> Oakes Home Rule Charter, Article 4, Section 8.

<sup>9</sup> See, e.g., N.D.A.G. 97-L-172; N.D.A.G. Letter to Schale (Dec. 20, 1999); Attorney General Opinion Drafting Policy Manual, p. 3 (Nov. 2005).

<sup>10</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).