

**LETTER OPINION
2019-L-03**

May 14, 2019

Mr. Erich M. Grant
McGee, Hankla, & Backes
Attorneys for the City of Berthold
PO Box 998
Minot, ND 58702-0998

Dear Mr. Grant:

Thank you for your question regarding the city of Berthold's home rule charter provision that allows the city to "define offenses against private persons and property and the public health, safety, morals, and welfare and provide penalties ... thereof." Specifically, you ask whether this provision provides authority for the city to enact ordinances similar or identical to the corresponding class A misdemeanors set out in the North Dakota Century Code relating to controlled substances (excluding marijuana)¹ and false statements to law enforcement², but assign penalties within the allowable range for municipalities³ as opposed to the penalties for class A misdemeanors.⁴

For the following reasons, it is my opinion that the city may not enact ordinances similar or identical to the corresponding class A misdemeanors set forth in state law as they relate to controlled substances (excluding marijuana), however it may enact an ordinance similar or identical to the corresponding class A misdemeanor set out in state law related to false statements to law enforcement while prescribing a penalty within the range allowable for municipalities.

¹ The city has requested this opinion in regards to N.D.C.C. §§ 19-03.1-22.3, 19.1-03.1-23, and 19-03.4-03 as they relate to controlled substances, excluding marijuana.

² See N.D.C.C. § 12.1-11-03.

³ See N.D.C.C. § 40-05-06.

⁴ See N.D.C.C. § 12.1-32-01(5).

ANALYSIS

The Legislature has provided by law for the establishment and exercise of home rule in cities.⁵ The law specifies certain powers a city may acquire if those powers are included in the city's home rule charter⁶ and the charter has been approved by a majority of the city's voters.⁷ Home rule authority gives the people in a home rule city the full right of self-government in all matters that fall within the powers enumerated in the home rule charter.

The city of Berthold operates under a home rule charter approved by a majority of its voters. Berthold's home rule charter provides that the city may define offenses against private persons and property and the public health, safety, morals, and welfare, and provide penalties for violations.

Sections 19-03.1-22.3, 19-03.1-23, and 19-03.4-03, N.D.C.C., relate to various criminal regulations and penalties regarding controlled substances and drug paraphernalia. Your request specified an analysis relating to only those portions of the statutes that were classified as class A misdemeanors and that related to controlled substances, but not including marijuana.

Sections 19-03.1-22.3, 19-03.1-23, and 19-03.4-03, N.D.C.C., classify violations of portions of the statutes as class A misdemeanors. Section 12.1-32-01, N.D.C.C., indicates that a class A misdemeanor is punishable by a fine of up to \$3,000, 360 days imprisonment, or both. Section 40-05-06, N.D.C.C., limits the penalties assessable by municipalities to a fine of up to \$1,500, up to 30 days imprisonment, or both, which is equal to the level of penalties for offenses classified as class B misdemeanors.⁸

Section 12.1-01-05, N.D.C.C., provides, that:

No offense defined in this title or elsewhere by law shall be superseded by any city or county ordinance, or city or county home rule charter, or by an ordinance adopted pursuant to such a charter, and all such offense definitions shall have full force and effect within the territorial limits and other jurisdiction of home rule cities or counties.⁹

⁵ See N.D. Const. art. VII, § 6 and N.D.C.C. ch. 40-05.1.

⁶ N.D.C.C. § 40-05.1-06.

⁷ N.D.C.C. § 40-05.1-05.

⁸ See N.D.C.C. § 12.1-32-01.

⁹ N.D.C.C. § 12.1-01-05.

The word “offense,” as utilized in N.D.C.C. § 12.1-01-05, includes criminal offenses.¹⁰

Generally, in order for a municipality to be able to enact an ordinance which provides for a penalty less than a similar state law there must be specific legislative authority to regulate the area. The North Dakota Supreme Court has previously addressed this issue in *City of Fargo v. Little Brown Jug*, 468 N.W.2d 392, 395 (N.D. 1991), where the Court held that where the Legislature has expressly granted a power to regulate a specific area to a municipality, the prohibition in N.D.C.C. § 12.1-01-05 does not prevent a municipality from enacting an ordinance with a penalty that is less than the penalty that could be imposed under a similar state law because to prohibit such an ordinance would implicitly repeal the power to regulate that specific area.¹¹

In this case, the Legislature has not granted municipalities any specific authority in regard to the regulation of controlled substances or drug paraphernalia other than for marijuana, which you excepted from your request. Because the Legislature has not granted specific authority to cities in this area, the underlying holding of *City of Fargo v. Little Brown Jug*, 468 N.W.2d 392 (N.D. 1991), does not apply, and N.D.C.C. § 12.1-01-05 prohibits the municipality from enacting an ordinance regulating controlled substances, excluding marijuana, which provides for a lesser penalty than what the state law on this subject provides. Where the Legislature has specified in law the class A misdemeanor penalties, I do not believe that the Legislature, without express statutory authorization, intended to allow a home rule charter city to reduce those penalties for those same offenses.

The language indicated in the home rule charter of the City of Berthold is not express statutory authority, and therefore, even if the municipality were able to regulate controlled substances, excluding marijuana, through this provision, the holding of *Little Brown Jug*, 468 N.W.2d 392, would not apply, and N.D.C.C. § 12.1-01-05 would prohibit the municipality from enacting an ordinance with a lesser penalty than what the state law on this subject provides.

Section 12.1-11-03, N.D.C.C., however, relates to false information or reports to law enforcement. Municipalities are given specific statutory authority to “pass and enforce all necessary police ordinances.”¹² An ordinance prohibiting false information or reports to law enforcement is arguably a necessary police ordinance. Because the municipality has express statutory authority to regulate this area, the holding of *City of Fargo v. Little*

¹⁰ See *Sauby v. City of Fargo*, 747 N.W.2d 65, 69 (N.D. 2008).

¹¹ S.B. 2304, 2019 N.D. Leg., does not affect or alter the analysis within this opinion as it is specifically limited to city ordinances that regulate the operation or equipment of a motor vehicle or which regulate traffic.

¹² N.D.C.C. § 40-05-02(9).

LETTER OPINION 2019-L-03
May 14, 2019
Page 4

Brown Jug, 468 N.W.2d 392 (N.D. 1991), indicates that N.D.C.C. § 12.1-01-05 does not prohibit the city of Berthold from enacting an ordinance identical to N.D.C.C. § 12.1-11-03 authorizing imposition of up to the maximum penalty the city may impose under state law.

Therefore, it is my opinion that the City of Berthold may not enact ordinances similar or identical to N.D.C.C. §§ 19-03.1-22.3, 19-03.1-23, or 19-03.4-03 as they relate to controlled substances (excluding marijuana) because it lacks specific legislative authority to do so. However, it may enact an ordinance similar or identical to N.D.C.C. § 12.1-11-03 while prescribing a penalty within the range specified by N.D.C.C. § 40-05-06 because specific authority exists in N.D.C.C. § 40-05-02(09).

Sincerely,

Wayne Stenehjem
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.¹³

¹³ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).