

N.D.A.G. Letter to Omdahl (Aug. 16, 1989)

August 16, 1989

Honorable Lloyd B. Omdahl
Lieutenant Governor
Office of the Governor
State Capitol
Bismarck, ND 58505

Dear Lieutenant Governor Omdahl:

Thank you for your July 12, 1989, letter posing eight questions concerning the scope of county home rule authority. I can answer your questions basically by reference to those statutory powers provided to a home rule county. I will answer your questions in the order your letter presents them.

QUESTION 1. If a county home rule charter authorized the county to utilize motor vehicle fuel taxes and motor vehicle registration fees to raise county revenues, would N.D. Const. art. X, § 11, earmark such county-imposed and county-collected revenues in the same manner as state revenue from these sources?

ANSWER. Yes. In a February 5, 1989, letter opinion to Walsh County State's Attorney Nicholas V. Hall, I concluded that the provisions of N.D. Const. art. X, § 11, restricting the use of revenue from gasoline and motor fuel excise taxes as well as other motor vehicle registration license taxes to uses related to the construction and repair and maintenance of public highways, applied to home rule county taxes of this nature. In those cases in which the North Dakota Supreme Court has addressed this constitutional provision, there is no indication that the scope of the provision is restricted only to state revenues as opposed to other forms of local revenue. See Newman v. Hjelle, 133 N.W.2d 549 (N.D. 1965); McKenzie County v. Lamb, 298 N.W. 241 (N.D. 1941).

QUESTION 2. Could a county home rule charter authorize the establishment of special assessments for ordinary county functions and services, such as the creation of special assessment districts for highway improvements?

QUESTION 3. Under home rule, may a county commission be authorized to combine all county mill levy authorizations into one general levy without a referendum so long as the total does not exceed the combination of the special levies?

QUESTION 4. Under home rule, may a county commission be authorized to combine all county mill levy authorizations into one general levy that exceeds the combination of the present levies, provided that the voters of the county approve the excess levy?

ANSWER (to Questions 2, 3, and 4): Yes, in answer to all three questions. The relevant

portion of N.D.C.C. § 11-09.1-05, which addresses these issues, states as follows:

[S]ubject to the limitations of this section [a home rule county may] levy and collect property taxes, sales taxes, motor vehicle fuels and special fuels taxes, motor vehicle registration fees, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements . . . and establish debt and mill levy limitations.

N.D.C.C. § 11-09.1-05(2). This provision allows a county home rule charter to determine the method by which county functions and services are financed. The home rule charter may address separate levies or one general levy and may address any requirement for voter approval. The amount of debt and mill levy is left to the county's determination as provided by the home rule charter and ordinances.

This statutory provision states that it is subject to the "limitations of this section." There are only two such limitations. First, all property must be assessed in a uniform manner as prescribed by the State Board of Equalization and the State Supervisor of Assessments. Second, a charter, ordinance, or act of a governing body of a home rule county may not supersede any state law that determines what property or acts are subject to or exempt from ad valorem or sales and use taxes. N.D.C.C. § 11-09.1-05(2). Beyond these statutory restrictions, the only restrictions applicable would be those contained within the home rule charter and ordinance.

QUESTION 5. Under home rule, may a county commission be authorized to provide certain programs and services without regard to state statutory election and unusual requirements for the majority of those programs and services (for example, county hospitals, county clinics, matching federal road aid, welfare levies, aid to county fairs, county agent levies, and ambulances).

ANSWER. Yes, unless the specific state statute involved is specifically applicable to a home rule county. N.D.C.C. § 11-09.1-05(5) allows the home rule charter to determine by ordinance, resolution, or regulation, the manner in which the county's governmental and proprietary powers are implemented and the manner in which the county provides for the public health, safety, morals, and welfare. The only restriction contained within this subsection is that a home rule county may not regulate any industry or activity that is regulated by state law or by rules adopted by a state agency. A specific state statute may specifically address its applicability to home rule counties. The specific program or service in question, therefore, would have to be identified and analyzed before making a final determination.

QUESTION 6. Under home rule, may a county commission be authorized to reorganize the structure of county government (outside of the offices of the elected officials), change selection procedures, and reallocate powers and duties of appointed officials without regard to state statutes to the contrary?

ANSWER. The home rule charter may determine the powers and duties of appointed officials. It may not determine the form or structure of county government. N.D.C.C. § 11-09.1-05(3) allows the home rule county to provide for county elected and appointed officers and employees, their selection, powers, duties, qualifications, and compensation as well as their terms of office. The corresponding statute with respect to home rule cities at one time included similar language. N.D.C.C. § 40-05.1-06(4). Based upon N.D.C.C. § 40-05.1-06(4), the North Dakota Supreme Court determined that a home rule city had no authority to determine its structure or form of government. Litten v. City of Fargo, 294 N.W.2d 628, 634 (N.D. 1980). Following Litten, the Legislature amended N.D.C.C. § 40-05.1-06(4) to allow a home rule city to provide for the change, selection, or creation of its form and structure of government, including its governing body, executive officer, and city officers. 1985 N.D. Sess. Laws ch. 455, § 2. Similar language concerning the structure and form of county government is not currently found within N.D.C.C. § 11-09.1-05. Thus, it appears that the decision in Litten would be applicable to a home rule county under existing statutory language and would prohibit a home rule county from determining the structure or form of its county government.

QUESTION 7. Under county home rule, are the county's "governmental and proprietary functions" limited to those enumerated in state statutes or may the county commission be authorized to define for itself the scope of governmental and proprietary functions to be funded and furnished by the county?

ANSWER. A home rule county's governmental and proprietary functions are determined pursuant to its home rule charter as implemented by home rule county ordinances. N.D.C.C. § 11-09.1-05(5) states that a home rule county may provide for the adoption of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers as well as the manner in which it provides for the public health, safety, morals, and welfare.

QUESTION 8. AS a general principle, may a county assume that home rule provides an exception to state statutes in all areas delegated by the Legislature and adopted by its home rule charter?

ANSWER. The last sentence of N.D.C.C. § 11-09.1-05 states as follows:

The statutes of the state, so far as applicable, continue to apply to counties, except as superseded by the charters of the counties or by ordinances passed pursuant to the charter.

Thus, home rule authority provides an exception to state statutes only where that authority exists pursuant to N.D.C.C. § 11-09.1-05, the authority is found within the home rule charter, and the authority is implemented through ordinance. In Litten the North Dakota Supreme Court addressed similar language with respect to home rule cities. There the court concluded that there was no legislative intent that each and every home rule city ordinance supersede all state laws that might be in conflict with the ordinance. Instead, the supersession provision applies only to statutory powers provided to home rule cities if

the powers are included in the charter and implemented by ordinance. 294 N.W.2d at 632.

I hope this information is helpful to you. If you have further questions, please do not hesitate to contact me or Terry Adkins.

Sincerely,

Nicholas J. Spaeth

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