

N.D.A.G. Letter to Herauf (Nov. 25, 1985)

November 25, 1985

Mr. William A. Herauf
Attorney at Law
Killdeer City Attorney
41 1st Avenue West
P.O. Box 866
Dickinson, ND 58601-0866

Dear Mr. Herauf:

Thank you for your letter dated October 15, 1985, in which you requested an Attorney General's opinion regarding the publication requirements of N.D.C.C. § 40-11-06 and §40-11-09 as to penalty clauses of municipal ordinances. Essentially, your inquiry concerns the applicability of the publication requirements of N.D.C.C. §40-11-09 where a revision of city ordinances has occurred. I apologize for the delay in responding to your letter.

The requirement as to the publication of ordinances is found at N.D.C.C. §40-11-06 which provides as follows:

40-11-06. PUBLICATION OF ORDINANCES. -- The title and penalty clause of every ordinance imposing any penalty, fine, imprisonment, or forfeiture for a violation of its provisions, after the final adoption of the ordinance, shall be published in one issue of the official newspaper of the city.

The title and penalty clauses of ordinances which do not come under the provisions of this section do not require publication.

N.D.C.C. § 40-11-09 provides the procedure for the enactment and revision of ordinances. This statute provides as follows:

40-11-09. ENACTMENT AND REVISION OF ORDINANCES. -- The executive officer of a municipality may appoint, by and with the advice and consent of the governing body of the municipality, one or more competent persons to prepare and submit to the governing body for its adoption or rejection, an ordinance for the revision or amendment of existing ordinances for such municipality. The attorney for the municipality, if it has an attorney, shall be appointed as one of the persons to prepare and submit such ordinance. The compensation of the revisor or revisors, including that of the attorney, shall be determined by the governing body and shall be paid out of the municipal treasury. Such revision, including any additional ordinances

and amendments to existing ordinances contained therein, may be passed as a single ordinance and may be published in pamphlet or book form, by and under the authority of the governing body of the municipality, and shall be valid and effective without publication in a newspaper or posting.
(Emphasis supplied.)

In a situation where a city revises its ordinances, the answer to the question presented concerning applicable publication requirements differs depending upon which statute is consulted. N.D.C.C. § 40-11-06 suggests that publication of the title and penalty clause of ordinances imposing a penalty must occur regardless of the fact that such ordinances are found within a revision of ordinances. N.D.C.C. §40-11-09, on the other hand, specifically states that ordinances part of an ordinance revision need not be published. Obviously, a conflict occurs between these statutes with respect to the issue of whether ordinances, revised or supplemental, which are part of an ordinance revision need to be published.

To reconcile the conflict between these statutes, one must utilize the rule of statutory construction found at N.D.C.C. § 1-02-07. That rule of statutory construction is stated as follows:

1-02-07. PARTICULAR CONTROLS GENERAL. -- Whenever a general provision in a statute shall be in conflict with a special provision in the same or in another statute, the two shall be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest legislative intent that such general provision shall prevail.

In applying this rule of statutory construction, we must attempt to construe the conflicting statutes so that effect may be given to both provisions. With respect to N.D.C.C. §§ 40-11-06 and 40-11-09, reconciliation is accomplished by concluding that where existing ordinances are revised or amended, pursuant to N.D.C.C. §40-11-09, the revisions and amendments are valid and effective without publication in a newspaper so long as the particular penalty section of the ordinance is not revised or amended. Indeed, this conclusion was presented earlier by this office in response to a similar question. See Letter to Hugh Seaworth (August 8, 1985) (copy enclosed).

In direct response to these specific questions presented, it is our opinion:

- (a) Penalty clauses of prior ordinances unchanged by the revision do not require publication.
- (b) Penalty clauses of prior ordinances which are modified by the adoption of new ordinances require publication.

- (c) Penalty clauses which are contained in additional ordinances first passed as a single ordinance pursuant to N.D.C.C. § 40-11-09, require publication so as to comply with the provisions of N.D.C.C. §40-11-06.

In addition, you state in your letter ". . . many small communities have adopted the traffic section of the North Dakota Century Code as their own ordinances." You further state that in this situation, typically, "there is no publication of any type of penalty clauses." This would appear to be a violation of N.D.C.C. §40-11-06 which requires publication of the title and penalty clause of any ordinance which imposes a penalty, fine, imprisonment, or forfeiture for a violation of its provisions.

Sincerely,

Nicholas J. Spaeth

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Enclosure