

OPINION
77-11

April 27, 1977 (OPINION)

Mr. John A. Zuger
City Attorney
P. O. Box 1695
Bismarck, ND 58501

Dear Mr. Zuger:

This is in response to your inquiry dated April 12, 1977, which was as follows:

"The City of Bismarck has appointed a commission to prepare a home rule charter for presentation to the electorate.

Section 40-05.1-07 provides that the home rule charter adopted by a city may be amended or repealed by proposals submitted to and ratified by the qualified electors of the city in the same general manner as provided in Section 40-05.1-02 and Section 40-05.1-04 for the adoption of such charter.

You will note that the language of Section 40-04.1-07 uses the verb, 'may be amended or repealed'. Since 40-04.1-02 specifically spells out the number of qualified electors who would have to file a petition, my question is whether or not the language of 40-05.1-07 is permissive or mandatory. In other words, if the charter commission determines to provide for direct legislation of initiative and referendum of ordinances, could it provide that the number of petitioners would be different than 15 percent of the qualified electors of the city voting in the last city election, as stated in 40-05.1-02?"

The permissive word "may" in Section 40-05.1-07 refers to the decision on whether or not a home rule charter is to be repealed or amended. That is, this language simply makes clear that once a home rule charter has been adopted by a majority of the electorate in the city, they are not permanently "locked in" with provisions that they find unworkable or even with the entire home rule method of governing if that is found to be unworkable.

Once the decision has been made to attempt an amendment or repeal, however, the requirements of 40-05.1-02 and 40-05.1-04 are mandatory. Therefore, if the amendment or repeal is initiated by a group of citizens, the proposals must be made in a petition filed with the governing body and signed by not less than 15 percent of the qualified electors of the city voting in the last election. This results in a situation where no greater or lesser burden is imposed when one attempts to amend or repeal than that which was imposed when the charter was originally adopted and therefore the situation remains fluid and flexible.

The above sections, however, are applicable and mandatory only when charter provisions are being dealt with. As for ordinances, Section

40-05.1-06(7) provides that the ". . . city, and the citizens thereof shall, if included in the charter and implemented through ordinances . . ." have the power "to provide for the adoption, amendment, and repeal of ordinances, resolutions and regulations . . .".

Therefore, if the charter includes provisions dealing with initiative and referendum of ordinances and makes provisions for the percent of voters required as signatories to a petition for this purpose, by the terms of Section 40-05.1-05 and the last paragraph in 40-05.1-06 the charter provisions would supersede conflicting state law within the territorial limits of the city.

Any conflicting charter provisions dealing with initiative and referendum of ordinances would therefore supersede North Dakota Century Code 40-12 which provides for initiative and referendum of ordinances in North Dakota cities which are not under home rule. That chapter provides in Section 40-12-02 that a proposed ordinance may be initiated via a petition signed by electors (of the municipality) equal in number to 15 percent of the votes cast for all candidates for the executive officer at the preceding regular municipal election.

The language of 40-05.1-07 on amendment and repeal of a charter and 40-05.1-02 and Section 40-05.1-04 would not be applicable nor controlling on the question of what percent of voter signatures would be required on a petition to initiate or refer an ordinance.

There is no section of the North Dakota Century Code which would prohibit a charter provision dealing with initiative and referendum or ordinances. Subparagraph (7) of Section 40-05.1-06, in fact, grants a home rule city the power to include in its charter a provision relating to the ". . . adoption, amendment and repeal of ordinances . . .".

However, because of the unique nature of the initiative and referendum the issue is not so clear cut as it might be. When the North Dakota Legislature was granted its basic constitutional powers, the power of the initiative and referendum were specifically reserved to the people in Article II, Section 25 of the North Dakota State Constitution. The state legislature, through enactment of Chapter 40-12, has provided what it considered to be reasonable procedures and requirements whereby this constitutional right may be exercised at the local level by citizens of the state's municipalities.

The determination by the state legislature that a petition for an initiated ordinance should be signed by a number of electors equal to 15 percent of the votes cast for all candidates for the executive office at the preceding regular election serves as a guideline and persuasive authority for those drawing up charter provisions in this area.

To vary this amount upward to any significant degree might lay the charter open to attack by citizens of the city who find that they now have less potential for direct control over their own situation than person in nonhome rule cities.

In terms of policy, this type of charter provision would create a

somewhat irrational situation whereby a greater burden would be placed on citizens wishing to initiate or refer an ordinance than on those wishing to attempt an amendment or even repeal of the entire home rule charter.

Practically speaking - it would require signatures of only 15 percent of the electorate voting in the last municipal election to initiate an amendment to the charter bringing the requirements for initiating an ordinance back in line with that of other cities.

I trust you will find this responsive to the thrust of your inquiry.

Sincerely,

ALLEN I. OLSON

Attorney General