

Office of the Attorney General
State of North Dakota

Opinion No. 82-67

Date Issued: September 13, 1982

Requested by: Robert W. Martinson
State Representative

--QUESTION PRESENTED--

Whether a home rule city ordinance which establishes liquor licensing fees supersedes state law regarding the limitation placed on liquor licensing fees.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that a home rule city ordinance which establishes liquor licensing fees supersedes state law regarding the limitation placed on liquor licensing fees.

--ANALYSIS--

The North Dakota Supreme Court stated in *Litten v. City of Fargo*, 294 N.W.2d 629, 632 (N.D. 1980):

It necessarily follows that in order to determine what broad powers are given to home rule cities we must examine the various provisions of § 40-05.1-06. If the authority or power to enact an ordinance on a specific subject is not found in § 40-05.1-06 or in Ch. 40-05.1, or some other comparable statute, then a strong presumption exists that the city will be governed by the laws generally applicable to cities.

Section 40-05.1-06(3) of the North Dakota Century Code states:

From and after the filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this chapter, such city, and the citizens thereof, shall, if included in the charter and implemented through ordinances, have the following powers set out in this chapter:

3. To fix the fees, number, terms, conditions, duration, and manner of issuing and revoking licenses in the exercise of its governmental police powers.

It is clear that this statutory provision gives home rule cities the power to enact an ordinance fixing the fees for liquor licenses. However, it is not sufficient to merely examine the subsections of Section 40-05.1-06, N.D.C.C., to determine what powers a home rule city may have. As the Supreme Court stated in *Litten*:

To make this determination it is also necessary to review the charter to determine if those powers are included in the charter, and if they are in it then it becomes necessary to determine if they were implemented by an ordinance. It therefore follows that if the powers are not stated in the charter, or if they are stated in the charter but not implemented by ordinance, the home rule city may not avail itself of the powers enumerated in 40-05.1-06, N.D.C.C., but would be governed by the statutes applicable generally to all cities. (294 N.W.2d 629, 634)

In addition, the Supreme Court in Litten laid down the following general rule with respect to when a home rule city ordinance may supersede state law:

In our view, to permit a conclusion that an ordinance supersedes a state law, providing the charter and implementing ordinance requirements have been met, it is not only essential that the power given to the city by the legislature is clearly expressed or necessarily implied from the grant but also that it conflicts with the laws generally applicable to cities. (294 N.W.2d 629, 634)

Section 40-05.1-05, N.D.C.C., which provides that charter and ordinance provisions of home rule cities shall supersede state law in conflict therewith applies only to those powers specifically granted to a home rule city by statute. We believe that the legislature by enacting Section 40-05.1-06(3), N.D.C.C., has granted to home rule cities the right to fix liquor license fees independent of the statutory restrictions which are applicable to cities that have not adopted a home rule charter. Therefore, if a particular home rule charter includes the power to fix the fees, number, terms, conditions, duration, and manner of issuing and revoking licenses and if that particular home rule city implements an ordinance which sets the fees for liquor licenses, that ordinance would then supersede state law which sets liquor licensing fees.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the action of public officials until such time as the question presented is decided by the courts.

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