

Office of the Attorney General
State of North Dakota

Opinion No. 83-34

Date Issued: August 19, 1983

Requested by: Brian D. Neugebauer
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--QUESTIONS PRESENTED--

I.

Whether a resolution passed by a city commission approving a tax exemption of property is subject to the initiative and referendum statutes.

II.

Whether a city governing body may call for a special election for the purposes of obtaining an advisory vote by the electors.

III.

Whether a city governing body may repeal, alter, or amend its own resolution.

IV.

Whether the repeal, alteration, or amendment of a city governing body's resolution may be given retroactive application.

V.

Whether a city would be held liable for the actions of its governing body in repealing, altering, or amending a resolution.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that a resolution passed by a city commission approving a tax exemption for property is not subject to the initiative and referendum statutes.

II.

It is my further opinion that a city governing body may call for a special election for the purposes of obtaining an advisory vote by the voters.

III.

It is my further opinion that a city governing body may repeal, alter, or amend its own resolution.

IV.

It is my further opinion that the repeal, alteration, or amendment of a city governing body's resolution may be given retroactive application unless such application would act to deprive a person of rights he acquired or contractual obligations he incurred under the original resolution.

V.

It is my further opinion that a city would not be held liable for the actions of its governing body in repealing, altering, or amending a resolution.

--ANALYSIS--

I.

The 1983 Legislature enacted two laws allowing for the exemption from taxation for new single family residential property and new condominium and townhouse residential property. 1983 N.D. Sess. Laws 597 and 1983 N.D. Sess. Laws 601. One of the conditions that must be met before such an exemption is available is a resolution approving the exemption by the appropriate governing body.

The governing body of the city, for property within city limits, or the governing body of the county, for property outside city limits, has approved the exemption of the property by resolution. [1983 N.D. Sess. Laws 597, § 1.]

Article III of the Constitution of North Dakota reserves to the people the authority to initiate and refer legislative acts. However, Article III, Section 1 states this power of initiative and referendum after stating that 'the legislative power of this state shall be vested in a legislative assembly.' As such, the constitutional authority of the power of the people to initiate and refer legislative acts refers to statewide legislation rather than county or city legislation.

Chapter 40-12 of the North Dakota Century Code provides for the initiative and referendum of municipal ordinances. However, these statutes are clearly restricted to municipal ordinances and do not include municipal resolutions. As provided for in Section 40-12-01, N.D.C.C.:

40-12-01. INITIATIVE AND REFERENDUM APPLY ONLY IN COMMISSION AND MODERN COUNCIL CITIES.--The provisions of this chapter relative to the initiating and referring of municipal ordinances shall apply only to cities operating under the commission and modern council system of government except those cities adopting the eleven-member council.

Case law is clear that there is a distinction between a resolution and an ordinance. *State v. Stues*, 116 N.W. 751 (N.D. 1908); *Mitchell v. City of Parshall*, 108 N.W.2d 12 (N.D. 1961). See also 5 *McQuillin Municipal Corporations* § 15.02 (3rd Ed. 1981).

The term 'resolution' denotes something less formal than the term 'ordinance'; generally, it is a mere expression of the opinion or mind of the council concerning some matter of administration coming within its official cognizance, and provides for the disposition of a particular item of the administrative business of a municipal corporation. It is ordinarily of a temporary character, while an ordinance prescribes a permanent rule of conduct or of government. A resolution is not a law, and in substance there is no difference between a resolution, order, and motion. [56 *Am Jur.2d Municipal Corporations, Etc.*, § 344 at 370 (1971).]

The general rule is that actions of a legislative body which are administrative or executive in nature are not subject to initiative and referendum laws. 42 *Am Jur.2d Initiative and Referendum*, § 11 (1969). See also 1981 N.D. Op. Att'y Gen. 1.

Generally, an enactment originating the permanent law or laying down a rule of conduct or course of policy for the guidance of citizens or their officers or agents is purely legislative in character and referable, while an enactment which simply puts into execution previously declared policies or previously enacted laws is administrative or executive in character and not referable. [42 *Am Jur.2d Initiative and Referendum*, § 12 at 660 (1969).]

The tax exemptions provided for in 1983 N.D. Sess. Laws 597, 601, are dependent upon approval by resolution of the appropriate governing body. This approval resolution is administrative in character rather than legislative. It simply puts into execution that which has already been provided for by the Legislature. It is of temporary character as these particular statutes are valid only for a limited period of time.

As such, it is my opinion that a resolution of a city or county governing body made pursuant to 1983 N.D. Sess. Laws 597, 601, is not subject to referral by the voters as it is not an ordinance as that term is used in Section 40-12-01, N.D.C.C.

Furthermore, Chapter 40-12, N.D.C.C., provides that the electors may initiate ordinances only. As it does not allow for the initiation of resolutions, an initiated measure attempting to restrict the manner in which a governing body may pass a resolution

approving or rejecting tax exemption under 1983 N.D. Sess. Laws 597, 601, would be void and of no effect.

II.

Section 40-21-16, N.D.C.C., states that special municipal elections must be conducted in the same manner as general elections. That section states as follows:

40-21-06. SPECIAL ELECTIONS CONDUCTED IN SAME MANNER AS GENERAL ELECTIONS.--Special municipal elections to fill vacancies or for any other purpose shall be held and conducted by the inspectors and judges of election of the several precincts in the same manner and the returns shall be made in the same form and manner as at regular municipal elections.

By the use of the phrase 'or for any other purpose,' the Legislature clearly intended to allow municipalities to hold special elections whenever they so desire. Whether a special election is needed or is appropriate is a matter for determination by the appropriate governing body.

III.

Section 40-05-01(1), N.D.C.C., states the authority of a governing body of a municipality with respect to ordinances and resolutions. That statute states, in part, as follows:

40-05-01. POWERS OF ALL MUNICIPALITIES. The governing body of a municipality shall have the power:

1. Ordinances. To enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the constitution and laws of this state, as may be proper and necessary to carry into effect the powers granted to such municipality or as the general welfare of the municipality may require, and to repeal, alter, or amend the same. [Emphasis supplied.]

Clearly, the Legislature has provided the authority to municipalities to enact and adopt resolutions as well as the authority to repeal, alter, or amend resolutions.

IV.

A municipal ordinance speaks only from the time that it goes into effect. The intention that they are to have a retrospective effect will not be presumed, but must be manifested by clear and unequivocal language. 5 McQuillin Municipal Corporations, § 20.69 (3rd Ed. 1981). There is no question but that municipalities possess the

unquestioned power to rescind prior acts and votes at any time thereafter. However, such action cannot violate vested rights in individuals. 5 McQuillin Municipal Corporations, § 13.49 (3rd Ed. 1981).

Repeal of an ordinance cannot deprive a person of rights acquired under it or prejudice him in those rights and thereby deprive him of his property without due process of law, impair the obligation of his contract, unreasonably discriminate against him, or otherwise violate his constitutional rights. [5 McQuillin Municipal Corporations, § 21.15 at 201 (3rd Ed. 1981).]

As stated earlier, a municipal ordinance and a resolution are not one and the same. There is a distinction between these two forms of action. However, it should be remembered that the Legislature, in Section 40-05-01(1), N.D.C.C., mentioned the municipalities' authority to enact ordinances and resolutions in the same statement. In addition, our Supreme Court has applied the same rules of construction to municipal ordinances as has been applied to state statutes. Thus, it is my opinion that the rules of construction with respect to municipal ordinances should apply equally to municipal resolutions.

The Connecticut Supreme Court applied this rule of construction in *Central Veterans' Ass'n v. City of Stamford*, 101 A.2d 281 (Conn. 1953). In that case, the Connecticut Supreme Court concluded that municipal resolutions, as well as municipal ordinances, operate prospectively only unless a contrary intention clearly appears. However, in no case would a resolution be applied retroactively so as to unlawfully deprive a person of properly acquired rights under the original resolution.

The power to adopt a resolution carries with it the power to rescind it unless irrevocable rights and obligations have been created by the original resolution. [101 A.2d 281, 283.]

In summary, a municipality clearly has the authority to amend, alter, or repeal a resolution it has previously approved. However, that resolution acts from the time of passage unless it clearly is stated to apply retroactively. In no case, however, may the resolution apply retroactively where it would act to illegally and unconstitutionally deprive a person of rights and obligations which have been acquired under the original resolution.

With respect to the tax exemption resolution provided for in 1983 N.D. Sess. Laws 597, 601, the question of what point does a person acquire property rights and becomes obligated by way of a contract is a question of fact rather than law. The facts and circumstances of each case must be reviewed in determining whether or not the retroactive application of a repealed or amended resolution would act to deprive one of his vested rights or would act to impair his obligation of contract. As the facts of each case obviously would differ, I am unable to provide a formal legal opinion as to the specific and precise point at which time irrevocable rights and obligations under an original resolution approving tax exemption status would occur.

V.

Section 32-12.1-03(3), N.D.C.C., states, in part, as follows:

Specifically, a political subdivision or an employee thereof shall not be liable for any claim which results from:

- a. The decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, charter, ordinance, order, regulation, resolution, or resolve.

...

- c. The decision to perform or the refusal to exercise or perform a discretionary function or duty. . . .

[Emphasis supplied.]

Clearly, the Legislature intended to prohibit liability from attaching to political subdivisions which passed resolutions or which exercised or refused to exercise discretionary functions or duties provided to it under the law. Therefore, a city may not be held liable for the actions of the city governing body in enacting or repealing a resolution.

--EFFECT--

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

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