

Office of the Attorney General
State of North Dakota

Opinion No. 85-17

Date Issued: May 6, 1985

Requested by: Senator Donald Kilander

--QUESTIONS PRESENTED--

I.

Whether a city's home rule charter is repealed by the adoption of the city manager plan of government.

II.

Whether the governing body of a home rule city has the authority to provide for changes in the form or structure of the city manager plan of government.

III.

Whether a city manager plan of government must remain in effect for a minimum of five years prior to the institution of any changes in the form of government.

IV.

Whether a city commission operating under a city manager plan of government continues to be responsible for the enactment of city ordinances.

V.

Whether a city manager prevails over the board of city commissioners and its president when conflicts occur between the statutory powers granted to the city manager and the statutory powers or duties granted to the board of city commissioners and its president.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that a city's home rule charter is not repealed by the adoption of the city manager plan of government.

II.

It is my further opinion that the governing body of a home rule city has the authority to provide changes in the form or structure of the city manager plan of government.

III.

It is my further opinion that a city manager plan of government need not remain in effect for a minimum of five years prior to the institution of any changes in the form of government.

IV.

It is my further opinion that a city commission operating under a city manager plan of government continues to be responsible for the enactment of city ordinances.

V.

It is my further opinion that the city manager prevails over the board of city commissioners and its president when conflicts occur between the statutory powers granted to the city manager and the statutory powers or duties granted to the board of city commissioners and its president unless the city in question is a home rule city and has provided otherwise through its charter and ordinances for the resolution of such conflicts.

--ANALYSES--

I.

The North Dakota Constitution, Article VII, Section 6, authorizes the establishment and exercise of home rule in North Dakota cities. The North Dakota Legislature has enacted N.D.C.C. Ch. 40-05.1 providing for the method of proposing and adopting home rule charters. The only manner in which home rule charters may be amended or repealed is that procedure provided for the adoption of such charters. N.D.C.C. § 40-05.1-07. Furthermore, the various statutes as to the differing forms of government available to a city do not provide for the discontinuation of the home rule charter simply as a result of the change in the form of government.

Thus, a home rule charter may be repealed only by approval of the qualified electors of the city at a regular or special city election. A change in the form of government of a home rule city does not act to terminate a previously adopted home rule charter.

II.

The authority of a home rule city to provide for its form and structure of government, including its executive and city officers, is provided for in N.D.C.C. § 40-05.1-06(4). Prior to the 1985 Legislative Assembly, this particular statute provided as follows:

40-05.1-06. POWERS. 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:

4. To provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation.

In 1980, the North Dakota Supreme Court, in *Litten v. City of Fargo*, 294 N.W.2d 628 (N.D. 1980), reviewed this statute and concluded that the term 'city officers' referred not to an executive officer or the governing body, but intended only to refer to individual officers, either elected or appointed, within the city. The Supreme Court further concluded that this statute did not bestow upon a home rule city the authority to select or change its form of government as it desired.

. . . [W]e conclude that the legislature did not intend, and the statutory provisions do not give, home rule cities the authority to select any form of government it may desire. Our conclusion is supported and evidenced by the lack of an orderly procedure to be followed in the change of government and the absence of clear or necessary implied authority under Ch. 40-05.1, NDCC. We conclude that in the matter of changing the form of government the legislature intended home rule cities to be governed by those laws applying to cities generally. *Id.* at 634.

However, the 1985 Legislative Assembly passed Senate Bill No. 2297 which amended N.D.C.C. § 40-05.1-06(4), so as to include the following sentence:

To provide for change, selection, or creation of its form and structure of government including its governing body, executive officer, and city officers.

Senate Bill No. 2297 also provided definitions for the terms of 'city officers,' 'executive officers,' and 'governing body.' By these definitions, it is clear that a city's executive officer and its governing body are subject to the authority of a home rule city

with respect to the change, selection, or creation of its form and structure of government. As Senate Bill No. 2297 carried with it an emergency clause and was filed in the Office of the Secretary of State on March 25, 1985, it does have the force and effect of law as of this date.

The impact of Senate Bill No. 2297 is the overruling of the decision of the North Dakota Supreme Court in *Litten v. City of Fargo*, supra, with respect to the authority of a home rule city to select any form of government it may desire. As the Legislature has clearly provided home rule cities with the authority to provide for change, selection, or creation as to its form and structure of government including the form and structure of its governing body, executive officer, and other city officers, it is clear that the city manager plan may be amended and implemented by a home rule city as it sees fit.

Upon adoption of a home rule charter, a city may exercise all powers set out in its charter and any inconsistent state law is superseded, N.D.C.C. § 40-05.1-06, provided two requirements are met. First, the city is limited to the exercise of those powers provided in N.D.C.C. § 40-05.1-06. Second, the powers the city desires to exercise must be clearly stated in its home rule charter, as approved by the voters, and implemented by ordinance. If either of these requirements are not met, the home rule city is governed by the statutes applicable generally to all cities. See N.D.C.C. § 40-05.1-06; *Litten v. City of Fargo*, supra at 632.

III.

North Dakota law, N.D.C.C. § 40-10-08, provides the city governing body with the authority to submit at any regular election the question of whether a city manager plan should be retained as the city's form of government. If such question is submitted to the voters by the governing board, it must occur after the city manager plan has been in effect for a period of five years or more.

However, the statute also provides that a petition signed by 40% or more of the qualified electors of the city may request submission of such a question. Where such a petition is presented, the submission of the question shall occur at an election to be held within 90 days after the filing of such petition. The statute prohibits the submission of the question as the retention of the city manager plan more than once in every five years, but does not require the passage of five years prior to the submission.

Therefore, a petition signed by 40% or more of a city's qualified electors requesting the submission of the question of whether a city manager plan should be retained as the form of

government of a city may be presented at any time so long as it is not submitted more than once within every five years.

Where the city involved is a home rule city, N.D.C.C. 40-05.1-06(4), as amended by Senate Bill No. 2297, allows the city to supersede N.D.C.C. 40-10-08 in determining the manner in which the retention of the city manager plan shall be submitted to the city's voters. If such authority is to be adopted by a home rule city, it must be included within its charter and implemented through ordinances. Litten v. City of Fargo, supra.

IV.

A key factor to the city manager plan of government is the division of administrative and legislative functions. Basic to the city manager plan is the role of the city manager as the city's chief executive and administrative officer. However, the city manager plan does not change the city governing body's traditional role as a policy-making and legislative body. 56 Am. Jur.2d Municipal Corporations, Etc. § 186 (1971).

The elected commissioners determine policies and pass legislation pursuant thereto, when necessary, and the manager, designed to be selected because of his supposed superior qualifications . . . , administers the government. . . . 2 E. McQuillin, Municipal Corporations, § 9.21 at 680 (3rd Ed. 1979).

The adoption of the city manager plan does not affect the authority of a city governing body to pass ordinances. Id. Indeed, N.D.C.C. § 40-10-05 indicates that a governing body which operates under the city manager plan of government continues to possess those powers granted to it by law. Among the powers granted by law to a city governing body is the authority to enact and adopt all ordinances. N.D.C.C. §§ 40-05-01(1), 40-05.1-06(7).

V.

N.D.C.C. § 40-10-07, provides for the resolution of conflicts between a city manager and the city's executive officer or governing body. The statute states as follow:

40-10-07. CONFLICT OF POWERS AND DUTIES OF CITY MANAGER AND OTHER OFFICERS--WHO TO GOVERN. If the powers granted to a city manager by this chapter shall conflict with or shall be opposed to the powers or duties imposed upon or granted by law to the executive officer or governing body, the powers or duties imposed or granted by law to the executive officer or the governing body shall be deemed to be suspended for and during the period in which the city manager plan is in force in the city and during the employment of a city manager thereunder.

This statute speaks clearly to the situation where powers granted to a city manager conflict with powers or duties granted to an executive officer, such as the president of the board of city commissioners, or to the governing body itself. Where such conflicts occur, the powers granted to the city manager by N.D.C.C. Ch. 40-10 prevail over those powers and duties imposed or granted by law to the city's executive officer or governing body so long as the city manager plan remains in force.

As stated previously in this opinion, a home rule city now possesses the authority by which changes in the form and structure of the city management plan of government may be adopted. Therefore, the resolution of such conflicts occurring within a home rule city may be handled in another manner where such resolution is provided for in the home rule charter and implemented through ordinances.

--EFFECT--

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

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