

Date Issued: March 7, 1986 (AGO 86-11)

Requested by: Hugh P. Seaworth
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- QUESTION PRESENTED -

Whether an ordinance authorizing a sales and use tax enacted pursuant to a home rule city charter may be referred to the electors of the city.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that an ordinance authorizing a sales and use tax enacted pursuant to a home rule charter may not be referred to the electors of the city.

- ANALYSIS -

On January 14, 1986, voters in the city of Bismarck narrowly approved a home rule charter. The charter was drafted for the limited purpose of enabling the board of city commissioners to adopt a city sales and use tax. The power to adopt a sales and use tax of no more than one percent was the only enumerated power contained within the city home rule charter.

On February 4, 1986, the board of city commissioners introduced a sales tax ordinance as authorized by the home rule charter. The ordinance essentially incorporated the provisions of the home rule charter concerning the use of tax revenues and a limitation as to the sales and use tax authorized by the home rule charter. The ordinance, if enacted in its present form, will take effect on April 1, 1986.

North Dakota law provides the authority for the referral of a city ordinance to the electors of that city upon the filing of a petition protesting that ordinance. This authority is found in N.D.C.C. section 40-12-08 which states, in part, as follows:

An ordinance which has been adopted by the governing body of a municipality may be referred to the electors of the municipality by a petition protesting against such ordinance.

There are no North Dakota cases on the question of whether all ordinances enacted by a municipality are subject to the power of referral provided for in N.D.C.C. section 40-12-08. However, this question has occurred in other jurisdictions and has resulted in a generally accepted rule of law on the referral of municipal ordinances.

Generally, an enactment originating a 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

section 12 (1969).

The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. Similarly, an act or resolution constituting a declaration of public purpose in making provision for ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body. 5 E. McQuillin, *Municipal Corporations*, section 16.55, at 194-95 (Third Rev. Ed. 1969).

The rule that only legislative, as opposed to administrative, ordinances are subject to the initiative and referendum has generally been justified by the requirements of the efficient administration of government.

A charter giving a small group of electors the right to demand a vote of the people upon every administrative act of the city council would place municipal government in a straightjacket and make it impossible for the city's officers to carry on the public business. *Housing Authority v. Superior Court* 219 P.2d. 457, 461 (Cal. 1950).

The legislative/administrative distinction in determining which municipal ordinances are subject to the referendum has been adopted by several opinions of this office. This office has concluded that zoning ordinances (1981 N.D. Attorney General's Opinion 1), resolutions approving a tax exemption of property (1983 N.D. Attorney General's Opinion 103) cable television franchise ordinances (1985 N.D. Attorney General's Opinion 24) and ordinances annexing territory to the city (1985 N.D. Attorney General's Opinion 73) may not be referred to the electors of the city. In such cases, the ordinance or resolution in question was administrative in character, rather than legislative, as it placed into execution that which had already been provided for by the body itself if not by a superior body.

With respect to ordinances imposing taxes, the various authorities are in disagreement as to the referral of such ordinances. Compare *State, ex rel. Boyer v. Grady* 269 N.W.2d. 73 (Neb. 1978) (one percent sales tax was subject to the referendum) with *Gilbert v. Ashley* 209 P.2d. 50 (Cal. Ct. App. 1949) (city tax not subject to the referendum). However, it must be pointed out that, in the case of the Bismarck sales and use tax, the ordinance enacting and levying the tax is pursuant to a home rule charter previously approved by the electors of the city. In other words, the ordinance imposing a sales tax is an extension of the authority bestowed upon the city governing body by the electors through the home rule charter approved by the electors. As such, the ordinance is seen as not prescribing a new policy or plan, but simply placing into effect that which has already

been approved. As such, the ordinance is administrative in character as opposed to legislative.

The case of *Denman v. Quin* 116 S.W.2d. 783 (Tex. Civ. App. 1938, writ ref'd), is most comparable to the situation involving the Bismarck sales and use tax. In *Denman* an attempt was made to refer an ad valorem tax imposed by the city governing body of the city of San Antonio. San Antonio is a home rule city containing a home rule charter provision authorizing the levying and collection of an ad valorem tax. The action of the city governing body to impose the tax was performed pursuant to this home rule charter authority.

In determining whether such an ordinance was subject to the power of the referendum, the Texas court utilized the legislative/administrative distinction previously described in this opinion. The court concluded that the ad valorem tax enacted by the city governing body was nothing more than an attempt to put into execution the home rule charter authorizing the levy of such a tax. For this reason, the court concluded that the power of referendum may not be applied to such an administrative ordinance.

It seems obvious that when the ordinance in question here is tested by the rules stated, it falls at once into the class of ordinances which are not deemed referable to a vote of the people. It is in no sense a declaration of a new policy or purpose, or a permanent or general law for the guidance of the public or their officers or agents, or authorizing the expenditure of public funds for any purpose not previously fully authorized by law. It is rather an ordinance putting into execution previously enacted laws authorizing the levy of taxes for the payment and servicing of existing contractual obligations of the city, and the maintenance and operation of the affairs and business of the municipality. 116 S.W.2d. at 786.

In summary, ordinances which are legislative in character (declaring new policy or purpose) are subject to the power of the referendum. Ordinances which are administrative in character (placing into execution previously declared policies or laws) are not subject to the power of the referendum. An ordinance imposing a sales and use tax as authorized by a previously approved home rule charter is administrative in character as it simply places into execution those policies and authorities previously declared and enacted by the people. Therefore, such an ordinance is not subject to the power of the referendum.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 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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Attorney General

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