

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-08

Date issued: April 8, 1992

Requested by: Mary E. Nordsven, Belfield City Attorney
Representative Ron Carlisle

- QUESTIONS PRESENTED -

I.

Whether the governing body of a city operating under the modern council system of government is required by N. D. C. C. ' 40-08-12 to publish a record of its proceedings in its official newspaper.

II.

Whether a home rule city may supersede the requirements of N. D. C. C. ' 40-08-12 to publish a record of its proceedings in its official newspaper.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that N. D. C. C. ' 40-08-12 does not apply to the governing body of a city operating under the modern council system of government and, further, that the governing body of a modern council city is not required to publish a record of its proceedings in its official newspaper.

II.

It is my further opinion that a home rule city may not supersede the requirements of N. D. C. C. ' 40-08-12 to publish a record of its proceedings in its official newspaper.

- ANALYSES -

I.

In North Dakota, a city may be organized under one of three systems of government: the commission system, the council system, or the modern council system. See N. D. C. C. chs. 40-03.1, 40-03.2, 40-04, and 40-04.1. Regardless of the system under which a city is operating, the electors of a city may adopt a city manager plan of government. N. D. C. C. ch. 40-10. In addition, the electors of a city may adopt a home rule charter to expand local control of certain matters. N. D. C. C. ch. 40-05.1.

Within N. D. C. C. tit. 40, certain chapters apply to all cities regardless of the system of government and certain chapters, by their titles, apply only to cities with a particular system of government. The modern council system of

government was established as an authorized system of government pursuant to the enactment of 1965 N. D. Sess. Laws ch. 285, which is codified as N. D. C. C. ch. 40-04.1. The council system was established as an authorized system of government pursuant to the enactment of 1887 N. D. Sess. Laws ch. 73, which is codified as N. D. C. C. ch. 40-08. The commission system was established as an authorized system of government pursuant to the enactment of 1907 N. D. Sess. Laws ch. 45, which is codified as N. D. C. C. ch. 40-04.

There is no provision in N. D. C. C. ch. 40-04.1 which requires the governing body of a modern council city to publish a record of its proceedings. N. D. C. C. ' 40-06-02, which applies to all cities organized under the laws of the state, provides that all meetings of the governing body must be open to the public and that a journal of its proceedings must be kept. The journal of its proceedings is also open to the public. N. D. C. C. ' 44-04-18. However, no law generally applicable to the governing bodies of all cities requires the publication of the records of their proceedings. In fact, the only provision in N. D. C. C. tit. 40 requiring the governing body of a city to publish a record of its proceedings is set out in N. D. C. C. ch. 40-08, which, as discussed above, concerns the council system of government. N. D. C. C. ' 40-08-12 provides as follows:

The city council shall publish a complete record of all its proceedings in its official newspaper no later than thirty days after the meeting at which the record is read and approved.

The real question then, is whether the term "city council" as used in N. D. C. C. ' 40-08-12 includes the city council of a city operating under the modern council system of government as well as the city council of a city operating under the council system of government. N. D. C. C. ch. 40-04.1 and ch. 40-08 each contain sections for which analogous counterparts may be found in the other chapter. However, each of these two chapters also contain sections which have no analogous counterparts in the other chapter. N. D. C. C. ' 40-08-12 is one of those sections for which there is no analogous counterpart in N. D. C. C. ch. 40-04.1.

The council system and the modern council system are distinct and separate systems of government. Unless the Legislature has specifically provided that the laws applicable to one system of government are also applicable to another system of government or the context requires references to one system to include another system, it is my opinion that the Legislature did not intend references to one system to include references to another.

Therefore, it is my opinion that N. D. C. C. ' 40-08-12 does not apply to the governing body of a city operating under the modern council system of government and, further, that the governing body of a modern council city is not required to publish a record of its proceedings in its official newspaper.

II.

N. D. Const. art. VII, ' 1 permits the legislature to devolve certain powers upon home rule cities. The provision does not in itself grant any powers to home rule cities. Litten v. City of Fargo, 294 N. W. 2d 628, 631 (N. D. 1980). Consequently, home rule cities have only those powers which are granted to them by the Legislative Assembly.

N. D. C. C. ' 40-05.1-06 sets forth the particular powers available to home rule cities. The North Dakota Supreme Court has explained that "[i]f the authority or power to enact an ordinance on a specific subject is not found in section 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." Linten, 294 N. W. 2d at 632. Thus, in order to determine whether a home rule city with the council system of government can pass an ordinance superseding N. D. C. C. ' 40-08-12, it is necessary to examine N. D. C. C. ' 40-05.1-06 to determine whether authority or power is granted home rule cities to enact such an ordinance.

N. D. C. C. ' 40-05.1-06 states:

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:

1. To acquire, hold, operate, and dispose of property within or without the corporate limits, and exercise the right of eminent domain for such purposes.
2. To control its finances and fiscal affairs; to appropriate money for its purposes, and make payment of its debts and expenses; to levy and collect taxes, excises, fees, charges, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; to contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; to establish charges for any city or other services, and to establish debt and mill levy limitations, provided that all real and personal property in order to be subject to the assessment provisions of this subsection shall be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments.
3. To fix the fees, number, terms, conditions, duration, and manner of issuing and revoking licenses in the exercise of its governmental police powers.
4. To provide for city officers, agencies, and employees,

their selection, terms, powers, duties, qualifications, and compensation. To provide for change, selection, or creation of its form and structure of government including its governing body, executive officer, and city officers.

5. To provide for city courts, their jurisdiction and powers over ordinance violations, duties, administration, and the selection, qualifications, and compensation of their officers; however, the right of appeal from judgment of such courts shall not be in any way affected.

6. To provide for all matters pertaining to city elections, except as to qualifications of electors.

7. To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof.

8. To lay out or vacate streets, alleys, and public grounds, and to provide for the use, operation, and regulation thereof.

9. To define offenses against private persons and property and the public health, safety, morals, and welfare, and provide penalties for violations thereof.

10. To engage in any utility, business, or enterprise permitted by the constitution or not prohibited by statute or to grant and regulate franchises therefore to a private person, firm, or corporation.

11. To provide for zoning, planning, and subdivision of public or private property within the city limits; to provide for such zoning, planning, and subdivision of public or private property outside the city limits as may be permitted by state law.

12. To levy and collect franchise and license taxes for revenue purposes.

13. To exercise in the conduct of its affairs all powers usually exercised by a corporation.

14. To fix the boundary limits of said city and the annexation and deannexation of territory adjacent to said city except that such power shall be subject to, and shall conform with the state law made and provided.

15. To contract with and receive grants from any other governmental entity or agency, with respect to any local, state, or federal program, project, or works.

16. To impose registration fees on motor vehicles, or sales and use taxes in addition to any other taxes imposed by law.

It is the intention of this chapter to grant and confirm to the people of all cities coming within its provisions the full right of self-government in both local and city matters within the powers enumerated herein. The statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters.

None of the powers enumerated in N. D. C. C. ' 40-05.1-06 includes the authority to control the publishing of a record of the proceedings of the governing body. Thus, the legislature has not granted to home rule cities the power to enact an ordinance which will supersede the requirements of N. D. C. C. ' 40-08-12. In light of this, home rule cities with the council system of government are bound to comply with the publication requirement of N. D. C. C. ' 40-08-12.

In conclusion, a home rule city is not required by N. D. C. C. ' 40-08-12 to publish a record of its proceedings in its official newspaper unless it is a home rule city operating under the council system of government. If a home rule city is operating under the council system of government, it must comply with the publication requirements of N. D. C. C. ' 40-08-12.

- 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.

Nicholas J. Spaeth
Attorney General

Assisted by: Leah Ann Schneider
Assistant Attorney General

krb

Ms. Mary E. Nordsvén
Attorney at Law
P. O. Box 370

ATTORNEY GENERAL' S OPINION 92-08
April 8, 1992
Page 41

Di cki nson, ND 58601

Representative Ron Carlisle
Box 222
Bismarck, ND 58502