

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

City of Fargo, Plaintiff and Appellant, v. State of North Dakota, Defendant and Appellees.	Supreme Court No. 20240125 District Court File No. 09-2023-CV-02540
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Appeal from:
District Court's Memorandum Opinion and Order dated February 20, 2024

Judgment entered February 28, 2024

District Court, East Central Judicial District
Cass County, North Dakota

**BRIEF OF AMICUS CURIAE NORTH DAKOTA LEAGUE OF CITIES
IN SUPPORT OF CITY OF FARGO'S APPEAL SEEKING REVERSAL OF
DISTRICT COURT'S MEMORANDUM OPINION AND ORDER AND
JUDGMENT**

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INTEREST OF AMICUS CURIAE

[¶1] The North Dakota League of Cities (“NDLC”) has an interest in this appeal as an amicus curiae. The North Dakota League of Cities is a voluntary membership organization with over ninety percent of North Dakota’s 355 incorporated cities as members. The NDLC’s member cities’ populations make up ninety-nine percent of the population in incorporated cities in North Dakota. Electors in 145 North Dakota cities have adopted home rule charters. All 145 cities with home rule charters are members of the NDLC.

[¶2] The North Dakota Constitution requires the North Dakota Legislature to provide for the establishment and exercise of home rule in cities. Further, the North Dakota Constitution requires that the establishment and exercise of home rule charter must be provided for in a way that provides for maximum local self-government. The Court’s decision in this case will impact the 145 home rule cities’ ability to exercise maximum self-government granted by its city electors.

STATEMENT OF AUTHORSHIP CONTRIBUTIONS

[¶3] No party’s counsel authored this brief in whole or in part, neither a party nor party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

[¶4] The North Dakota Constitution requires the legislature to enact statutes providing city electors with the ability to enact a home rule charter providing for

maximum local self-government. Alternatively, the constitutional mandate of maximum self-government prevents the legislature from passing a statute that supersedes a city ordinance enacted pursuant to elector-granted home rule authority on a purely local subject.

[¶5] Please note this Court has determined the North Dakota Constitution does not directly vest powers in city electors to grant home rule authority to cities. See Litten v. Fargo, 294 N.W.2d 628 (N.D. 1980). This Court has also reviewed questions about whether a home rule city is acting within the authority granted by the legislature in N.D.C.C. § 40-05.1-06. See Klug v. Minot, 2011 ND 67, 795 N.W.2d 906, Sauby v. Fargo, 2008 ND 60, 747 N.W.2d 65, Pelkey v. Fargo, 453 N.W.2d 801 (N.D. 1990). The Court has not reviewed what the constitutional mandate of maximum local self-government means in relation to home rule cities.

I. THE NORTH DAKOTA CONSTITUTION REQUIRES THE LEGISLATURE TO ENACT STATUTES PROVIDING CITY ELECTORS WITH THE ABILITY TO ENACT A HOME RULE CHARTER PROVIDING FOR MAXIMUM LOCAL SELF-GOVERNMENT.

[¶6] North Dakota electors added home rule to the North Dakota Constitution at the general election in November 1966. See 1967 N.D. Sess. Law ch. 510. As adopted,

Section 130 provided:

Except in the case of home rule cities and villages as provided in this section the legislative assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes and assessments, borrowing money, and contracting debts. Money raised by taxation, loan or assessment for any purpose shall not be diverted to any other purpose except by authority of law.

The legislative assembly shall provide by law for the establishment of

home rule in cities and villages.¹ It may authorize such cities and villages to exercise all or a portion of any power or function which the legislative assembly has power to devolve upon a non-home rule city or village, not denied to such city or village by its own home rule charter and which is not denied to all home rule cities and villages by statute. The legislative assembly shall not be restricted in granting of home rule powers to home rule cities and villages by section 183 of this Constitution.

Id. (emphasis added).

[¶7] At the June 1982 election, Section 130 of the North Dakota Constitution was repealed and replaced with the new Article VII Political Subdivisions. 1983 Sess. Law ch. 718. This is the current language in the North Dakota Constitution, and it provides:

Section 1. The purpose of this article is to provide for maximum local self-government by all political subdivisions with a minimum duplication of functions.

...

Section 6. The legislative assembly shall provide by law for the establishment and exercise of home rule in counties and cities. No home rule charter shall become operative in any court or city until submitted to the electors thereof and approved by a majority of those voting thereon. In granting home rule powers to cities, the legislative assembly shall not be restricted by city debt limitations contained in this constitution.

N.D. Const. Art. VII §§ 1 and 6 (emphasis added).

[¶8] This Court has stated:

When interpreting constitutional provisions, ‘we apply general principles of statutory construction.’ State ex rel. Heitkamp v. Hagerty, 1998 ND 122, ¶ 13, 580 N.W.2d 139 (quoting Comm'n on Med. Competency v. Racek, 527 N.W.2d 262, 266 (N.D. 1995)). We aim to give effect to the intent and purpose of the people who adopted the constitutional provision. Id. We determine the intent and purpose of a constitutional provision, ‘if possible, from the language itself.’ Kelsh v. Jaeger, 2002 ND 53, ¶ 7, 641 N.W.2d 100. ‘In interpreting clauses in a constitution we must presume that words have been employed in their natural and ordinary meaning.’ Cardiff v. Bismarck Pub. Sch. Dist., 263 N.W.2d 105, 107 (N.D. 1978).

¹ In 1967 all villages became cities. See 1967 N.D. Sess. Law ch. 323.

Sorum v. State, 2020 ND 175, ¶ 19, 947 N.W.2d 382.

[¶9] Sections 1 and 6 of article VII of the North Dakota Constitution need to be reviewed to ensure the intent of the 1982 electors is followed.

A. Constitutional Mandate on the Legislature

[¶10] The difference in the language between the 1966 constitutional provision and the 1982 constitutional provision demonstrates the legislature is mandated to provide city electors with the option for maximum local self-government through home rule.

[¶11] Adopted in 1966, section 130 provided the legislature “shall provide by law for the establishment of home rule in cities and villages. It may authorize such cities and villages to exercise all or a portion of any power or function which the legislative assembly has power to devolve upon a non-home rule city or village.” 1967 N.D. Sess. Law ch. 510. In other words, it was mandatory for the legislature to adopt statutes providing for home rule authority; however, the power provided through home rule was within the discretion of the legislature.

[¶12] This requirement was further explained in a letter to all city auditors in cities with a population over 1,000, dated August 30, 1967, from C. Emerson Murry, the director of the Legislative Research Committee explaining, “[t]he amended section 130 requires the legislature to make some provision for home rule in North Dakota, but the extent and scope of such home rule is left to the discretion of the legislature.” North Dakota State Historical Society, Manuscripts by Subject – Politics/Government-#10100, North Dakota League of Cities, Box 17, Home Rule Study.

[¶13] In 1982, the constitutional provisions related to home rule were repealed and replaced with updated language. The new language of sections 1 and 6 of article VII, continues to mandate the legislature passes statutes providing for cities to have a home rule charter. N.D. Const. Art. VII §§ 1 and 6. However, the language added three new concepts: 1) mandating maximum local self-government; 2) allowing counties to adopt home rule charters; and 3) requiring a vote of electors before a home rule charter becomes effective. Id. In other words, when reading this language together, electors in a city or county must be provided a process to grant maximum local self-government to their city or county government through adopting a home rule charter in an election.

[¶14] Ballot measure summary materials produced in 1982 about enacting Title VII provide that:

This new article is intended to provide for maximum local self-government by all political subdivisions with minimum duplication of functions. The principal changes proposed are as follows:

1. The new measure would require the legislature to provide home rule for counties and cities, whereas the current constitutional home rule provision only applies to cities.

Fuglesten, Harlan, Summary of Ballot Measures for Primary Election – June 8, 1982 and General Election – November 2, 1982, Bureau of Governmental Affairs, University of North Dakota (May 1982). The addition of the language maximum local self-government to the title on home rule authority in 1982, created a minimum amount of authority the legislature is required to provide as an option to electors to grant to a city through a home rule charter.

B. Maximum Local Self-Government

[¶15] The North Dakota Constitution provides city electors with the right to provide a city with maximum self-government through enacting a home rule charter. N.D. Const. Art. VII §§ 1 and 6. Neither North Dakota’s Constitution, nor the North Dakota Century Code, define what maximum local self-government means. To give full effect to the constitution, the meaning of maximum local self-government should be examined from the perspective of the electors who enacted the language. See Bismarck v. Fettig, 1999 ND 193, ¶ 8, 601 N.W.2d 247.

[¶16] North Dakota electors were already familiar with home rule authority when the language requiring maximum local self-government was added to the constitution. In 1969, the North Dakota Legislature adopted statutes providing a process for a city to adopt a home rule charter and providing the powers that could be provided in a home rule charter. 1969 N.D. Sess. Law ch. 371. These statutes were promulgated specially to address local concerns. See 1969 ND Legislative Research Committee Final Report, page 39. (“The Committee was most concerned with the scope and extent of the home rule powers to be granted and with scaling these powers to the cities’ needs. It was noted that the powers to be granted must relate to matters of city government and concern.”). The legislative determination was the powers listed in the original enactment of the statute covered local city self-government. Id. Since the initial enactment of N.D.C.C. § 40-05.1-06 preceded the enactment of sections 1 and 6 of Article VII, North Dakota electors would presume the powers provided in the initial version of N.D.C.C. § 40-05.1-06 were included in empowering city electors to provide cities with maximum local self-government.

[¶17] A Fargo city ordinance on zoning is at issue in this case. Fargo Municipal Code § 20-0403(C)(5)(e) states, “The sale of firearms and/or ammunition, and the production of ammunition for sale or resale are prohibited as home occupations.” This ordinance was adopted pursuant to authority provided by the city electors in Fargo’s home rule charter. See Fargo Home Rule Charter Art. 3(k) (“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.”) The ordinance does not prohibit the sale or production of firearms and/or ammunition — rather, it states only that the sale or production may not be a home occupation (in other words, in a residential neighborhood). The ordinance relates solely to planning and zoning.

[¶18] During the 2023 Legislative Session, the Legislature passed H.B. 1340, amending N.D.C.C. § 40-05.1-06. 2023 N.D. Sess. Law ch. 106. H.B. 1340 added the following underlined language to N.D.C.C. § 40-05.1-06:

14. 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. This subsection is subject to the provisions of section 62.1 - 01 - 03.

Id. As amended in H.B. 1340, section 62.1-01-03, N.D.C.C., provides:

2. A political subdivision, including home rule cities or counties, may not enact a zoning ordinance relating to the purchase, sale, ownership, possession, transfer of ownership, registration, or licensure of firearms and ammunition. All such existing ordinances are void.
3. This section does not limit the ability of a political subdivision, including home rule cities or counties, to enforce an ordinance or zoning regulation relating to a business operation if the restriction in the ordinance or regulation:

- a. Applies equally to all persons engaging in commerce within the area subject to the ordinance or regulation; and
 - b. Is not specifically related to the purchase, sale, ownership, possession, transfer of ownership, registration, or licensure of firearms and ammunition.
4. The absence of a state law restriction relating to the purchase, sale, ownership, possession, transfer of ownership, registration, or licensure of firearms and ammunition may not be construed to allow a political subdivision, including a home rule city or county, to enact an ordinance restricting the purchase, sale, ownership, possession, transfer of ownership, registration, or licensure of firearms and ammunition.

2023 N.D. Sess. Law 106. To summarize, H.B. 1340 seeks to divest city electors from the authority to provide zoning authority to the cities related to zoning for home businesses related to firearms. Id.

[¶19] One of the powers provided in the original enactment of N.D.C.C. § 40-05.1-06 was, “To provide for zoning, planning, and subdivision of public or private property within the city limits.” 1969 N.D. Sess, Law ch. 371. Additionally, the authority for city zoning was first enacted in 1923. 1923 N.D. Sess. Law ch. 175. Both the 1969 enactment of N.D.C.C. § 40-05.1-06 and the chapter on zoning occurred before electors enacted the 1982 amendment on home rule charter. As such, zoning is necessarily part of the powers that city electors can grant to a home rule city as part of maximum local self-government.

[¶20] H.B. 1340 violates city electors’ rights to provide a city with maximum local self-government related to the purely local matter of zoning. As such, the district court’s decision in this case should be reversed.

II. THE LEGISLATURE CANNOT INVALIDATE A HOME RULE CITY’S ORDINANCE THAT WAS VALIDLY EXERCISED IN ACCORDANCE WITH POWERS PROVIDED IN A HOME RULE CHARTER.

[¶21] As discussed in the preceding paragraphs, North Dakota’s Constitution requires that city electors be provided the ability to grant a city, through enacting a charter, the authority of maximum local self-government. N.D. Const. Art. VII §§ 1 and 6. At a minimum, the concept of maximum local self-government means that the legislature cannot override an ordinance regarding local matters that was passed in accordance with authority granted by city electors through a home rule charter.

[¶22] In previous cases, the North Dakota Supreme Court has reviewed whether a city’s actions are consistent with the authority granted in N.D.C.C. § 40-05.1-06. See Klug, 2011 ND 67, 795 N.W.2d 906 (holding a city ordinance related to police and fire pensions was a valid exercise of home rule authority), and Sauby, 2008 ND 60, 747 N.W.2d 65 (holding that home rule authority did not supersede the prohibition on cities enacting ordinances on offenses with greater penalties than state law). These cases do not address what happens to an ordinance, on a purely local topic, which is validly enacted pursuant to home rule authority, if a statute contradicting the ordinance is enacted.

[¶23] In 1953, prior to inclusion of home rule in North Dakota’s Constitution, the North Dakota Supreme Court held that a city ordinance is invalid if a state law is enacted that is incongruent with the city ordinance. See Minot v. Gronna, 59 N.W.2d 514, 531 (N.D. 1953). After the 1982 home rule amendment to the constitution, this Court held a change to a state law involving an offense invalidates a city ordinance on the same offense because N.D.C.C. § 12.1-01-05 requires uniformity for laws on offenses in North Dakota. Jamestown v. Casarez, 2021 ND 71, 958 N.W.2d 467. This Court has also held a county zoning ordinance is invalidated when a statute contradicting it is passed. Envtl.

Driven Solutions, LLC v. Dunn Cnty., 2017 ND 45, 890 N.W.2d 841. These cases do not apply to the current situation, because they did not involve an ordinance, on a purely local subject, passed according to city elector-granted home rule authority.

[¶24] It is incongruent with the constitutional concept of maximum local self-government for the legislature to tack an exception on to the powers of home rule cities, invalidating a city ordinance, which was adopted prior to the statute, using elector-granted home rule authority on a purely local matter. In this case, the matter at hand is the zoning of businesses dealing with ammunitions and firearms. It is logical to assume we will see additional bills brought forth under this section, which will slowly erode the concept of maximum local self-government mandated by the Constitution. Since H.B. 1340 seeks to invalidate an ordinance on a purely local zoning matter that was enacted pursuant to elector-granted home rule authority, this Court should hold H.B. 1340 does not impact the validity of the City of Fargo's zoning ordinance on home-based businesses.

CONCLUSION

[¶25] North Dakota's Constitution provides city electors the right to grant cities the authority of maximum local self-government through enacting a home rule charter. The North Dakota Legislature has a duty to comply with this constitutional mandate and enact statutes providing for the powers associated with maximum local self-government.

[¶26] Alternatively, the constitutional mandate of providing city electors with the right to provide their city with the powers associated with maximum local self-government means the legislature cannot invalidate a city ordinance related to purely

local matters that was enacted pursuant to home rule authority.

CERTIFICATE OF COMPLIANCE

[¶27] The undersigned, as attorney for Amicus Curiae North Dakota League of Cities, certifies this brief is in compliance with the page limitations in Rules 29 and 32(a) of the North Dakota Rules of Appellate Procedure. The brief was prepared in 12-point font and is 16 pages in length.

[¶28] Respectfully submitted this 29th day of May 29, 2024.

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CERTIFICATE OF SERVICE

[¶29] A copy of this document was electronically filed with the North Dakota Supreme Court, on May 29, 2024, and electronically through the Supreme Court electronic filing system upon:

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