

LETTER OPINION
97-L-153

September 26, 1997

Mr. William A. Herauf
Assistant Medora City Attorney
PO Box K
Dickinson, ND 58602-8305

Dear Mr. Herauf:

Thank you for your letter asking whether the city council of the city of Medora can delegate its decision-making authority to the voters of the city. If not, you question whether the city council is bound by an initiated ordinance presented to and passed by the voters.

The city of Medora has the traditional council form of government. N.D.C.C. ch. 40-12 provides procedures relative to the initiating and referring of municipal ordinances. N.D.C.C. § 40-12-01 clearly limits the authority to initiate and refer municipal ordinances to cities operating under the commission and modern council systems of government. Letter from Attorney General Nicholas Spaeth to William L. Strate (July 2, 1986). The authority to initiate and refer city ordinances does not apply to cities which utilize forms of government not provided in N.D.C.C. § 40-12-01. Id.; Letter from Attorney General Helgi Johanneson to Howard Stormon (October 27, 1969). Because the city of Medora does not fall within one of the permissible forms of government which enjoy the authority to initiate and refer municipal ordinances, citizens of the city of Medora do not have initiative authority.

Although citizens of the city of Medora do not have initiative authority, an initiated ordinance was presented to and passed by the voters. You question whether such act was a delegation of the city council's decision-making authority.

Legislative and discretionary powers devolved by law on a council cannot be delegated to others. McQuillin Mun. Corp. § 10.41 (3d ed. 1996). "The rule is well settled that legislative power cannot be delegated by a municipality, unless expressly authorized by the statute conferring the power." Id. at § 10.40. Although not directly addressed, prior opinions by this office impliedly find city councils cannot delegate legislative power to electors absent express statutory authority. In a 1969 opinion, Attorney General Johanneson opined that if the electors of a city do not have a right of referendum, the same cannot be conferred upon them by municipal

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ordinance. Letter from Attorney General Helgi Johanneson to J. Howard Stormon (October 27, 1969). Similarly, because North Dakota law does not give citizens of a traditional council city initiative powers, the city council may not grant such power to the citizens. See Letter from Attorney General Nicholas J. Spaeth to William L. Strate (July 2, 1986) ("a municipality is without authority to authorize the powers of initiative and referendum unless authorized by the constitution or by a statute"). Thus, it is my opinion a city council may not delegate its legislative power to electors except as provided by the constitution or by a statute.

Because the electors of the city of Medora do not have initiative authority, the next issue is the impact of an initiated ordinance passed by the voters. This office has previously determined "a board of county commissioners may seek a nonbinding, advisory opinion of its constituents in implementing a specific statutory authority given to the board by the constitution or a statute." Letter from Attorney General Nicholas J. Spaeth to Tom Slorby (September 23, 1987). The unauthorized initiated ordinance would, at best, constitute a "straw vote" or an advisory vote and have no legal effect. See 1996 N.D. Op. Att'y Gen. L-192; Letter from Attorney General Nicholas J. Spaeth to Wade G. Enget (March 19, 1987). Advisory votes are non-binding and the city council is not obligated by the results of advisory votes. Letter from Attorney General Nicholas J. Spaeth to Roger Kringlie (April 8, 1992); Letter from Attorney General Nicholas J. Spaeth to Bradley Berg (March 9, 1988).

In conclusion, it is my opinion a city council may not delegate its legislative power to electors except as provided by the constitution or by a statute. It is my further opinion that an unauthorized initiated ordinance voted on by the electors of a city is not binding upon the city council, but may be considered an advisory vote.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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