STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF CASS | EAST CENTRAL JUDICIAL DISTRICT

City of Fargo, Plaintiff, vs. State of North Dakota, Defendant.	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** File No. 09-2023-CV-02540

[¶1] This matter came before the Court on competing motions for summary judgment. Plaintiff, the City of Fargo ("the City"), requests judgment declaring that (1) recent amendments to N.D.C.C. § 40-05.1-06 and § 62.1-01-03 are unconstitutional, or (2) the amended provisions do not void Fargo Municipal Code ("F.M.C.") § 20-0403(C)(5)(e) and § 20-0402(T)(3). Defendant, the State of North Dakota ("the State"), requests dismissal of the City's complaint, alleging the amended provisions are constitutional and expressly preempt the City's ordinances.

[¶2] For the reasons discussed below, the State's motion for summary judgment is **GRANTED** and the City's motion for summary judgment is **DENIED**.

FACTUAL AND PROCEDURAL HISTORY

[¶3] The City is a home rule municipality with an adopted home rule charter. F.M.C., Home Rule Charter. The charter sets forth various powers of the City, including to provide for public health, safety, morals, and welfare; to define offenses against private persons and property; and to provide for zoning of property. Id. at Art. 3(G), (I), (K).

[¶4] The City has adopted use regulations for residential districts. Specific to this proceeding, F.M.C. § 20-0403(C)(5)(e) prohibits the sale of firearms and/or ammunition, and the production

of ammunition for sale or resale, as home occupations. Firearms and ammunition sales are also prohibited non-farm commercial uses in agricultural zoning districts. F.M.C. § 20-0402(T)(3).

[¶5] In 2023, the North Dakota Legislature passed House Bill ("HB") 1340, amending N.D.C.C. § 40-05.1-06 on home rule powers and N.D.C.C. § 62.1-01-03 on political subdivision authority to regulate firearms, as follows:[1]

> **40-05.1-06. Powers.**
>
> . . .
>
> 12. To define offenses against private persons and property and the public health, safety, morals, and welfare, and provide penalties for violations thereof. This subsection is subject to the provisions of section 62.1-01-03.
>
> . . .
>
> 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.
>
> . . . .
>
> **62.1-01-03. Limitation on authority of political subdivision regarding firearms – Civil action.**
>
> 1. A political subdivision, including home rule cities or counties, may not enact ~~a zoning ordinance or~~ any ~~other~~ ordinance relating to the purchase, sale, ownership, possession, transfer of ownership, registration, or licensure of firearms and ammunition which is more restrictive than state law. All such existing ordinances are void.
>
> 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:

[1] Underlined language was added to the statute. Stricken language was removed from the statute.

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.

5. A person aggrieved under ~~subsection 1~~ this section may bring a civil action against a political subdivision for damages as a result of an unlawful ordinance.

[¶6] On August 3, 2023, the City commenced this action against the State. Doc. No. 4. In its complaint, the City seeks declaratory judgment that (1) the recently amended statutes are unconstitutional as applied to the City's home rule charter and F.M.C. § 20-0403(C)(5)(e) and § 20-0402(T)(3), or (2) the recently amended statutes do not void the City's ordinances. Doc. No. 1. On August 23, 2023, the State answered. Doc. No. 7. Both parties moved for summary judgment. Doc. Nos. 21, 36.

LEGAL ANALYSIS

I. Standard of Review

[¶7] "Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law." Leet v. City of Minot, 2006 ND 191, ¶ 12, 721 N.W.2d 398. "Summary judgment is appropriate when either party is entitled to judgment as a matter of law, and no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or resolving the factual disputes would not alter the result." Ward v. Bullis, 2008 ND 80, ¶ 14, 748 N.W.2d 397.

In this case, the only issues before the Court involve questions of law pertaining to the State's ability to limit home rule authority and whether the State has preempted local ordinance. Summary judgment is appropriate in this matter.

[¶8] The City's only cause of action is for declaratory relief. Under North Dakota's Declaratory Judgment Act ("the Act"), any person, whose rights, status, or other legal relations are affected by a statute may have determined any question of construction or validity arising under the statute and may obtain a declaration of rights, status, or other legal relations thereunder. N.D.C.C. § 32-23-02. A "person" includes a municipality. N.D.C.C. § 32-23-13. The Act is remedial, and its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be construed and administered liberally. N.D.C.C. § 32-23-12. Courts review summary judgments in declaratory judgment actions under the same standard as other cases. Env't Driven Sols., LLC v. Dunn Cnty., 2017 ND 45, ¶ 6, 890 N.W.2d 841.

II. Constitutionality of HB 1340

[¶9] The City argues HB 1340 violates the plain language of Article VII of the North Dakota Constitution and its intent to provide maximum local self-government to home rule cities. The specific constitutional provisions the City claims have been violated are as follows:

> **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 . . . .

N.D. Const., art. VII, §§ 1, 6 (emphasis added). The City contends these constitutional provisions require the legislature to enact home rule authority without limitation to enable maximum local

government, and HB 1340 has violated this constitutional directive by stripping away powers granted to home rule cities.[2]

[¶10] When interpreting the Constitution, it is the Court's "overriding objective to give effect to the intent and purpose of the people adopting the constitutional statement." City of Bismarck v. Fettig, 1999 ND 193, ¶ 8, 601 N.W.2d 247. "Such intent and purpose are to be found in the language of the constitution itself." Id. If the intentions of the people cannot be determined from the language itself, the Court may turn to other aids in construing the provision, including appropriate historical context. Id.

[¶11] Although Article VII, § 1 expresses intent for maximum local government functions, two issues are unclear: (1) the scope of home rule city authority, and (2) the extent, if any, to which the legislature may restrict such authority. The North Dakota Supreme Court has not yet addressed these issues. However, the Court has repeatedly examined the power provided to the legislature to grant authority to home rule cities.

[¶12] In Litten v. City of Fargo, the Court faced the issue of whether a home rule city had authority to change its form of government. 294 N.W.2d 628, 631 (N.D. 1980). At the time, Article VII, § 6 contained the following language:

> The legislative assembly shall provide by law for the establishment of home rule 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 nonhome rule charter and which is 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 the constitution.

[2] To be clear, this case does not pertain to the constitutional right to bear arms under the United States Constitution or North Dakota Constitution. The constitutional issue in this case relates solely to home rule authority under Article VII of the state constitution.

[¶13] In light of this language, the Court noted the constitutional provision directed the legislature to enact laws authorizing home rule and permitted the legislature to devolve certain powers upon home rule cities. Litten, 294 N.W.2d at 631. Thus, according to the Court, "[t]his constitutional provision in itself does not grant any powers to home rule cities[,] [and] [w]hatever powers home rule cities may have are based upon statutory provisions." Id. After examining the authority granted under N.D.C.C. ch. 40-05.1, the Court held home rule cities lacked authority to select any form of government they desired. Id. at 634. The Court reasoned that "the legislature did not intend, and the statutory provisions do not give, home rule cities [such] authority." Id.

[¶14] Following Litten, a constitutional amendment was proposed and passed with the present language found in Article VII. See ch. 665, Proposed Const. Amend., Doc. No. 33. The Senate Judiciary Committee notes indicate "major" changes were extension of home rule to counties, ability of political subdivisions to transfer powers to the county, and removal of constitutional status from county offices. Id. at 82. Nothing in the legislative history indicates any intent to otherwise expand home rule authority of cities or change Litten's holding that the legislature has authority to grant home rule powers.

[¶15] After the constitutional amendment, the Court reaffirmed the legislature's authority to set limits on home rule authority in Pelkey v. City of Fargo, 453 N.W.2d 801 (N.D. 1990). The issue in Pelkey was whether residents in a home rule city had a constitutional right to change a city charter despite the legislature's time restriction on such amendments. 453 N.W.2d 801, 803 (N.D. 1990). The Court interpreted Article III, § 1, consistent with Article VII, § 2, which gave the legislative assembly power to provide by law for the establishment and government of all political subdivisions. Id. at 805. Citing Litten, the Court acknowledged, "Whatever powers a home rule city may have are based upon statutory provisions." Id. According to the Court, the

legislature is empowered to set forth how home rule charters may be enacted, amended, or repealed. Id. Therefore, the legislature acted within its authority to set time restrictions for reconsidering amendments to home rule charters. Id.

[¶16] The Court reiterated that home rule cities are bound by legislative limits in City of Fargo v. Malme, 2007 ND 137, 737 N.W.2d 390. In Malme, the issue was whether the City's creation of a layperson Administrative Enforcement Board conflicted with N.D.C.C. § 40-18-01, requiring municipal judges to be licensed to practice law. 2007 ND 137, ¶ 8. At the outset, the Court noted the legislature's constitutional power to provide for the establishment and exercise of home rule in cities. Id. at ¶ 9 (citing N.D. Const., art. VII, § 6). As stated by the Court, while home rule charters allow cities to enact laws contrary to those of the state, this ability "is not without limitation, because 'whatever powers a home rule city may have are based upon statutory provisions.'" Id. at ¶ 10 (citing Pelkey, 453 N.W.2d at 805). Supersession only applies if the home rule powers are enumerated in N.D.C.C. § 40-05.1-06, included in the home rule charter, and implemented by ordinance. Id. at ¶ 11. The Court held that N.D.C.C. § 40-05.1-06 did "not address, let alone authorize, the creation of an administrative system for adjudication." Id. at ¶ 14. The City also argued it had inherent authority to delegate adjudicative functions to administrative bodies. Id. Rejecting the argument, the Court concluded the home rule charter and statutory provisions relied upon could not be reasonably construed as providing the authority to create a layperson administrative adjudicatory board. Id.

[¶17] The legislative limitations of home rule cities were reexamined—and reaffirmed—in Sauby v. City of Fargo, 2008 ND 60, 747 N.W.2d 65. Sauby held a state statute precluded the City from imposing higher fees for noncriminal traffic offenses than those set by state law. 2008 ND 60, ¶ 13. The Court again announced, "[A] home rule city's power to enact ordinances that

supersede state law is not without limitation, because a home rule city's powers must be based upon statutory provisions." Id. at ¶ 6 (citing Malme, 2007 ND 137, ¶ 10). "[C]ities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant." Id. (quoting Fettig, 1999 ND 193, ¶ 4). While the City did have statutory home rule authority under N.D.C.C. § 40-05.1-06 to enact traffic ordinances and penalties for violations, N.D.C.C. § 12.1-01-05 provided an express limitation, directing that all crimes defined by state law shall not be superseded, precluded the City from imposing a higher fine. Id. at ¶¶ 6, 13.

[¶18] None of the cases above squarely address the issue presented in this case of whether the legislature has constitutional authority to carve out limitations within the home rule powers it had once granted. However, it is undeniable from this long line of cases that the legislature has considerable power to shape home rule authority. As noted in Litten, the state constitution does not grant any powers to home rule cities; cities' powers are only bestowed by legislative action. Litten, 294 N.W.2d at 631 ("Whatever powers home rule cities may have are based upon statutory provisions."); see also Pelkey, 453 N.W.2d at 805. Further, these powers are not limitless; the Court has expressly indicated cities "possess only those powers and authorities granted by statute." Sauby, 2008 ND 60, ¶ 6; Malme, 2007 ND 137, ¶¶ 9-10; see also State ex rel. City of Minot v. Gronna, 59 N.W.2d 514, 529 (N.D. 1953) (stating, prior to the constitutional amendment allowing home rule cities, that "cities are creatures of statute and of the statute alone" and "[t]he state may withhold, grant or withdraw powers and privileges as it sees fit") (emphasis added). Because the North Dakota Supreme Court has repeatedly viewed home rule authority as subject to legislative action, this Court is unable to conclude that HB 1340, and its limitation of home rule powers, violates Article VII of the state constitution.

[¶19] The City cited several state constitutions from other jurisdictions—namely, Texas, Massachusetts, Minnesota, and Iowa—to emphasize that these constitutions include express limitations of home rule authority. According to the City, because Article VII of the North Dakota Constitution does not include similar limitations, the intent was that the legislature may not limit home rule authority. The Court does not find these constitutions comparable due to their differing language.

[¶20] For instance, the Texas Constitution provides that "[t]he adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature." Tex. Const. art. XI, § 5. Texas courts have interpreted this clause broadly to mean that cities look to the general laws "not for specific grants of power, but to ascertain whether or not a specific power is denied them." Pitre v. Baker, 111 S.W.2d 359, 361 (Tex. Civ. App. 1937). By contrast, the North Dakota Supreme Court has established that cities must look to the powers granted to them by statute. See Sauby, 2008 ND 60, ¶ 6.

[¶21] The Massachusetts and Iowa Constitutions differ, as well. Where these constitutions affirmatively grant municipalities home rule power not inconsistent with the state constitutions and general laws, the North Dakota Constitution contains the inverse, directing the legislature to "provide by law for the establishment and exercise of home rule." Compare Mass. Const., art. LXXXIX, § 6 and Iowa Const., art. III, § 38A, with N.D. Const., art. VII, § 6.

[¶22] The Minnesota Constitution indicates the legislature "may" provide by law for the creation of local government units and their functions and local governments may adopt home rule charters when authorized by law. Minn. Const. art. XII, §§ 3-4. Similar to North Dakota, however, the Minnesota courts have stated municipalities can enact regulations only as "expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred."

Bicking v. City of Minneapolis, 891 N.W.2d 304, 312 (Minn. 2017); see Malme, 2007 ND 137, ¶ 9 (stating cities "possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant"). Therefore, "state law may limit the power of a city to act in a particular area." Bicking, at 312 (emphasis added).

[¶23] Though not cited by either party, it is notable that both Alaska and New Mexico have similar home rule purpose statements in their respective constitutions for "maximum local self-government." Alaska Const. art. X, § 1; N.M. Const., art. X, § 6(E). While the courts in Alaska and New Mexico have cited this language in liberally construing home rule powers in a municipality's favor, it does not appear the courts have found the language provides, in and of itself, a basis for a constitutional violation if the state infringes on home rule city authority. See, e.g., Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92, 99 (Alaska 1974) (reading the purpose "for maximum local self-government" to favor upholding organization of boroughs by the commission if the other requirements have been minimally met); State ex rel. Haynes v. Bonem, 845 P.2d 150, 151 (N.M. 1992) (holding "the purpose of the home rule amendment to [the] Constitution—to provide for maximum local self-government—would be frustrated by applying the statutes to a home rule municipality, because the subject of the legislation (composition of the municipal government) is a matter of local concern"). Alaska's and New Mexico's constitutional schemes are further distinguishable from North Dakota's, affirmatively granting home rule cities all powers unless otherwise denied or prohibited. See Alaska Const. art. X, § 11 (stating "[a] home rule borough or city may exercise all legislative powers not prohibited by law or by charter"); N.M. Const. art. X, § 6(D) (municipalities adopting a home rule charter "may exercise all legislative powers and perform all functions not expressly denied by general law or charter").

[¶24] In North Dakota, home rule cities are subject to the powers bestowed upon them by the legislature. Litten, 294 N.W.2d at 631. Although the purpose statement for "maximum local self-government" may show intent for broad local self-government authority, it does not express that home rule cities have limitless authority and further does not negate the other language in the Constitution, requiring the legislature to provide for the establishment and exercise of home rule in cities. N.D. Const., art. VII, §§ 1, 6. There is no language, as in other states, providing limitations on the legislative authority to do so aside only from the franchise of a public utility or similar service. See id. at § 11 ("The power of the governing body of a city to franchise the construction and operation of any public utility or similar service within the city shall not be abridged by the legislative assembly); see, e.g., Apodaca v. Wilson, 525 P.2d 876, 881-82 (N.M. 1974) (noting the state constitution allows the legislature to expressly limit home rule authority by "general law," which must be of general concern to the people of the state). Accordingly, it does not appear that the intent of the constitutional amendment was to provide home rule authority without any bounds or restrict the legislature in the manner in which it establishes the laws for exercise of home rule authority.

[¶25] The City also argues no provision of the constitution allows the State to amend a home rule charter once it has been voted and approved by the city's residents. The City argues the amendments to home rule authority in N.D.C.C. § 40-05.1-06 cannot apply retroactively to amend the City's already approved charter. The only authority the City cites in support of its position is N.D.C.C. § 40-05.1-07, which provides when a city may amend or repeal its home rule charter.

[¶26] The Court disagrees. While HB 1340 does change the authority of a home rule city, it does not necessitate any amendment to the home rule charter. Rather, it places limits on the extent to which the City may have ordinances to (1) define offenses against private persons and property

and (2) provide for zoning, planning, and subdivision of property. See N.D.C.C. § 40-05.1-06(12), (14).

[¶27] Additionally, regardless of N.D.C.C. § 40-05.1-06's limiting language, N.D.C.C. § 62.1-01-03 was also amended by HB 1340 and its express language supersedes the City's ordinance. See discussion supra at Section IV; see, e.g., Sauby, 2008 ND 60, ¶ 10 (holding "Fargo [was] empowered to define and enact both criminal and noncriminal offenses[, but] N.D.C.C. § 12.1-01-05 does not permit a home rule city to supersede criminal or noncriminal offenses defined by state law"); see also Easterday v. Village of Deerfield, 176 N.E.3d 187, 207 (Ill. 2020) (holding state law, which limited home rule powers and prohibited any inconsistent ordinance, preempted home rule city ordinance). Preemption under N.D.C.C. § 62.1-01-03 is not contingent on the amendment of N.D.C.C. § 40-05.1-06. See, e.g., Sauby, 2008 ND 60, ¶ 10. The amendments in N.D.C.C. § 40-05.1-06 simply reinforce the limitations for home rule cities in N.D.C.C. § 62.1-01-03.

[¶28] In North Dakota, a statute carries a strong presumption of constitutionality "unless the challenger clearly shows the statute contravenes the state . . . constitution." In re Craig, 545 N.W.2d 764, 766 (N.D. 1996). The City has not made a clear showing of the unconstitutionality of HB 1340. While the Court agrees that Article VII, § 1 of the North Dakota Constitution intends for "maximum local self-government," the law is not settled that this language alone provides home rule cities the right to legislate on topics the state legislature has limited. The Court further has difficulties squaring the bare purpose statement with the extensive precedent in our state allowing the legislature to establish home rule authority. Accordingly, the Court is required to resolve any doubts as to the statute's constitutionality in favor of its validity. Id.

[¶29] For the foregoing reasons, the Court concludes HB 1340 does not violate the North Dakota Constitution.

III. The City's Implied Powers

[¶30] The City alternatively argues it has implied powers to regulate solely local matters, such as zoning, and HB 1340 improperly restricts its municipal powers. The City relies on Fettig and its language that "[c]ities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant." 1999 ND 93, ¶ 4 (emphasis added). The City further relies on Ebach v. Ralston, 469 N.W.2d 801 (N.D. 1991) as supporting the City's implied authority under N.D.C.C. § 40-05.1-06(10)—allowing the City to provide for public health, safety, morals, and welfare.

[¶31] The Court does not find Ebach persuasive on the issue of the extent of the City's implied powers based on N.D.C.C. § 40-05.1-06. Ebach involved no issues related to home rule authority or the implied powers a city may have based on an express grant of authority.

[¶32] Importantly, HB 1340 amended not only N.D.C.C. § 40-05.1-06, but also N.D.C.C. § 62.1-01-03, expressly precluding home rule cities from passing certain zoning ordinances. Therefore, the question here is whether the City can pass ordinances pertaining to matters of local interest as an implied power when the State has expressly limited the same.

[¶33] In North Dakota, "[t]he rule of strict construction applies to defining a municipality's powers." Haugland v. City of Bismarck, 2012 ND 123, ¶ 48, 818 N.W.2d 660. It is only after a municipality's powers have been determined that the rule of strict construction no longer applies and "the manner and means of exercising those powers where not prescribed by the Legislature are left to the discretion of municipal authorities." Id. The rule of strict construction must be applied in this case to first determine the City's powers. In applying the rule, the limitations in HB 1340 have expressly restricted the City's authority. Any implied authority of the City cannot override the express limitation by the State. See Bd. of Cnty. Comm'rs of Douglas Cnty. v.

Bainbridge, Inc., 929 P.2d 691, 707 (Colo. 1996) (holding the county did not have implied power to override clear, unambiguous, and definitive language by the legislature); see also Malme, 2007 ND 137, ¶ 14 (rejecting the city's argument that it had "inherent authority" based on its home rule powers to create an administrative enforcement board because the charter and statutory provisions relied upon could not reasonably be construed to provide such power).

[¶34] The City has additionally cited several North Dakota Attorney General opinions, arguing these opinions establish home rule cities have authority to regulate solely local matters. See, e.g., 1998 N.D. Op. Att'y Gen. L-117. These opinions set forth a four-part test stating

> A home rule political subdivision may exercise powers not allowed under state law if: (1) the Legislature granted it that power; (2) the political subdivision included that power in its home rule charter; (3) the political subdivision properly implemented the power through an ordinance; and (4) the power concerns only local, rather than statewide, matters.

Id. The authority relied on by the attorney general is Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980).

[¶35] Assuming, without deciding, that this four-part test is accurate and applicable, the Court agrees with the City that the regulation of building uses is a matter of local, rather than statewide, concern. As discussed more in depth below in Section IV, the ordinances at issue are zoning in nature. Courts in several jurisdictions have held that zoning is a purely local issue. Nat'l Advertising Co. v. Dept. of Highways of State of Colo., 751 P.2d 632, 635 (Colo. 1988) (stating "a home-rule municipality's control of land use within its borders through zoning legislation is a matter of local concern"); Gurba v. Comm. High Sch. Dist. No. 155, 40 N.E.3d 1, 5 (Ill. 2015) ("Included within the realm of home rule powers are municipal development regulations such as zoning ordinances, which undoubtedly pertain to local affairs."); Bartle v. Zoning Bd. of Adjustment, 137 A.2d 239, 242 (Pa. 1958) ("Surely, there are few matters which are of less State-

wide concern and which are more local in scope than zoning inside the City of Philadelphia."); see also Subdiv. Law & Growth Mgmt. § 1:18 ("Most home rule states treat zoning as a matter of local concern.").

[¶36] Even if the fourth element is met, however, the first element cannot be met. Not only has the legislature not granted home rule cities the power to pass zoning ordinances impacting firearms or ammunition sales, it has expressly prohibited them from doing so.

[¶37] The Court is troubled that the state legislature has limited home rule authority on a purely local issue, such as zoning. The State has not advanced any statewide interest in prohibiting localities from regulating in this area and, indeed, no such interest appears to exist. The Court is concerned that the legislature's ability to strip home rule authority in this instance could threaten home rule authority in the future. If the legislature continues to pare home rule powers, home rule cities lack the discretion to address important issues impacting their respective and unique communities. Home rule authority would, in essence, be rendered obsolete.

[¶38] Notwithstanding, based on the analysis above, the Court is unable to conclude that the City has implied authority over these local matters when the State has expressly limited its authority on this issue. Accordingly, the Court finds the City has not sufficiently established HB 1340 is void for infringing on any implied power of the City.

IV. Preemption

[¶39] The City alternatively requests a declaration from this Court that HB 1340 has not preempted F.M.C. § 20-0403(C)(5)(e) and § 20-0402(T)(3). The City argues the legislature has only expressly restricted criminal offenses and zoning ordinances related to firearms and ammunition sales, but has not restricted all other ordinances on the topic unless they are more restrictive than state law. The City contends it had the power to pass the ordinances pursuant to

its general power to provide for public health, safety, morals, and welfare under N.D.C.C. § 40-05.1-06(10), and its ordinances are not more restrictive than state law because there are no state laws on home occupations for firearms or ammunitions sales. The State argues the ordinances are zoning matters, and under HB 1340, all zoning ordinances on the topic, regardless of whether they are more restrictive than state law, are void. Thus, the State argues HB 1340 preempts F.M.C. § 20-0403(C)(5)(e) and § 20-0402(T)(3).

[¶40] In North Dakota, the preemption analysis involving state and local law mirrors federal preemption analysis. Env't Driven Sols., LLC, 2017 ND 45, ¶ 7. The three forms of preemption are (1) express preemption, (2) field preemption, and (3) conflict preemption. Id. State law expressly preempts an ordinance "when there is an explicit state law or rule restraining the [city's] authority." Id.; see also State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶ 19, 712 N.W.2d 828 ("Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.") Field preemption exists "when the industry or activity involved is already subject to substantial state control through broad, encompassing statutes or rules." Env't Driven Sols., LLC, 2017 ND 45, ¶ 7. Finally, there is conflict preemption "where it is impossible for a private party to comply with both state and [local] requirements, or where [local] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the [legislature]." FreeEats.com, Inc., 2006 ND 84, ¶ 19.

[¶41] In this case, it is unnecessary to engage in field or conflict preemption analysis because the issue is resolved by looking only to express preemption. In passing HB 1340, the legislature restricted home rule authority in N.D.C.C. § 40-05.1-06(14) by noting that home rule city's powers "[t]o provide for zoning, planning, and subdivision of public or private property within the city

limits" are "subject to the provisions of section 62.1-01-03." Under N.D.C.C. § 62.1-01-03(2), "[a] political subdivision, including home rule cities . . . , may not enact a zoning ordinance relating to the purchase, sale, ownership, possession, transfer of ownership, registration, or licensure of firearms and ammunition." Unlike N.D.C.C. § 62.1-01-03(1), there is no requirement that the zoning ordinance be more restrictive than state law to be void. All zoning ordinances on the topic are void. N.D.C.C. § 62.1-01-03(2).

[¶42] Here, the City does not appear to contest that F.M.C. § 20-0403(C)(5)(e) and § 20-0402(T)(3) are zoning ordinances; the City only argues the ordinances are not "exclusively" for the purpose of zoning and were also implemented to ensure the character, livability, and safety of surrounding neighborhoods. Pl's Br. in Supp. of Motion for Summ. J., Doc. No. 22 at ¶ 55 (emphasis added). The City certainly may have various reasons for passing the ordinances, including protection of the general welfare and safety, but the City cannot escape the fact that the ordinances, at their core, are zoning ordinances.

[¶43] Both ordinances are located within F.M.C.'s Land Development Code ("L.D.C."). F.M.C. ch. 20. The L.D.C. was adopted pursuant to authority granted by, among others, chapter 40-47 of the North Dakota Century Code, entitled "City Zoning." Id. § 20-0102. N.D.C.C. § 40-47-01 explains "[f]or the purpose of promoting health, safety, morals, or the general welfare," the governing body of a city may regulate and restrict the "use of buildings, structures, and land for trade, industry, residence, or other purposes." The purpose of the L.D.C. reinforces that it implements Fargo's Comprehensive Plan and related policies "in a manner that protects the health, safety, and general welfare of the citizens of Fargo." F.M.C. § 20-0104.

[¶44] Under the L.D.C., "no land use may occur except in accordance with all of the regulations established by [the L.D.C.] for the zoning district in which the building, structure or land use is

located." Id. at § 20-0105. The two regulations at issue in this case are (1) a prohibition of firearms and ammunition sales as a non-farm commercial use in agricultural districts and (2) a prohibition of firearms and ammunition sales as a home occupation in residential districts. F.M.C. §§ 20-0403(C)(5)(e), 20-0402(T)(3). Although these regulations may ultimately impact health, safety, and general welfare of the City's residents, they regulate land or building use. See Black's Law Dictionary (11th ed. 2019) (defining "zoning" as "[t]he legislative division of a region, esp. a municipality, into separate districts with different regulations within the districts for land use, building size, and the like").

[¶45] Given the language of the ordinances in the L.D.C. and their function in regulating use of land or buildings, the Court concludes F.M.C. § 20-0403(C)(5)(e) and § 20-0402(T)(3) are zoning ordinances. See Powell v. City of Houston, 580 S.W.3d 391, 402-03 (Tex. Ct. App. 2019) (considering the plain language, purpose, and function of an ordinance to determine whether it implicated zoning regulations). Under HB 1340, the legislature made its intent clear: to prohibit any and all local zoning ordinances relating to the purchase, sale, ownership, possession, transfer of ownership, registration, or licensure of firearms and ammunition. See FreeEats.com, Inc., 2006 ND 84, ¶ 19 (looking to explicit statutory language to determine intent for express preemption analysis). Because the zoning ordinances in this case restrict the sale of firearms and ammunition, HB 1340 expressly preempts and voids them.

CONCLUSION AND ORDER

[¶46] Based on the foregoing, the State's motion for summary judgment is **GRANTED**, and the City's motion for summary judgment is **DENIED**.

[¶47] The City's complaint is dismissed with prejudice.

[¶48] Counsel for the State is to prepare and submit the proposed judgment to the Court within seven days of the date of this order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 20 day of February, 2024.

BY THE COURT:

Hon. Cherie L. Clark
Judge of District Court

Kasper, Jim M.

rom: Wrigley, Drew H. <dwrigley@nd.gov>
t: Monday, February 3, 2025 10:34 PM
Kasper, Jim M.
Subject: Fw: Docs
Attachments: 24 - Opinion Affirmed.pdf; 49 - Order Granting [36] and Denying [21].pdf

Jim—
Here's that Supreme Court opinion we recently received regarding home rule cities and the constitutional authority the Legislature retains to define the contours of home rule autonomy. Very solid opinion in favor of the state, defending the Legislature's work—
~Drew

Drew H. Wrigley
Attorney General
North Dakota