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The Legislative/Administrative Dichotomy and the Use of the Initiative and Referendum in a North Dakota Home Rule City

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THE LEGISLATIVE/ADMINISTRATIVE DICHOTOMY AND THE USE OF THE INITIATIVE AND REFERENDUM IN A NORTH DAKOTA HOME RULE CITY

I. INTRODUCTION

On November 8, 1966, the voters of North Dakota approved the 84th amendment to the Constitution of the State of North Dakota by a vote of 84,255 "yes" votes and 77,187 "no" votes.[1] This measure amended Section 130 of the North Dakota Constitution to provide for home rule for cities and villages in North Dakota.[2]

One author notes that this

> . . . amendment to Article 6 of the Constitution of North Dakota is not self-executing procedurally or substantively; the legislature is directed to provide procedures for municipalities to adopt home rule charters and authorized to devolve substantive powers. This type of provision is called "permissive home rule," because the constitution does not devolve power directly but merely permits the legislature to grant home rule power.[3]

The fortieth session of the Legislative Asembly of the State of North Dakota meeting in 1967 did not pass the necessary implementing legislation required by Section 130. It did, however, pass House Concurrent Resolution "A" which submitted to the voters a package of measures to revise or amend some twenty-three sec-

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1. 1967 N.D. Sess. Laws, Ch. 510, p. 1210.

2. *Id.* Section 130 now reads as follows:

> SECTION 130. 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.
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> The legislative assembly 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, 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.

N.D. CONST., art. VI, 130. Section 183 sets debt limitations on political subdivisions.

3. Schwabacher, *The Seamless Web: A Critical Analysis of the Municipal Corporations Article of the North Dakota Constitution and the Proposed Amendment of it in Light of Other Variants of the Fordham Formula for Home Rule*, 44 N.D. L. REV. 370, 389 (1968).

tions of the North Dakota Constitution.[4] This measure included a provision to amend Section 130 to make it somewhat more permissive than the 1966 Amendment.[5] The voters of the state of North Dakota disapproved this attempt at piecemeal constitutional revision on November 5, 1968, by a vote of 82,400 "yes" votes and 116,813 "no" votes.[6]

On March 8, 1969, the forty-first session of the Legislative Assembly of the State of North Dakota passed House Bill No. 41 establishing home rule in cities of 100 or more in population in North Dakota under Section 130 of the North Dakota Constitution.[7] House Bill No. 41 was the result of an interim study by a subcommittee of the North Dakota Legislative Research Committee. The Committee was concerned with the scope and extent of the home rule powers to be granted and with scaling these powers to the needs of cities. There was concern that the powers to be granted must relate to matters of city government and concern including such matters as the health, welfare, and safety of the inhabitants, a right to raise revenue to finance city services and duties, and to restrict monopolies in trade within its borders.[8]

This bill established Chapter 40-05.1 of the North Dakota Century code.[9] Chapter 40-05.1 outlines which cities are eligible for home rule,[10] methods of proposing a home rule charter,[11] procedures governing the formation and activities of a home rule charter commission,[12] submission[13] and ratification by the voters,[14] and the powers which may be exercised by home rule cities in North Dakota.[15]

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4. 1967 N.D. Sess. Laws, Ch. 518, p. 1235.

5. The proposed amendment reads as follows:

> Except in the case of home rule cities as provided in this section the legislative assembly shall provide by general law for the organization of municipal corporations, specifying 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. Home rule cities shall have all powers of self-government except:
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> 1. Those powers withheld from them by law; 2. Those powers not accepted by the city by its home rule charter; and 3. Those powers prohibited by this Constitution or the law of the land; provided that the legislative assembly shall not be restricted in granting of home rule powers to home rule cities by Section 183 of this Constitution.

1967 N.D. Sess Laws, Ch. 518, p. 1235.

6. 1969 N.D. Sess. Laws, Ch. 586, p. 1259.
7. 1969 N.D. Sess. Laws, Ch. 371, p. 753-758.
8. REPORT OF NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 39 (1969).
9. 1969 N.D. Sess. Laws, Ch. 371, p. 753-758.
10. Only incorporated cities with a population of 100 or more persons as determined by the last federal census. N.D. CENT. CODE § 40-05.1-01 (Supp. 1973).
11. N.D. CENT. CODE § 40-05.1-02 (Supp. 1973).
12. N.D. CENT. CODE § 40-05.1-03 (Supp. 1973).
13. N.D. CENT. CODE § 40-05.1-04 (Supp. 1973).
14. N.D. CENT. CODE § 40-05.1-05 (Supp. 1973).
15. N.D. CENT. CODE § 40-05.1-06 (Supp 1973).

On November 7, 1972, the voters of the city of Minot, North Dakota, adopted a home rule charter to govern their city.[16] Article Four of the Home Rule Charter provides for the use of the initiative and referendum by the voters of the city of Minot.[17] Since the adoption of the charter, the city of Minot has held three elections[18] forced by the use of the initiative and referral provisions of Section 1, Article 4 of the Home Rule Charter.[19] The cost of these three elections has exceeded $3,500.00.[20]

In light of these developments there has been discussion of various alternatives to restrict the use of the initiative and referendum provisions of the home rule charter. John E. Arnold, Minot City Manager, has suggested two alternatives to protect against potential abuse: first, would be to amend Section 1, Article 4, of the charter to prevent the use of referral and initiative for ordinances "under which the law provided protest procedures";[21] and second, to increase the number of signatures on referral petitions from the current 10 percent "of the total votes cast in the city at the most recent presidential election"[22] to 15 percent.[23] These two ideas were discussed at a meeting of the Minot Home Rule Charter Commission on January 17, 1974.[24] The discussion was extensive on the possible abuse of the initiative and referral provisions of the home rule charter and the suggestions for possible revisions put forth by the City Manager noted above.[25] "It was the feeling of members of the Home Rule Charter Commission that more time was needed to measure the effect of charter provisions, before drastic changes are proposed."[26]

On May 20, 1974, the city council requested the city attorney to draft an amendment to the Home Rule Charter to provide for at least 180 days for calling an election on a referred or initiated measure.[27] The proposal was discussed at the June 17, 1974, meeting of the Minot City Council, but no action was taken.[28]

It is the purpose of this paper to examine a third alternative to be considered by a home rule city in North Dakota to restrict the possible abuse of the initiative and referral provisions of the

16. Fargo and Grand Forks adopted home rule charters on November 3, 1970.
17. MINOT, N.D., HOME RULE CHARTER, art. 4.
18. Special elections were held on August 7, 1973, and October 23, 1973. A third election of a referred measure was held in conjunction with the statewide special election on December 4, 1973.
19. *See* MINOT, N.D., HOME RULE CHARTER.
20. Data supplied by the office of the Minot City Auditor.
21. Memorandum from John Arnold, City Manager, to Honorable Mayor and City Council of Minot, November 29, 1973, p. 5.
22. MINOT HOME RULE CHARTER, art. 4. § 3.
23. Memorandum, *supra* note 21.
24. Minutes of Home Rule Charter Commission (Minot), January 17, 1974.
25. *Id.*
26. *Id.*
27. Minutes of Minot City Council, May 20, 1974.
28. Minutes of Minot City Council, June 17, 1974.

city's home rule charter. That alternative is for the city to review any future initiated or referred petitions to determine if the subject matter is a legislative or administrative matter. If it can reasonably be determined to be an administrative matter, then under rulings by various courts, it would not be subject to the initiative or referral process.[29] The following sections of this paper will discuss in detail the legislative/administrative distinction as laid down by the courts and will then analyze the six measures submitted to the voters of the city of Minot to determine if any were of an administrative nature and, therefore, could have been deflected from the costly election process.

II. LEGISLATIVE/ADMINISTRATIVE DISTINCTION

A. *General*

Professor McQuillin, a noted authority often quoted by judicial opinion-writers, has defined initiative as the

> . . . initiation of municipal legislation and enactment or rejection thereof by the municipal electorate in the event the proposed measure is not enacted by their elected representatives.[30]

In the same work,[31] he defines referendum as "the right of people to have an act passed by the legislative body submitted for their approval or rejection."[32]

The adoption of provisions for initiative and referendum has been said to have resulted from the growth of dissatisfaction and distrust of the people for their municipal legislative bodies.[33] However, it is clear that both the initiative and referendum process can be used both constructively and destructively. James M. Olson's comments on the use and abuse of the power of referendum are equally applicable to the initiative power. He notes that the local power of referendum provides a tool in the electorate to ignore and illegitimatize the actions of representative self-government.[34]

The initiative and referral process is normally provided for, and restricted by, the state constitution, state statute, or the municipal charter.[35] In addition to any such restrictions placed on the

29. *See, e.g.*, Denman v. Quin, 116 S.W.2d 783 (Tex. Civ. App. 1938).

30. 5 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 16.52, at 205 (3rd ed. 1969).

31. *Id.* § 16.53.

32. *Id.*, § 16.53, at 205.

33. 62 C.J.S. § 449.

34. Olson, *Limitations and Litigation Approaches: The Local Power of Referendum in Federal State Courts—A Michigan Model*, 50 J. URBAN LAW 209, 210 (1972).

35. *Id.* at 210.

use of the initiative and referral power in these sources, the courts over the years have placed further restrictions. These restrictions are generally classified into three main areas: (1) the resolution vs. the ordinance approach,[36] (2) the statewide vs. local concern approach,[37] and (3) the administrative vs. the legislative approach.[38]

The resolution vs. ordinance theory is based on the fact that most municipal charters provide for a referendum on "any ordinance."[39] Therefore, the theory reasons, any action taken by a municipal governing board in the form of a resolution is not subject to the referral power since it is not an ordinance. The courts, however, have generally pierced the form of municipal action and considered its substance. Generally, the question is on the reality, not the form, and so where a resolution is in substance and effect a permanent regulation, the name given to it is immaterial.[40]

The second restriction generally placed on the use of referral and initiative is that of the statewide vs. local concern approach. Thus where a matter is deemed by the courts "statewide" in its scope, the municipality and the citizenry are without the power to deal with the subject matter in question.[41]

The third restriction, and the primary subject of this paper, the legislative vs. the administrative approach, theorizes that "since the exercise of the initiative and referendum by the state electorate is constitutionally confined to determinations of the legislative branch of the state government,"[42] it is merely a logical application of the same limitation to inferior political bodies that only matters that are legislative in nature can be subject to the initiative and referendum. Professor McQuillin sums it up by noting that

> [t]he power of initiative and referendum usually is restricted to legislative ordinances, resolutions, or measures, and is not extended to executive or administrative action. . . .[43]

Most of the case law tends to be on the use or abuse of the referral power, but from reading the cases it seems relatively clear that the distinction is equally valid in regard to the initiative power. The general rule of what is a legislative and what is an

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36. *See, e.g.*, Schrier v. City of Kalamazoo, 380 Mich. 626, 158 N.W.2d 479 (1968).
37. *See, e.g.*, Hurst v. City of Burlingame, 207 Cal. 134, 277 Pac. 308 (1929).
38. *See, e.g.*, Denman v. Quin, 116 S.W.2d 783 (Tex. Civ. App. 1938).
39. Olson, *supra* note 34, at 217.
40. *Id.* at 218.
41. *Id.* at 225.
42. Note, *Judicial Limitations on the Initiative and Referendum in California Municipalities*, 17 HASTINGS LAW J. 805, 806 (1966).
43. 5 E. MCQUILLAN, § 16.55 at 211-212.

administrative matter, in reference to the power of the initiative and referral, was stated by a Texas court in *Denman v. Quin*:[44]

> It is obvious that ordinances intended by the electorate to be subject to referendum are those which are legislative in character, as distinguished from those of an administrative or executive nature; legislative, as relates to subjects of a general, or permanent character, as distinguished from those which are only transitory, or temporary, or routine, and therefore administrative or executive in their purpose and effect. An ordinance originating or enacting a permanent law or laying down a rule of conduct or course of policy for the guidance of the citizens or their officers and agents is purely legislative in character, and referrable, but an ordinance which simply puts into execution previously declared policies or previously enacted laws is administrative or executive in character, and not referrable.[45]

The test then is "whether the proposition is one to make new law or to execute law already in existence."[46] If the power exercised prescribes a new policy or plan, it is legislative; if it merely pursues a plan already adopted by the legislative body, or some power superior to it, then it is administrative in nature.[47]

An exception to the power of initiative and referendum is frequently found in authorizing constitutions, statutes, or charters. This exception covers emergency police measures such " . . . as may be necessary for the immediate preservation of the public health, peace or safety, or support of the state government and its exist-

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44. Denman v. Quin, 116 S.W.2d 783 (Tex. Civ. App. 1938).

45. *Id.* at 786. Justice Spratley of the Supreme Court of Appeals of Virginia perhaps summed it up best, as follows: "The tests as to what are legislative or administrative acts have been stated in various cases. It has been said that those which relate to subjects of a permanent or general character are to be considered legislative; while those which are temporary in operation and effect are administrative. Acts constituting a declaration of public purpose or policy are generally classified as involving the legislative power. The crucial test is said to be whether a proposed ordinance is one making a new law, or one executing a law already in existence. If it merely pursues a plan already adopted by the legislative body itself, or may be properly classed among the executive powers, it is deemed to be administrative." Whitehead v. H. and C. Development Corporation, 204 Va. 144 at 148, 129 S.E.2d 691 at 695 (1963).

46. 5 E. MCQUILLIN, *supra* note 43, at 212. *See also* State v. Strahan, 374 S.W.2d 127 (Mo. 1963), (determination as to fluoridation of water supply was legislative act); Billings v. Nore, 148 Mont. 96, 417 P.2d 458 (1966), (ordinance formulating storm sewer rates as executing authorized bond issue and therefore administrative); Whiteback v. Funk, 140 Ore. 70, 12 P.2d 1019 (1932), (purchase of real estate is not legislative an ordinance designating property for use as public market and authorizing purchase of it is contractual and not legislative in character).

47. 5 E. MCQUILLIN, *supra* note 43, at 214. The rationale for the rule has been stated: "To allow it [referendum] to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city. In many cases it would entirely prevent the exercise of the executive power necessary to carry out the acts determined by the legislative department. In the absence of a very clear declaration to the contrary, it must be presumed that the power of referendum was intended to apply solely to the legislative powers of the city." Hopping v. Council of City of Richmond, 170 Cal. 605 at 611, 150 P. 977 at 979 (1915). *See also* Harbor Center Land Co. v. Richmond, 38 Cal. App. 315, 176 P. 50 (Ct. App. 1918) and Dooling v. Fitchburg, 242 Mass. 599, 136 N.E. 616 (1922).

ing public institutions."[48] Also included in the exception are those measures of a more general nature, but passed by the legislative body with an emergency clause.[49]

Although the courts have generally declared that only those ordinances which are legislative in nature are subject to the process of initiative and referral, there is considerable confusion as to what matters are legislative and what are administrative or executive. Some of the courts go far in extending them to particular ordinances which in some instances appear to be more administrative than legislative in character. Other courts are more strict and apparently deny their application unless they are clearly legislative in nature.[50]

B. *Legislative Matters*[51]

1. *Extension of city boundaries*

In *State ex. rel. Lindstrom v. Goetz*,[52] the South Dakota Supreme Court held that a resolution of the governing board of the city of Yankton "extending the boundary of the city so as to include platted lots adjacent to the city"[53] was subject to a referendum. The court stated:

> The power to extend the boundaries of the municipal corporporation by the annexation of adjacent territory is inherent in the legislature. . . . This power may be exercised by the municipality in the manner and to the extent described by law. SDC 45.29. In this instance the city has exercised the power delegated to it by SDC 45.2906 by adoption of the resolution involved in this case. . . . The resolution is therefore subject to the referendum provision of Art. III, § 1 of the state Constitution. . . .[54]

2. *Acquisition or construction of a public utility*

In 1936, the Supreme Court of Ohio decided *State ex. rel. Didelius v. City Commission of City of Sandusky*.[55] In this case, the city commission passed an ordinance declaring the necessity for the city to construct or purchase a municipal light and power plant.[56] An accompanying resolution was passed declaring the ne-

48. 5 E. MCQUILLIN, § 16.56 at 215.
49. *Id.*
50. Annot. 122 A.L.R. 769 (1939).
51. *See generally* 5 E. MCQUILLIN § 16.57. The above is only a sample of a number of cases holding various propositions subject to the referendum or initiative. It is not meant to be exhaustive, but rather illustrative.
52. 73 S.D. 633, 47 N.W.2d 566 (1951).
53. *Id.* at 634, 47 N.W.2d at 566.
54. *Id.* at 637, 47 N.W.2d at 568. [citations omitted].
55. 131 Ohio St. 356, 2 N.E.2d 862 (1936).
56. *Id.* at 862.

cessity of issuing bonds to pay for such a facility.[57] The resolution provided for a referendum to be held at the next general election on this issue. Such referendum was held and approved by over 65 percent of the voters.[58] The city commission then proceeded to pass an ordinance and resolution implementing the decision to purchase or construct the electric plant.[59] A group of citizens demanded that this second ordinance and resolution be referred to the voters, but the city commission refused.[60] The citizens then sought a writ of mandamus to force an election.[61] In denying the writ, the Court held that succeeding "ordinances incidental to and in furtherance of such project are not subject to referendum. . . ."[62]

3. *Fluoridation of Water*

Although the preceding two cases have not directly discussed the legislative/administrative dichotomy, the decisions certainly imply that the courts were making such a distinction. In *Hughes v. City of Lincoln*[63] the court directly discussed this point. This case involved an action by electors of the city of Lincoln to force the city council to submit to the voters an initiated measure to prohibit fluoridation of the city's public water supply.[64] Essentially, the city's position was that an ordinance proposed by initiative must be one that the city council could itself enact. Since the Legislature has delegated control of domestic water supplies to the State Department of Public Health, the matter is an administrative rather than legislative act, hence not subject to the initiative power of the municipal electors.[65]

In rejecting the city's contention, the court discussed the three tests for ascertaining the scope of the initiative and referendum in regard to cities. First, the court discussed the legislative/administrative dichotomy:

> Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as acts of administration, and

57. *Id.* at 863.
58. *Id.*
59. *Id.*
60. *Id.* at 963-4.
61. *Id.* at 864.
62. *Id.* at 862. In denying the writ, the Court stated: "[A]n ordinance initiating the acquirement or construction of the utility, and not successive ordinances in furtherance of that purpose, is subject to referendum. The legal contention of the relator that each successive step in the furtherance of the public utility project is open to referendum might often lead to anomalous situations which, in our judgment, the Constitution did not intend to create." *Id.* at 865.
63. 232 Cal. App. 2d 897, 43 Cal. Rptr. 306 (1965).
64. *Id.* at 306. The Superior Court granted a peremptory Writ of Mandate and the city appealed. *Id.* at 306.
65. *Id.* at 308.

> classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence.[66]

Second, the Court discussed the situation when the local proposal deals with a subject affected by state policy and/or law.

> If the subject is one of statewide concern in which the Legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy, the action receives an 'administrative' characterization, hence is outside the scope of the initiative and referendum.[67]

The third test is whether, under the initiative power, the proposed ordinance is one which the legislative body of the city has the power to enact under the law governing its actions.[68] The Court deals with this test in a succinct manner. First, it notes that operation of public water facilities by cities is clearly a "municipal affair."[69] Second, it argues that the decision to fluoridate water is clearly a legislative policy decision. The argument is that the traditional goal of water treatment is restricted to purity and potability. The decision to fluoridate involves a different goal—medication of public water for a therapeutic purpose.[70] Such a goal is clearly a declaration of public purpose and, therefore, a legislative decision and, as a necessary consequence, subject to the initiative power.

The Court then found that the state policy is not to make cities mere administrative agents of the state in this area. Rather, the State Board of Public Health only has power to refuse a permit to a city on the grounds of impurity or the lack of potability. The Court stated: "[E]ssentially, [the Statutes] cast the state board in the role of a censor upon local decisions."[71] In light of the above, it also found that, should the voters reject fluoridation, the city would necessarily apply to the State Board of Public Health for a permit to change the water treatment process by removing the fluoridation process. Such an action is an implicit condition of the process. Thus, the city's argument that the measure is not subject to the initiative process because it covers an area the city council does not have the power to legislate upon, is fallacious.[72]

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66. Hughes v. Lincoln, 232 Cal. App. 2d 897, 43 Cal. Rptr. 306, 309 (1965) *quoting* McKevitt v. City of Sacramento, 55 Cal. App. 117, 124, 203 P. 132, 136 (Ct. App. 1922).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 310.
71. *Id.* at 311.
72. *Id.* at 311-12.

C. *Administrative Matters*[73]

The courts have ruled several other subject areas to be administrative matters and, therefore, not subject to initiative and referendum.

1. *Repeal of parking meter ordinances*

In 1961, the California Court of Appeals for the Fourth District held that a proposed measure seeking the repeal of parking meter ordinances was not subject to the initiative process.[74] The court reasoned that the state had legislatively occupied the field of vehicular traffic on public streets and had specifically delegated particular authority to the governing board. Therefore, the subject of regulating parking on public streets was no longer a "municipal affair" and as a consequence was not subject to the initiative process.[75] In effect, the Court argued that because of state preemption in this area, the city was not acting in a legislative capacity when it enacted the parking meter ordinances, but rather was acting in an administrative capacity—that is to say, the enactment of the parking meter ordinances was an implementation of power delegated to the city by the state to regulate vehicular traffic on public streets.[76] Such action by the city, in effect, as an agent of the state, is administrative action and, therefore, not subject to review by the electorate through the use of the initiative process.

2. *Completion of the construction of a municipal building*

The Supreme Court of Nebraska in 1948 decided *State v. Leeman.*[77] This case involved an attempt to force the referral of a city ordinance ordering the purchase of land, selection of plans, and letting of contracts to build a municipal auditorium. The voters of the city of Omaha had earlier approved a measure to issue bonds for the construction of such an auditorium.[78] The Court, following similar logic as that expressed in *Hughes,*[79] stated:

> [I]t was an act of legislation to direct and authorize the construction of a public building . . ., but that it is an *executive and administrative* duty to select the site, buy same select plans and let a contract, provide precise cost of various items, terms of payment, and numerous other conditions incident to building a large municipal audi-

73. *See generally* 5 E. MCQUILLIN, § 16.57.
74. Mervynne v. Acker, 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (1961).
75. *Id.* at 342-44.
76. *Id.*
77. 149 Neb. 847, 32 N.W.2d 918 (1948).
78. *Id.* at 849, 32 N.W.2d at 919.
79. Hughes v. Lincoln, 232 Cal. App. 2d 897, 43 Cal. Rptr. 306 (1965).

torium. No one of the many executive and administrative acts necessary to complete such project referrable to a vote of the people is a legislative act.[80]

3. *Sale of franchise right to operate motorbuses*

In 1944, the Kentucky Court of Appeals ruled that an ordinance of the city of Paducah offering for sale a bus franchise was not subject to a referendum.[81] The court reasoned that since state statutes required a city to sell a new franchise prior to the expiration of the old franchise; the ordinance in question was administrative in nature and, therefore, not subject to either initiative or referendum proceedings.[82]

D. NORTH DAKOTA CASES

There are no North Dakota cases on the use of initiative and referendum in North Dakota cities that deal with the legislative/administrative dichotomy. However, in 1966, Justice Knutson of the North Dakota Supreme Court holding that a legislative delegation of $10 million bonding authority to the State Board of Higher Education was an unconstitutional delegation of legislative authority, stated:

> It is difficult, if not impossible, to lay down exactly the line that marks the distinction between administrative and legislative functions. As was said by the Supreme Court of the United States in *Mutual Film Corporation v. Industrial Commission,* 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed. 552, Ann. Cas. 1916C, 296: 'While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the Legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and the conditions which policy and principles apply.'[83]

Thus, it would appear that North Dakota courts recognize the legislative/administrative dichotomy on the state level, but have not been faced with the issue involving the use of initiative or referendum at the city level.

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80. 149 Neb. at 858, 32 N.W.2d at 923. [emphasis added]. The Court cites several cases which follow this line of reasoning very closely. *See* Monahan v. Funk, 137 Or. 580, 3 P.2d 778 (1931), (purchase of land for a crematory); Burdick v. City of San Diego, 29 Cal. App. 2d 565, 84 P.2d 1064 (Ct. App. 1938), (selection of site and building of a police station); and McKevitt v. City of Sacramento, 55 Cal. App. 117, 203 P. 132 (Ct. App. 1922).

81. Seaton v. Lackey, 298 Ky. 188, 182 N.W.2d 336 (1944).

82. *Id.* at 339-40.

83. Nord v. Guy, 141 N.W.2d 395, 400 (N.D. 1966) *quoting* Wilder v. Murphy, 56 N.D. 436, 441-42, 218 N.W. 156, 158 (1928).

III. ANALYSIS OF SPECIFIC EXAMPLES OF USE OF INITIATIVE AND REFERENDUM IN THE CITY OF MINOT

A. *Constitutional, Statutory, and Charter Provisions*

1. *North Dakota Constitution, Section* 130

In reviewing section 130,[84] which directs the legislative assembly to ". . . provide by law for the establishment of home rule in cities and villages"[85] there is no mention made of the power of initiative and referendum as far as home rule cities are concerned. Thus, it would appear that there is no constitutional bar to the use of the legislative/administrative dichotomy in the field of the use of initiative and referendum in regards to municipal ordinances.

2. *Chapter* 40-05.1 *of the North Dakota Century Code*

Chapter 40-05.1 of the North Dakota Century Code provides for home rule in cities under authority of Section 130 of the state constitution. Since this chapter does not specifically discuss the initiative or referendum, much less make their inclusion in the home rule charter mandatory, it would appear from a careful reading of the chapter that the legislative assembly left the decision as to inclusion of either the initiative or the referendum on municipal ordinances up to the individual city and its charter commission. Since there is not a specific requirement that a city provide for either the initiative or the referendum, then it seems obvious that there would be no statutory bar to the adoption of the legislative/administrative dichotomy in this field.

3. *Minot Home Rule Charter*

The city of Minot in adopting a home rule charter in 1972 provided for the initiative and referendum.[86] Section 1 of that Article provides:

> The voters of the City of Minot shall have the power to refer and initiate ordinances, except that the power of initiative and referendum shall not extend to the annual appropriation ordinances nor to those ordinances implementing public projects upon which an election has previously been held, or special improvement projects under which the law provides for protest procedures.[87]

In analyzing the above section, one notes that although the powers of initiative and referendum are provided for, they are not unre-

84. N.D. CONST., art. VI, § 130.
85. *Id.*
86. MINOT HOME RULE CHARTER, art. 4.
87. *Id.* § 1.

stricted powers. The charter sets forth three types of ordinances that are not subject to the initiative or referendum: (1) the annual appropriations ordinances; (2) ordinances implementing public projects upon which an election has been held; and (3) ordinances implementing special improvement projects where a protest procedure is provided.[88]

It is the second exception that is of major interest here—excepting ordinances implementing public projects upon which an election has already been held. This exception appears to reflect the case law that distinguishes between legislative and administrative matters. It would appear that the Minot Home Rule Charter Commission was aware of such cases as *Didelius*,[89] *Hughes*,[90] and *Leeman*,[91] which created the distinction between legislative matters (most of which had been submitted to the voters for approval) and later administrative decisions (ordinances implementing the earlier-approved policy issues). Therefore, it could be argued that the city of Minot has implicitly recognized the legislative/administrative dichotomy within the home rule charter its citizens approved in 1972.

B. Analysis of Six Measures Submitted to the Voters of Minot Under the Initiative and Referendum Provision of the Minot Home Rule Charter

On March 26, 1973, four initiative petitions were filed with the Minot City Auditor.[92] The petitions were circulated by students in a municipal government class taught by Professor Carl Kalvelage of Minot State College.[93] The petitions called for the following initiative measures:

1. Bingo and other forms of gambling shall be legal for fraternal, charitable and religious organizations within the City of Minot.
2. The Minot police force and city magistrate will be paid a salary and fringe benefits at least equivalent to that paid Grand Forks policemen and magistrates.
3. Suits may be brought against the City of Minot for negligent injury to a person or his property, but the City Council may provide for reasonable limitations.
4. Tenants Rights Ordinance—This initiative measure provides, in effect, that a tenant may apply his rent payments to an escrow account to provide for repair of his

88. *Id.*
89. See note 55 *supra.*
90. See note 63 *supra.*
91. See note 77 *supra.*
92. Minot Daily News, Mar. 26, 1973, at 1.
93. *Id.*

> apartment or room to the minimum standards of the City of Minot. The initiative petition provides for a certification of substandard dwellings by the City of Minot and provides for non-eviction during the time that rental payments are being made to the escrow account.[94]

The Minot city council refused to enact the four measures and, under the Minot Home Rule Charter,[95] a special election was called for August 7, 1973.[96] All four measures were defeated by substantial margins.[97] An analysis of each of these four measures should be done to see if the legislative/administrative dichotomy would have been applicable.

1. *Bingo and Gambling Ordinance*

This proposed measure would have legalized bingo and other forms of gambling for fraternal, charitable and religious organizations in Minot.[98] Using the test set forth by Professor McQuillin[99] that if the proposition is one to make new law, it is legislative, then this measure is clearly legislative.[100] To open up a city to bingo and gambling is certainly a question of policy and would certainly be making a new law, not implementing a prior policy. If bingo and/or gambling were already legal in the city and, for example, a measure was proposed to confine the activity to a certain section of the city, then such an ordinance would probably be administrative.

2. *Police Pay*

This proposed measure would set the pay of Minot policemen and the city magistrate at the level paid Grand Forks policemen and the city magistrate.[101] The question of whether the salaries of municipal employees is an administrative or legislative matter is one of some confusion among various jurisdictions. In *Murphy v. Gilman*,[102] the Supreme Court of Iowa held an initiated ordinance raising the salaries of municipal firemen above the level set by the city government to be invalid.[103] The court stated:

> . . . fixing of the compensation of firemen was an exercise of the administrative function of the city, and . . . was

94. Memorandum from R. A. Schempp, City Auditor, to Honorable Mayor and City Council (Minot), May 12, 1973, at 2. See Appendix B for full text of Initiative No. 4.
95. MINOT HOME RULE CHARTER, art. 4 § 8.
96. Minutes of Minot City Council, June 12, 1973.
97. Minutes of Minot City Council, August 20, 1973.
98. Memorandum, *supra* note 94.
99. 5 E. McQUILLIN, *supra* note 43.
100. For purposes of discussion here, the fact that such a measure is in direct violation of the first amendment to the N.D. CONST. which bans lotteries, etc., is being ignored.
101. Memorandum, *supra* note 94.
102. 204 Iowa 58, 214 N.W. 679 (1927).
103. *Id.* at 64, 214 N.W. at 682.

> not an act to which the initiative and referendum applied. . . .[104]

The court followed the rationale that the establishment of a fire department is clearly a legislative act, but the fixing of compensation is clearly an administrative exercise of power necessary to implement the earlier adopted legislative action.[105]

The numerical weight of authority, however, would hold that the subject of municipal employee salaries is a legislative matter and, therefore, subject to the initiative and referendum.[106] These cases can be distinguished from the situation involved in the proposed initiated ordinance in Minot. The cases that hold that municipal employee salary issues are legislative in character generally deal with measures that go far beyond mere salary issues.[107] These measures generally involved a complex pay plan, terms of working conditions, number of holidays, organizational structure, promotion, etc.[108] In other words, they are really more policy in nature since they cover the whole range of issues involved in municipal employment. Since they are so vast and complex, they are clearly questions of policy and, as such, can easily be defined as legislative in nature.

The proposed ordinance in Minot, on the other hand, deals solely with salary and fringe benefits. It does not deal with promotions, working conditions, etc. Therefore, it could be argued that it is administrative in character because it deals with only one facet of the problem and is really an implementation step of a total personnel policy—such policy being legislative in nature.

3. *Tort Liability*

The third initiated ordinance called for the end of governmental immunity from tort liability of the city of Minot and authorized the City Council to provide for reasonable limitations on such suits as may be brought for negligent injury to a person or his property.[109] Disregarding all the questions about governmental immunity from tort liability, it would seem clear on the surface that not only is this a question of policy, but is also a change to a new law and therefore legislative in character.[110]

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104. *Id.*
105. *Id.* at 681. *See also* City of Newport v. Gugel, 342 S.W.2d 517 (Ky. 1961); Shriver v. Bench, 6 Utah 2d 329, 313 P.2d 475 (1957).
106. *E.g.*, Parrack v. Phoenix, 84 Ariz. 82, 329 P.2d 1103 (1958); Williams v. Parrack, 83 Ariz. 227, 319 P.2d 989 (1957); Spencer v. Alhambra, 44 Cal. App. 2d 75, 111 P.2d 910 (Ct. App. 1941); Morro v. City Clerk of New Bedford, 340 Mass. 240, 163 N.E.2d 268 (1960); Glass v. Smith, 150 Tex. 632, 244 S.W.2d 645 (1951); State v. Spokane, 17 Wash. 2d 22, 134 P.2d 950 (1943).
107. *See* cases cited note 106 *supra.*
108. *Id.*
109. Memorandum, *supra* note 94.
110. There are apparently no cases in point on whether governmental immunity from tort liability is a legislative or administrative matter.

4. *Tenants Rights*

The fourth ordinance would have provided for rights of tenants who had landlords who failed to keep their property up to certain minimum standards.[111] Again, there is apparently no case law in point. However, it would also seem readily apparent that this proposed ordinance is a legislative matter since it involves both a policy decision as to the rights of tenants and would be new law on the subject.

5. *Franchise Fee*

On July 16, 1973, the Minot City Council passed Ordinance No. 1849, which provided for the imposition of a franchise fee upon Northern States Power for the use of avenues, streets, alleys and public grounds of the city.[112] The fee was to amount to two per cent on the gross revenues of the company.[113] Petitions were circulated to refer this ordinance and a special election was held on October 23, 1973.[114] The voters of the City of Minot overwhelmingly rejected the ordinance.[115]

Prior to the submission of the issue to the voters the assistant city attorney wrote an opinion that held that the measure was not subject to referral.[116] His rationale for such an opinion was essentially two-fold: First, he argued that since the anticipated revenue from this proposed tax was included in the annual budget for the city government[117] it, therefore, came within the exception to the initiative and referendum set forth in Section 1, Article 4 of the Home Rule Charter. This exception excludes the "annual appropriation ordinances"[118] from the power of initiative and referendum.[119] Second, he, in effect, argued that this was an administrative matter and, therefore, not subject to initiative and referendum.[120]

The State Attorney General, however, issued an opinion stating that the matter was subject to referral.[121] The opinion narrowly construes the Home Rule Charter provision excepting appropriation measures from the initiative and referendum and concludes that a tax measure does not fall within the exception.[122] The opinion gen-

111. See note 94 *supra* and Appendix B.
112. Minutes of Minot City Council, July 16, 1973.
113. *Id.*
114. Minutes of Minot City Council, November 5, 1973.
115. *Id.* The vote was 579 "Yes" and 2,924 "No."
116. Letter from Hugh McCutcheon to Honorable Mayor and City Council (Minot), August 13, 1973.
117. *Id.* at 3.
118. MINOT HOME RULE CHARTER, art. 4, § 1.
119. *Id.*
120. Letter, *supra* note 116, at 4-7.
121. OP. ATT'Y. GEN. (Aug. 28, 1973).
122. *Id.*

erally ignores the second aspect of the assistant city attorney's opinion that the measure was an administrative matter.

In reviewing the cases in point, it is obvious that there is no consensus as to whether propositions involving taxes are subject to initiative or referendum.[123] The case of *Balten v. Hambley*[124] is most persuasive in arguing that a tax measure such as the one under consideration should not be subject to initiative or referendum. In *Balten* the court held that the occupational license tax established by the city of Pikeville was not subject to initiative.[125] The court reasoned that the tax measure was a portion of the total budget process followed by the city and that to allow its repeal without providing for a replacement could result in serious damage to the administration of the city.[126] This situation is almost identical to the City of Minot situation where the franchise tax ordinance was a part of the annual budget of the city and the referendum was strictly on the approval or disapproval of the tax with no alternative source of revenue provided for.[127] Therefore, it can be argued that the franchise tax ordinance was not subject to the referendum.

6. *Zoning*

On December 4, 1973, a special election was held in Minot on the referral of Ordinance No. 1871[128] which involved the re-zoning of land from single family residence to a planned residential district.[129] The question of whether a re-zoning ordinance is subject to the initiative and referendum is another area where there is a sharp split of authority.

In *Johnston v. City of Claremont*[130] the Supreme Court of California held that a re-zoning ordinance amending a general zoning ordinance is a legislative act and, therefore, is subject to the ref-

123. *See, e.g.*, Hunt v. Mayor and Council of Riverside, 31 Cal. 2d 619, 191 P.2d 426 (1948) (sales tax excepted from referendum provisions); Gilbert v. Ashley, 93 Cal. App. 2d 414, 209 P.2d 50 (Ct. App. 1949) (tax levies excepted from referendum provisions); Kohler v. Benckart, 252 S.W.2d 854 (Ky. 1952) (Occupational tax not subject to referendum); State v. Carr, 239 Mo. App. 939, 203 S.W.2d 670 (1947) (cigarette tax submissible to referendum); State v. Board of Elections of Lucas County, 78 Ohio App. 194, 69 N.E.2d 634 (1946) (payroll and income tax subject to referendum); Garbade v. Portland, 188 Ore. 158, 214 P.2d 1000 (1950) (business license tax subject to referendum); Denman v. Quin 116, S.W.2d 783 (Tex. Civ. 1938) (ad valorem property tax not subject to referendum).

124. 400 S.W.2d 683 (Ky. 1966).

125. *Id.* at 685.

126. *Id.*

127. *See also* State v. St. Petersburg, 106 Fla. 742, 145 So. 175 (1933) which also held " . . . that the initiative and referendum provisions of the city charter of St. Petersburg have no application to those matters of fiscal management which have been expressly delegated to city officials, such as the making of appropriations and the levying of necessary taxes to meet the same . . ." at 177.

128. Minutes of Minot City Council, Jan. 7, 1974.

129. Notice of City of Minot Special Election, undated.

130. 49 Cal. 2d 826, 323 P.2d 71 (1958).

erendum.[131] The court stated that "a zoning ordinance constitutes the exercise of a governmental and legislative function and is subject to change by the legislative power."[132]

However, in *Kelley v. John*[133] the Supreme Court of Nebraska held that an ordinance re-zoning a piece of property in McCook, Nebraska, from residential to business use was an administrative matter and not subject to the referendum.[134] It argued that the comprehensive plan for zoning a city was a legislative matter, but that this ordinance changing the zoning on a particular piece of property "is the carrying out of the purposes of the comprehensive zoning ordinance"[135] and, therefore, is an administrative matter.[136]

The argument in *Kelley* is persuasive. It is logical to argue that the initial master zoning plan is a legislative act since it is setting forth new policy. However, it is equally logical that the individual zoning or re-zoning of particular pieces of property from time to time is administrative in nature. The overall substance of the previously adopted zoning plan is not being changed. Rather the individual zoning decisions are administrative since they merely effectuate the basic concept of a master zoning ordinance that is to bring some rational thought and planning to the development of a city. Based on this logic, then, it can be argued that the Minot rezoning ordinance under discussion could have been classified as administrative and, therefore, not subject to the referendum.

IV. SUMMARY AND CONCLUSIONS

As was stated above, the thesis of this paper was to examine the legislative/administrative dichotomy and to suggest its use by the City of Minot to minimize the use, or potential abuse, of the initiative and referendum. After reviewing the development of the legislative/administrative dichotomy by the Courts, the six measures submitted to the voters of the City of Minot were analyzed to see if any or all of them could reasonably be classified as administrative in nature and, therefore, not subject to the initiative or referendum.

It seems clear that three of the measures can reasonably be classified as administrative in nature—the police pay plan, the franchise tax, and the re-zoning measure. Thus, it can be suggested that

131. *Id.* at 76.
132. *Id.*
133. 162 Neb. 319, 75 N.W.2d 713 (1956).
134. *Id.* at 324, 75 N.W.2d at 715.
135. *Id.*
136. *Id.* A virtually identical case was decided the same way in Bord v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

based on legal precedent at least two of the three special elections could have been avoided.

However, it must be acknowledged that the question of whether to submit a given measure to the voters is rarely a purely legal matter. The normal situation involves questions of a political nature which can, and often times do, outweigh the narrow legal issue. As a result of this situation, it appears that although the courts would in all probability rule that three of the measures were administrative in nature and, therefore, not subject to initiative or referendum, it was a sound decision to submit the measures to the voters. Should the city feel at some later date that the initiative and/or referendum is too easily used, or abused, there are remedies available through amendment of the Minot Home Rule Charter to restrict the use of initiative and referendum or, possibly, even the elimination of one or both of the processes. Such decisions would then be made by the voters of the City of Minot.

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