STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Court File No. 27-CV-15-11494

Judge James A. Moore

Joel Jennissen, Russell Burnison
Mark Vanick, William Reichert,
Sunil Lachhiramani,

Plaintiffs,

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

vs.

The City of Bloomington,

Defendant.

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The above-entitled matter came on for a hearing before the undersigned Judge of District Court on the parties' cross-motions for summary judgment at the Hennepin County Government Center on October 21, 2015. Michael R. Drysdale, Esq. and Samir M. Islam, Esq., appeared for and on behalf of Plaintiffs.[1] George C. Hoff, Esq. and Justin L Templin, Esq., appeared for and on behalf of Defendant. The Court took this matter under advisement at the conclusion of the hearing. Thereafter, the Court requested that the parties file supplemental memoranda on the following question: "Must the proposed limitation on future city council action be accomplished by amendment of the City Charter or can it be legally enacted by Initiative?" Upon receipt of the parties' supplemental memoranda, the Court took the matter under advisement.

Based upon the file, record, and proceedings herein, the Court, being fully advised in the premises, makes the following:

**ORDER**

1. Plaintiffs' Motion for Summary Judgment is **DENIED, in its entirety.**

[1] Individual Plaintiffs Joel Jennissen, William Reichert, and Mark Vanick also appeared in person.

2. Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's Complaint for Declaratory and Injunctive Relief is hereby DISMISSED.

3. The attached Memorandum is incorporated herein.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: April 25, 2016

BY THE COURT:

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James A. Moore
Judge of District Court

## MEMORANDUM

### I. Facts[2]

Plaintiffs in this action, Jennissen, Burnison, Vanick, Reichert, and Lachhiramani, are each adult residents of the City of Bloomington. (*See* Compl. ¶¶ 2-6.) Defendant City of Bloomington (hereafter "City") is a municipal corporation chartered under the Laws of the State of Minnesota. (Compl. ¶ 7; Ans. ¶¶ 3-4.) The City has been undergoing a process by which it intends to change from an "open system" of Mixed Municipal Solid Waste ("MMSW") collection to "organized collection."[3] Plaintiffs seek to place an initiative measure on the ballot regarding the City's proposed solid waste program. (*See gen.* Compl. for Declaratory and Injunctive Relief "Compl.".)

The City has employed an open system for collecting MMSW for a number of years. (Compl. ¶ 14; Ans. ¶ 5; Bloomington Code, Art. II, Section 10.5.) MMSW is collected for disposal

[2] The City of Bloomington does not disagree with Plaintiffs' Statement of Undisputed Facts. (*See* Def.'s Mem., pg. 2; Pls.' Mem., pg. 4-6.) Further, the parties agree that the issues currently before the Court are legal in nature, not factual, and thus, appropriate for resolution by summary judgment.

[3] The City's efforts to organize collection to the date of the motion are set forth in some detail in the record but its efforts, if any, to advance toward organized collection since the motion was filed have not been described to the Court. The Court is generally aware from newspaper reports that the City has continued toward organized collection since the matter was first taken under advisement, but does not rely in any way on this general knowledge in deciding the legal issues presented.

from homes and businesses in the City by solid waste collection companies ("Haulers") that are licensed under the City's code. (*See* Bloomington Code, Art. II, Section 10; Ans. ¶ 5.) Under an open system for collection of MMSW, individual property owners contract with the licensed hauler of their choice. Minnesota law allows cities to prescribe, and define a system of organized collection. *See* Minn. Stat. Ch. 115A. To implement an organized collection system for MMSW, a city must follow the specific statutory process specified in the Waste Management Act ("WMA") Minn. Stat. § 115A.94. In 2014, the City began the statutory process to implement organized collection pursuant to Minn. Stat. § 115A.94. (Compl. ¶ 18; Ans. ¶ 7.) Plaintiffs oppose implementation of organized collection within the City. (*See gen.* Compl.)

Bloomington is a Home Rule Charter ("HRC") city that provides the powers of initiative, referendum and recall to its residents. *See* Bloomington Charter § 5.01. Pursuant to the Bloomington Charter § 5.04[4], Plaintiffs prepared and presented a proposed ballot initiative to the City Attorney. (Compl. ¶ 21.) The proposed Organized Collection Ballot Initiative states:

> Unless first approved by a majority of the voters in a state general election, the City shall not replace the competitive market in solid waste collection with a system in which solid waste services are provided by government-chosen collectors or in government-designed districts. The adoption of this ordinance shall supersede any ordinances or ordinance amendments related to solid waste adopted by the city council in 2015-16.

(Compl. ¶ 22; Answer ¶ 11.) The City Attorney declined to authorize Plaintiffs' proposed Initiative, stating that it was preempted by the WMA. (Compl. ¶ 23; Answer ¶ 12; First Bloomington Letter.) The City Attorney further advised Plaintiffs that the WMA created a comprehensive scheme for managing MMSW that precludes any ballot initiative or referendum language other than a measure

[4] The Bloomington Charter § 5.04 provides, in relevant part:

> Any five registered voters can establish a committee for the initiation of any ordinance, except an ordinance appropriating money or authorizing the levy of taxes. Before circulating any petition, the committee must submit to the city attorney a copy of the proposed ordinance. The city attorney must approve it or put it into a form which is legally sufficient for its intended purpose.

(Drysdale Aff. ¶ 2 Ex. D.)

stating "[a]ny ordinance or ordinance amendment to regulate solid waste collection in the City must be in accordance with Minnesota Statute Chapter 115A, as amended from time to time." (Compl. ¶ 23; Answer ¶ 12; First Bloomington Letter at 2.)[5]

After retaining counsel, Plaintiffs responded to the City Attorney's letter on May 19, 2015 requesting that the City Attorney reconsider her opinion. On June 1, 2015, the City held a public hearing on the proposed imposition of organized collection. (Compl. ¶ 26; Ans. ¶ 15.) Thereafter, on June 4, 2015, the City Attorney responded to the Plaintiffs' May 19, 2015 letter again declining to authorize Plaintiffs' proposed Initiative. (Compl. ¶ 27; Ans. ¶ 16; Second Bloomington Letter.) The City Attorney reiterated that the Initiative was preempted by the WMA, and stated two additional deficiencies with the proposed Initiative: (1) that the Initiative constitutes a premature referendum, and (2) the Initiative is an impermissible attempt to legislate administrative actions. (Compl. ¶ 27; Ans. ¶ 16; Second Bloomington Letter.) Plaintiffs' initiated this lawsuit by service of a Summons and Complaint upon the City on June 16, 2015.

## II. Standard of Review

Summary judgment is appropriate when, based upon the entire record before the Court, there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Summary judgment is proper when there are no genuine issues of material fact and a determination of the applicable law will resolve the matter. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue of material fact exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The party moving for summary judgment has the burden "to

[5] The Court observes that the City Attorney's proposed language in her First Bloomington Letter was an apparent effort to put the Plaintiffs' proposed Initiative into a legally sufficient form as required by section 5.04 of the Bloomington Charter.

show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

**III. Analysis**

The parties agreed that the three issues before the Court for consideration are: (1) whether the Minnesota Waste Management Act, Minn. Stat. Ch. 115A, preempts Plaintiffs' proposed Initiative; (2) whether Plaintiffs' proposed Initiative is an impermissible attempt to legislate an administrative City function; and (3) whether Plaintiffs' proposed Initiative is a premature referendum. Despite the parties' agreement as to the statement of issues, the Court concludes that the stated issues miss a bigger point. The parties' issues and arguments presume, as argued by Plaintiffs in their supplemental memorandum, that the Initiative "… is appropriately fashioned in the form of an ordinance."[6] The Court questions whether this presumption is true. If not, a question arises as to whether the proposed Initiative is proper under the city charter. For the reasons set forth below, the Court finds that the proposed Initiative is not in the form of an ordinance and was, therefore, properly rejected by the City Attorney for submission to the ballot.

The parties' assumption that the proposed Initiative is properly in the form of an ordinance leaves the parties struggling to analyze its legality. Thus, the City postulates that the Initiative seems to be a premature referendum.[7] The City cites the limitations on the use of referendum to argue that Plaintiff's premature referendum should not be countenanced. Plaintiffs disagree, arguing that their proposed Initiative fits neatly within the confines of the Initiative doctrine and the Court need not analyze it as a referendum. The parties' arguments do not fit the facts. A referendum is used to challenge a city council-adopted ordinance by placing it on the ballot for voter approval or repeal.

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[6] Plaintiff's Supplemental Memorandum, pp 1-2.

[7] A "referendum" under the City's Charter is a tool by which voters can challenge an ordinance passed by the City Council from going into effect by requesting it be repealed or submitted to a vote of registered voters. Bloomington Charter § 5.10.

The proposed Initiative does not specifically address an ordinance or even a proposed ordinance.[8] Thus, it is not a referendum under the city charter and it should not be analyzed as such.

The City argues, in the alternative, that the Initiative infringes the administrative authority of the city council. Again, the argument is not a perfect fit. Exactly how the City will eventually implement organized collection is uncertain at this point and what, if any, administrative authority the city council will use in the eventual implementation is unknown. The City makes a valid point that Initiative is limited to actions that are legislative in nature.[9] However, the facts of this case do not permit a full analysis of whether or not the City's organizing of MMSW collection will invoke the City's legislative power, administrative power, or both. The fact that the City's arguments are inapt does not end the Court's inquiry.

***The right retained by the citizens under the City Charter is limited.***

By charter the City of Bloomington has reserved for its citizens the right of Initiative and Referendum.[10] Bloomington Charter § 5.01. An "initiative" under the City's Charter is a process that allows voters to bypass their elected city council representatives and propose an ordinance to be placed on the ballot. Bloomington Charter § 5.04. Plaintiffs correctly assert that this reservation of legislative power creates a system of coterminous, dual authority to enact or change legislation.[11] The present case involves an attempt to use that reserved power to enact an alleged ordinance.

***Plaintiff's proposed Initiative is not an ordinance.***

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[8] No party has identified which, if any, existing ordinances may be amended in the proposed organization of collection of MMSW. The Court notes that Minn. Stat. Ch. 115A allows for organizing collection by use of, among other things, contract.

[9] *See People v. City of Centralia*, 117 N.E.2d 410, 412-13 (Ill. App. Ct. 1953) ('Both legislative and executive powers are possessed by municipal corporations. Often executive powers are vested in the council or legislative body and exercised by motion, resolution or ordinance. Executive action evidenced by ordinance or resolution does not subject such action to the power of the referendum, which is restricted to legislative action as distinguished from mere administrative action. The form or name does not change the essential nature of the real step taken.' The Court goes on to point out that the power to initiate legislation under the statutes providing for initiation and referendum in the conduct of municipal affairs does not extend to such functions of city government as are purely administrative in character).

[10] The charter also gives the citizens a right to initiate Recall. Recall is not implicated in this case.

[11] Plaintiffs' Supp. Mem. P. 3, *citing, Schultz v. City of Duluth,* 203, N.W 449, 450 (MInn. 1925); *State v. Erickson,* 195 N.W. 919, 921 (Minn. 1923); see also authorities cited in Defendant's Spp. Mem at p. 4..

No party has offered the Court a precise definition of what an "ordinance" is within the context of a charter-authorized referendum. The Court's independent research reveals no commonly-accepted, and uniformly applied, definition of an "ordinance" in this context. Black's Law Dictionary offers only the unhelpful generality that an ordinance is "[a]n authoritative law or decree. specif., a municipal regulation, esp. one that forbids or restricts an activity" and that "[m]unicipal governments can pass ordinances on matters that the state government allows to be regulated at the local level." Black's Law Dictionary (10th ed. 2014), *available at* Westlaw Blacks. No case that the Court could find specifically narrows this broad definition of "ordinance" when used in connection with the power of Initiative. Thus, the scope of charter-based initiative is unclear. This ambiguity in the law has allowed Plaintiffs to propose an "ordinance" that is not actually an ordinance. An ordinance either regulates citizens' behavior or prescribes municipal processes such that the municipality's exercise of it authority comports with due process. The proposed Initiative ordinance does neither, but instead seeks to limit the power of the city council to act in the realm of collection of MMSW.[12] Although the parties look past this question, the Court finds that calling Plaintiffs' proposed Initiative an ordinance creates two separate issues. First, the purported limitation on city council action by ordinance creates an absurdity. Second, the proposed limitation on the power of the city council must be accomplished, if at all, by amendment of statute or city charter, not by ordinance.

Although titularly an "ordinance," Plaintiffs' Initiative is, in fact and in effect, an anti-ordinance. It seeks to preclude legislative action by elected officials now, and in the defined future. It seeks to regulate the city council, not the collection of MMSW. Unlike other, recognized ordinances, the Initiative ordinance does not prescribe a hearing process by which municipal action

[12] The Initiative language seeks to limit the city council in two ways: first, by requiring a popular vote before any city council action to organized collection and second, to supersede any ordinance passed on the topic in 2015 or 2016.

may be taken on citizen's requests. Instead, it seeks to preempt and reverse city council action on organized collection.

This attempted regulation of the city council by ordinance creates an absurdity. Given that the initiative power and the city council's power to enact ordinances are co-extensive, passing an initiative "ordinance" purporting to limit the authority of the city council to act on a topic is entirely ineffectual. Indeed, in response to the Court's inquiries Plaintiffs have conceded that their proposed ordinance, if passed, would be subject to immediate repeal or replacement by the city council under the council's coterminous authority to pass ordinances.[13] Thus, even if the Initiative were passed, its purported limitations on the city council could be rejected by the city council at its next regularly scheduled meeting. This absurd result points up an underlying deficiency in Initiative to accomplish Plaintiffs' purpose.

Cities have no inherent powers. They have only such powers as are delegated to them by the legislature or by their city charters.[14] Changes to a city's power must come through amendment of statute or amendment of the city charter. The methods for amendment of a city charter are set forth in Minn. Stat. § 410.12. The use of Initiative to amend the city charter is not thereby authorized.

Plaintiffs' Initiative petition seeks to redefine the power of the city council. As such it is a misuse of the power of Initiative. Nothing in the city charter authorizes or requires the direct approval of a majority of the voters before the duly elected city council may act. Nothing in the city charter authorizes citizens to demand an election before the city council takes an action. Plaintiffs cannot, under the guise of Initiative, impose such a limitation on its duly elected city council.

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[13] The Court relies on Plaintiff's argument but finds some support for the proposition that a properly enacted Initiative ordinance may be entitled to some deference by elected officials. *See, G.E.M. of St. Louis v. City of Bloomington*, 274 Minn. 471, 144 N.W 2d 552, 555 (1966), *citing dicta in Megnella v. Meining*, 133 Minn. 98, 157 N.W. 991. The viability and scope of the *Megnella* dicta is not before this Court.

[14] Mangold Midwest Co. v. Vill. of Richfield, 274 Minn. 347, 357, 143 N.W.2d 813, 820 (1966) (municipalities have no inherent powers and possess only such powers as are expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred).

Plaintiffs remain free to offer *ordinances* through Initiative. Such ordinances must be in proper form and seek to either regulate citizens or to provide due process to the citizenry. They may not seek to limit the authority of the city council. If Plaintiffs wish to re-define the powers of the city council, they are free to seek amendment of the city charter under Minn. Stat. § 410.12. But Plaintiff cannot use the Initiative power as a less burdensome alternative to § 410.12.

**IV. Conclusion**

Based upon the foregoing analysis, the Court concludes that there are no genuine issues of fact in this case. Plaintiffs' Initiative is not a proper ordinance. Based upon this conclusion, the Court finds it unnecessary to address the issue of preemption. The City of Bloomington is entitled to judgment as a matter of law. Plaintiffs' Complaint is hereby dismissed.

*J.A.M.*