

STATE OF NORTH DAKOTA
COUNTY OF GRAND FORKS

DISTRICT COURT
NORTHEAST CENTRAL JUDICIAL DISTRICT

Benjamin Grzadzielewski,
People for the Vote LLC

Petitioners,

v.

City of Grand Forks, North Dakota,
Maureen Storstad, in her official capacity as
City Auditor

Respondents,

Case No.:
Case Type: Petition for Writ of Mandamus

ORAL ARGUMENT REQUESTED

**MEMORANDUM IN SUPPORT OF PETITIONERS' VERIFIED PETITION FOR WRIT
OF MANDAMUS OR, IN THE ALTERNATIVE, COMPLAINT FOR INJUNCTIVE
RELIEF**

INTRODUCTION

Petitioners seek to exercise a fundamental right held sacred in this state: the right of the people to vote on the government actions that significantly impact their lives. The City Auditor for the City of Grand Forks impermissibly robbed the Petitioners of this critical right by unlawfully rejecting their referendum petition. The referendum petition concerned the controversial decision by the City of Grand Forks, North Dakota to implement a massive incentive plan designed to entice Fufeng Group Ltd. – an American subsidiary of the Chinese company Fufeng Group – to build a corn wet milling plant. Concerned by the environmental, financial, and other broad implications of this development scheme, Petitioners sought, through a referendum petition, to simply allow the citizens of Grand Forks to vote on whether to approve the contracts necessary for this historic project to move forward. The City Auditor rejected the Petitioners' valid referendum petition through a decision that was unsanctioned, unacceptable, and unlawful. Thus, this Court must

exercise its discretion to issue a writ of mandamus under North Dakota rules of Court 8.10(1), compelling the City Auditor to find the Petitioners' referendum petition valid. Failure to do so would permit the City of Grand Forks, through the exercise of raw power, to silence its citizens on a matter of grave public importance.

ISSUE PRESENTED

Whether the City of Grand Forks City Auditor should be compelled to certify Petitioners' Referendum Petition as sufficient pursuant to the City of Grand Forks Home Rule Charter?

RELIEF SOUGHT

Petitioners seek a writ of mandamus compelling the City Auditor to certify Petitioners' Referendum Petition as sufficient pursuant to the City of Grand Forks Home Rule Charter.

FACTUAL BACKGROUND

Beginning in 2020, the North Dakota Department of Commerce issued a Request for Proposals for a corn wet mill site selection for Fufeng. (Exhibit A – City Council Record of Vote and Staff Report at 1.) The City of Grand Forks, through the Grand Forks Region Economic Development Corporation (“EDC”) responded to the Request for Proposals and was selected for the Fufeng corn wet milling site (“Fufeng Project”) in November 2021. (*Id.* at 2.) The Grand Forks City Council describes the Fufeng Project as:

The Fufeng Corn Wet Mill is the largest proposed private investment in Grand Forks County of approximately \$700 million of which about \$352 million is true and full value for property tax purposes. Fufeng will primarily manufacture food additives, animal feed, and other products. The finished products are high valued amino acids, lysine, and threonine, which are essential ingredients in animal nutrition feed formulations.

(Ex. A. at 2.)

On February 22, 2022, the Grand Forks City Council approved, by a vote of five to one, a Development Agreement and Escrow Agreement for the Fufeng Project, along with associated

Task Order Agreements and Amendments. *See* CityofGrandForksND, Grand Forks City Council 2-22-22 at approximately time stamp 2:21:31, 3:54:10, YOUTUBE (Feb. 23, 2022), <https://www.youtube.com/watch?v=k3ud1LfooaM>. The Agreements and Amendments (hereinafter “Support Materials”) were summarized in a City of Grand Forks Staff Report for the February 22, 2022, City Council meeting (hereinafter “Staff Report”).¹ (Ex. A, at 1, 7.)

Concerned by the City Council’s vote on the Fufeng Project, a large group of citizens, including Petitioners, began circulating a referendum petition (“the Referendum Petition”) to bring the City Council’s troubling decision to Grand Forks’ citizen electors, as permitted by the City of Grand Forks Home Rule Charter (“Home Rule Charter”). (Exhibit B – Blank Petition at 1-13.) This group of concerned citizens included nearly one hundred members, who actively knocked on their neighbors’ doors, held tabling events, and attracted the support of *thousands* of their fellow citizens. Indeed, Plaintiff Benjamin Grzadzielewski alone collected nearly six hundred signatures. The Referendum Petition was, and remains, popular and widely supported by the citizen electors of Grand Forks.

The Referendum Petition opened with a request for the “resolution approving the Development Agreement/Associated Exhibits and Escrow Agreement for the Fufeng Group Ltd. Corn Wet Mill Project” to be placed on the ballot referendum, followed by the names of three members of the Committee for the Petitioners. (Ex. B at 1.) The bottom of the first page of the Referendum Petition contained a section appropriately labelled as the full text of the City Council Resolution, which encompassed the Development Agreement and Escrow Agreement for the

¹ According to the City Auditor, the Support Materials were allegedly attached to the Staff Report; in reality they are only separately available on the City Council’s website. (Exhibit D – City Attorney Memorandum on Referendum Petition at 4; Ex. A at 1, 7); *See* City of Grand Forks North Dakota, City Council, MEETING AGENDAS & MINUTES (Feb. 22, 2022, 5:30 PM to 11:58 PM), <https://www.grandforksgov.com/Home/Components/Calendar/Event/8807/459?selcat=231&toggle=allpast>.

Fufeng Project, along with the associated Task Order Agreements and Amendments. (Ex. B at 1.) A reference to the attached Staff Report was included on the bottom of page one. (*Id.*)

The second page of the Referendum Petition opened with instructions to petition signers and followed with a table containing columns for capturing petition signers' information. (*Id.* at 2.) Consecutively numbered rows in the table extended from page two to page five, allowing for fifty eligible electors to sign each petition packet. (*Id.* at 2-5.) The substance of the Referendum Petition ended with an affidavit to be signed by the Referendum Petition circulator, followed by a space for notarization. (*Id.* at 5-6.) The Referendum Petition also had attached, as pages seven through thirteen, the full text of the Staff Report. (*Id.* at 7-13.)

Less than a month after the City Council's vote, Petitioners submitted the Referendum Petition to the City Auditor on March 23, 2022, containing 5,311 signatures. (Exhibit C – City Auditor's Certification of Insufficiency at 1-2.) The Referendum Petition was required to contain signatures equal to 15% of the votes cast for Governor by Grand Forks electors, *i.e.*, 3,617. Home Rule Charter Art. IV, § 3. On April 8, 2022, the City Auditor invalidated 514 signatures due to various alleged signature issues, still placing the signature count well above the required threshold.² (*See* Ex. C at 1.) Nonetheless, the City Auditor issued a Certificate of Insufficiency, alleging five grounds on which the Referendum Petition was found insufficient:

- (1) the Referendum Petition sought to refer an administrative matter;
- (2) the Referendum Petition improperly includes two or more distinct and unrelated questions;
- (3) the Referendum Petition included extraneous matter;

² While the City Auditor's Certificate of Insufficiency additionally claims that 514 of the 5,311 signatures collected were invalid for various reasons, this is immaterial to the present petition for writ of mandamus or injunctive relief as that still left 4,797 valid signatures which is more than 15% of the votes cast for Governor in 2020, *see* Home Rule Charter Art. IV, § 3, and the City Auditor stated that such signatures would not affect its determination of insufficiency. (Ex. C at 1, 2 n. 3 (noting the required number of valid signatures would be 3,617).)

(4) the Referendum Petition did not include the full text of the matter referred, including the full text of the relevant Agreements and Amendments; and

(5) the names of the Referendum Petition committee members and the circulator affidavit did not appear on every signature page.

(Ex. C at 2.) The City Auditor justified the alleged Referendum Petition insufficiencies with an attached memorandum from the Grand Forks City Attorney (“the Memorandum”), which the City Auditor adopted and approved in its entirety.³ (Ex. C at 2.) The issues addressed in the Memorandum mirror the insufficiencies alleged by the City Auditor. (*Compare* Ex. C at 2 with Exhibit D – City Attorney Memorandum on Referendum Petition at 2.)

In nearly ten pages of analysis devoid of any mandatory authority as support, the Memorandum asserted that referenda can only be held on legislative actions, not administrative actions. (Ex. D at 17-27.) The Memorandum next suggested that the Referendum Petition contained two or more distinct questions, and thus must be found insufficient. (*Id.* at 27-32.) Hedging against the failure of the previous argument, the Memorandum next claimed that the Referendum Petition contained “extraneous matter” by selectively designating a statement on the Referendum Petition as the full text of the resolution referred, even though the full text of the resolution referred was designated as such by a bolded, capitalized heading. (*Id.* at 32-33; Ex. B at 1.) The City Attorney also claims that Referendum Petition did not contain the full text of the resolution, apparently suggesting that the entirety of the voluminous Support Materials should have been physically attached to the Referendum Petition. (Ex. D at 34-37.)

Finally, despite relying on a holding that applies to the state-level petition process and the fact that the Petitioners here used a Referendum Petition form akin to one offered and approved

³ The Memorandum and the City Auditor’s Certificate of Insufficiency were received as a single document. For ease of referencing said document, it has been split into separate documents, as presented herein.

by the Secretary of State of North Dakota,⁴ the City Attorney nonetheless determined that the Referendum Petition was insufficient because the circulator affidavit and the names of the Petitioner Committee Members were not on each and every page of the Referendum Petition. (Ex. D at 37-40; Ex. B, at 1-6.) The Memorandum bases this “each and every page” requirement on a theory that the affidavit and names of the Petitioner Committee Members cannot be attached to a petition, and thus must be on each and every page. (Ex. D at 37-38.) Even if this were the case, the affidavit and names of the Petitioner Committee Members in the Referendum Petition here are not attached; they are contained in the text of the Referendum Petition, bookending the elector’s signatures.⁵ (Exhibit E – Completed, Redacted Referendum Petition at 1-6.)

After adopting these findings, the City Auditor noted that the Petitioners had seven days to make available corrections to cure the defects alleged. (Ex. C at 3.) Given that the City Attorney’s grounds for rejection were improper, together with the fact that the alleged defects were not in any event curable in the time period provided, this deadline passed on April 15, 2022, without corrections being made. (*See id.* at 3.) Thus, to Petitioners’ knowledge, for the first time in twenty years, the City Auditor rejected a petition that had a valid, qualifying number of signatures.

STANDARD OF REVIEW

The decision to issue a writ of mandamus is left to the sound discretion of the district court. *Kalvoda v. Bismarck Pub. Sch. Dist.* #£1, 2011 ND 32, ¶ 20, 794 N.W.2d 454, 459 (citing *Frank*

⁴ See Alvin A. Jaeger, *Initiating and Referring Law in North Dakota* at 4 (May 2021), <https://vip.sos.nd.gov/pdfs/Portals/initiating.pdf> (last visited May 5, 2022); *Sample Referendum Petition*, <https://vip.sos.nd.gov/pdfs/Portals/SampleReferral.pdf> (last visited May 5, 2022).

⁵ Shockingly, and demonstrating the peculiar and unprecedented nature of the City Auditor’s actions here, numerous petition signers have reported that City of Grand Forks police officers have come onto their property to question them about the Referendum Petition. Indeed, both petition committee members and signers were required to fill out a questionnaire regarding their signatures. An exemplar questionnaire has been attached as Exhibit F. Such heavy-handed government interference in the sacred right to petition one’s government for grievances is telling of the City’s motives and should cause alarm to this Court.

v. Traynor, 1999 ND 183, ¶ 9, 600 N.W.2d 516). A writ of mandamus may be issued when the petitioner has a clear legal right to the performance of the act and when there is not a plain, speedy, and adequate remedy in the ordinary course of law. N.D.C.C. § 32–34–01; 32–34–02; *McCallum v. City Comm'rs*, 393 N.W.2d 263 (N.D.1986); *Fargo Education Ass'n v. Paulsen*, 239 N.W.2d 842 (N.D.1976). A party seeking a writ of mandamus bears the burden of demonstrating a clear legal right to the performance of the particular acts sought to be compelled by the writ. *Nagel v. City of Bismarck*, 2004 ND 9, ¶ 11, 673 N.W.2d 267, 270 (citing *Krabseth v. Moore*, 1997 ND 224, ¶ 6, 571 N.W.2d 146). Finally, mandamus is unavailable if an appeal is authorized from an adverse decision.⁶ *Id.*

ARGUMENT

A writ of mandamus “may be issued by the supreme or district courts to any inferior tribunal corporation, board, or person” to compel them to perform an act which the law requires be performed and which “the party is precluded unlawfully by such inferior tribunal, corporation, board, or person.” N.D.C.C. § 32-34-01. The “fact a court must construe a statute does not preclude the remedy of mandamus[.]” *Riemers v. Jaeger*, 2018 ND 192, ¶ 7, 916 N.W.2d 113, 116. Despite the Fufeng Project being the “largest proposed private investment in Grand Forks County”, the City of Grand Forks apparently believes that its citizens should have no say on whether this massive, unprecedented project is approved. (Ex. A at 2.) Instead, the City Auditor went beyond

⁶ Petitioners acknowledge that mandamus would be unavailable here if an administrative appeal is available from the City Auditor’s decision. *Nagel v. City of Bismarck*, 2004 ND 9, ¶ 11, 673 N.W.2d 267, 270. In that regard, Petitioners are also filing on this date a Notice of Appeal from that decision under N.D.C.C. § 28-34-01. However, should this Court determine for any reason that neither N.D.C.C. § 28–34–01 nor any other state statute permits an administrative appeal from the City Auditor’s decision, this Petition for Writ of Mandamus should be granted for the reasons detailed in this Memorandum of Law.

her legal authority in rejecting the Petitioners' Referendum Petition; the City Auditor's failure to certify the Referendum Petition thus authorizes this Court to issue a writ of mandamus.⁷ *Id.*

A. Petitioners Have a Right to Have Their Referendum Petition Deemed Sufficient Because It Complied with All Enumerated Requirements of the Home Rule Charter.

The Home Rule Charter, the governing "constitution" for the City of Grand Forks, contains only four express requirements that referendum petitions must meet to be deemed sufficient; Petitioners' Referendum Petition meet each of these. The four requirements, found in Article IV, are as follows:

1. Referendum petitions must be signed by qualified voters of the city equal to at least fifteen (15%) percent of the total votes cast in the city at the most recent gubernatorial election. ("15% requirement")
2. Each petition, whether for initiating or referring an ordinance or resolution, shall contain or have attached thereto throughout their circulation the full text of the ordinance or resolution proposed or referred. In addition, each petition shall list the names of the three electors who shall constitute the "committee for the petitioners" who shall represent and act for the petitioners. ("Full Text requirement")
3. Each petition shall also contain an affidavit signed by the circulator of the petition affirming that the signers thereto are believed by him to be qualified electors of the City of Grand Forks. ("Affidavit requirement")
4. Referendum petitions for resolutions must be filed with the City Auditor within thirty (30) days after the passage of the resolution referred. ("30-day requirement")

Home Rule Charter Art. IV §§ 3-5. First, and critically, Petitioners easily met the key requirement of obtaining the support of 15% of the electorate. They were required to submit 3,617 signatures; even taking into consideration the signatures rejected by the City Auditor, they submitted 4,797

⁷ Alternatively, this Court may construe the present petition as one for a writ of prohibition on the grounds that the City Auditor should be prevented from acting in excess of the office's jurisdiction by rejecting the Referendum Petition. *See* N.D.C.C. § 32-35-01; 32-35-02; *Old Broadway Corp. v. Backes*, 450 N.W.2d 734, 736 (N.D. 1990) ("A writ of prohibition is an extraordinary remedy to prevent an inferior body or tribunal from acting without or in excess of jurisdiction when there is not a plain, speedy, and adequate remedy in the ordinary course of law.").

signatures, more than enough to fulfill the requirement. (Ex. C. at 1.) Second, as explained in substantially more detail in Part VI.B(iv), Petitioners met the Full Text requirement, submitting the full text of the City Council resolution to be referred to the citizen electors of the City of Grand Forks and listing the name of the three electors: Joseph P. Dempsey, Petitioner Benjamin Ross Grzadzielewski, and Christopher Craig Michael Spencer. (Ex. E at 1.) Third, Petitioners met the Affidavit requirement, as evidenced by the first page of each Referendum Petition packet. (Ex. E at 1.)

Fourth, and finally, the Petitioners submitted the Referendum Petition on March 23, 2022, twenty-nine days after February 22, 2022, meeting the 30-day requirement. Thus, each of the conditions required by the Home Rule Charter were met by the Referendum Petition and the City Auditor, performing a purely ministerial function, had no discretion or authority to reject the Referendum Petition. *Tooley v. Alm*, 515 N.W.2d 137, 139 (N.D. 1994) (“Mandamus may be used to compel performance of a ministerial duty, but may not be used to compel performance of discretionary acts.”); *but see Abrahamson v. Amos*, 245 N.W.2d 888, 891 (N.D. 1976) (“The discretionary acts of public officials are not, however, beyond the scope of judicial review.”).

Further, the four non-discretionary conditions outlined above are the *only* express conditions in the Home Rule Charter, and as such, are the only conditions on which the City Auditor is allowed to determine the sufficiency of a submitted referendum petition submitted. Passing on the sufficiency based on any other condition pulled from outside the Home Rule Charter would be an abuse of the City Auditor’s limited ministerial authority and grounds for issuance of a writ of mandamus by this Court. *see also State ex rel. N. Pac. Transp. Co. v. Pub. Serv. Comm’n*, 82 N.W.2d 597, 602 (N.D. 1957) (“The office of the writ of mandamus is in general to compel the performance of mere ministerial acts prescribed by law.”). And yet, this is exactly what the City

Auditor did, adding three entirely new grounds, and misconstruing the Full Text and Affidavit requirement to impermissibly grant discretion to certify the valid Referendum Petition as insufficient. *City of Minot v. Cent. Ave. News, Inc.*, 308 N.W.2d 851, 861–62 (N.D. 1981) (“If a license applicant believes that he has been denied a license because the licensing official has introduced an impermissible element of discretion into the licensing process, the proper remedy would lie in an application for a writ of mandamus.”). Therefore, this Court must issue a writ of mandamus requiring the City Auditor to do what should have been done: certify the Referendum Petition as sufficient and refer it to the City Council.

B. The City Auditor’s Bases for Rejecting the Referendum Petition Are Incorrect, Irrelevant, Arbitrary, Capricious, and Unreasonable.

1. North Dakota has rejected a legislative/administrative split for referenda.

The City Auditor rejected Petitioners’ Referendum Petition on the grounds that a vote on the Development Agreement and Task Orders would involve an administrative issue, which allegedly cannot be the subject of a referenda. (Ex. D at 2, 17-27.) A basic case law research on North Dakota law would have revealed to the City Auditor that the North Dakota Supreme Court has specifically established that there is no legislative/administrative distinction in North Dakota and thus North Dakota state law does not recognize a prohibition on referenda regarding administrative matters. Either unaware of (or perhaps intentionally ignoring) this reality, the City Auditor relied entirely on irrelevant law of outside jurisdictions and overturned North Dakota Attorney General Opinions, which do not bind North Dakota courts. Further, the City Auditors’ decision finds no basis of support in the language of the Home Rule Charter. As such, the City Auditor is completely outside the bounds of the law in rejecting the Referendum Petition on this ground.

In *Christianson v. City of Bismarck*, the North Dakota Supreme Court rejected the

legislative and administrative dichotomy, holding that administrative measures can be referred to a state referendum. 476 N.W.2d 688, 689-91 (N.D. 1991) (“Nowhere is such a distinction [between administrative and legislative matters] made and we are reluctant to create one absent direction from the legislature.”). Moreover, the court considered one of the North Dakota Attorney General’s opinion specifically cited by the City Auditor here, and declined to follow the Attorney General’s position. *Id.* at 691; (Ex. D at 17.) The court also addressed authority outside of North Dakota, which the City Auditor cited extensively, (*Id.* at 19), and rejected those positions. *Christianson*, 476 N.W.2d at 691. Put simply, the City Auditor’s argument on this issue was based on bad, outdated law. The Supreme Court of North Dakota has directly contradicted the support cited by the City Auditor.

Because North Dakota state law does not recognize a legislative/administrative distinction, the City Auditor must find support for the certificate of insufficiency in the Grand Forks Home Rule Charter. But the Home Rule Charter makes no distinction between administrative and legislative matters regarding referenda and initiatives either. Home Rule Charter, Art. IV. That should end the discussion there.

However, assuming *in arguendo*, this Court determines that the Home Rule Charter is ambiguous as to whether there is a legislative/administrative distinction, standard tools of statutory construction show there is not. In interpreting this possible ambiguity, this Court must consider what has been intentionally omitted from the Home Rule Charter because “[i]n construing statutes and rules, the law is what is said, not what is unsaid[.]” *City of Jamestown v. Nygaard*, 965 N.W.2d 47, 50 (N.D. 2021). Here, the Home Rule Charter has enumerated certain restrictions on the types of initiatives and referenda that may be brought by citizens:

the power of initiative and referendum shall not extend to the [1] annual appropriations ordinance, or any limitation as to the annual mill levy, nor to [2]

those ordinances or resolutions implementing public projects upon which an election has previously been held, nor shall the power of initiative and referendum extend to [3] special improvement projects under which the law provides for protest procedures or to [4] special assessment projects carried out under the provisions of the North Dakota Century Code.

Home Rule Charter, Art. IV § 1.⁸ Utilizing the canon of construction *expressio unius est exclusio alterius*, the existence of these enumerated categories of issues that cannot be subject to referenda suggests the exclusion of prohibitions that are not enumerated. In other words, by listing specific categories of issues that citizens cannot vote on, the Home Rule Charter permits all other categories to be voted on. It thus follows that referral of administrative matters is not prohibited because it is not expressly forbidden by the Home Rule Charter. If the Home Rule Charter is to prohibit referenda on administrative matters, it must expressly say so. *Nygaard*, 965 N.W.2d at 50. It does not.

Further, if the Home Rule Charter truly prohibited referenda on “administrative matters,” it is telling that the City Auditor has been uninterested in enforcing any such prohibition until now. On December 2, 2016, for example, the City Auditor passed on the sufficiency of a petition that sought to convey property owned by the city pursuant to Grand Forks City Code § 2-0402. (Exhibit G - City of Grand Forks City Attorney Memorandum on Arbor Park Referendum at 1.) The City Auditor found the petition insufficient for lack of signatures, but nowhere in its mandatory explanation for rejection did the City Auditor nor the supporting memorandum raise the “administrative action” issue. (*Id.* at 1-7; Exhibit H – December 2, 2016 Arbor Park Certificate of Insufficiency at 1-2.) In fact, the supporting memorandum concluded that if the petition is certified

⁸ As evidenced by Home Rule Charter, Art. IV § 1, petitions may refer either ordinances or resolutions to the City of Grand Forks electors so long as they are not about implementing public projects *and* have not been previously subject to elections. Home Rule Charter, Art. IV § 1. Petitioners’ Referendum Petition does not trigger either of these prohibitions.

as having a sufficient number of signatures, “the City Council must consider the adoption of the proposed resolution.” (Ex. G at 6.) Thus, the only reason the December 2, 2016 petition was rejected was due to an insufficient number of signatures. (*Id.*) How a conveyance of land could not raise any concerns of being prohibited by administrative action, whereas a vote on the “largest proposed private investment in Grand Forks County” is a mystery to Petitioners. The difference in the City Auditor’s approach to the December 2, 2016 petition vs. Petitioners’ Referendum Petition reveals nothing more than an impermissible bias aimed at rejecting Petitioners’ Referendum Petition for its subject matter, not for its compliance with the Home Rule Charter.

Thus, the City Auditor rejected Petitioners’ Referendum Petition based on a legislative/administrative dichotomy that simply does not exist in North Dakota law, does not exist in the Home Rule Charter, and apparently wasn’t even recognized by the City Auditor until ruling on Petitioners’ Referendum Petition. This Court must issue Petitioners’ requested writ of mandamus so that this impermissible decision is invalidated.

2. The Referendum Petition clearly posed a single distinct question.

The Home Rule Charter is silent as to any prohibition on including two or more distinct and unrelated questions on a petition. City of Grand Forks, N.D., Home Rule Charter, Art. IV. However, the North Dakota Supreme Court, in two key cases, has held that two or more distinct and unrelated questions may not be placed on a ballot by a municipality as a single question. *See Lang v. City of Cavalier*, 228 N.W. 819, 829 (N.D. 1930); *Stern v. City of Fargo*, 122 N.W. 403, 408 (N.D. 1909). Thus, this prohibition is arguably read into the Home Rule Charter. To the extent that it is not, the City Auditor had no legal authority to reject the Referendum Petition on this ground, even if it did find that the Referendum Petition constituted two distinct and unrelated questions. If the City Auditor can weigh on this ground, it must do so under the clear and well-

established the test for whether a petition presents distinct and unrelated measures: whether the questions have a “natural or necessary connection with each other.” *Lang*, 228 N.W. at 829.

Stern is perhaps most pertinent case here, as it clearly demonstrates the dividing line between a natural or necessary connection. In *Stern*, the North Dakota Supreme Court considered a ballot measure that asked voters if bonds should be issued “for the construction of a new waterworks pumping station and filtration plant, etc., and for the purpose of installing an electric lighting plant in connection with said pumping station” 122 N.W. at 405. The *Stern* court considered the pumping station and filtration plant to be *naturally connected* as both plants dealt with water and one plant served no purpose without the other. *Id.* at 409 (“The question is, not one of connecting by words, but, identity of purpose, or can one naturally be operated without the otherwe have no doubt that a pumping station and a filter each constitute part of one purpose.”). Conversely, the *Stern* court reasoned, a voter may see a need for improved water systems, but not electrical systems, and vice versa. *Id.* Upon this reasoning, the court held that the questions relating to the water systems and the electrical systems were distinct, and therefore the ballot measure was legally invalid. *Id.* (“We have no doubt that a pumping station and a filter each constitute part of one purpose, and an “electric light plant” another purpose[.]”).

Applying the above reasoning to the Referendum Petition, it is indisputable that the questions raised by the Referendum Petition are naturally connected and not “distinct and unrelated.” Like the pumping station and filtration plant in *Stern*, the Development Agreement and the Task Order Agreements here are necessarily connected. A few examples illustrate this position: (1) the completion of the Traffic Study presented in the Task Order Agreement is a condition precedent to the construction of city infrastructure in the Development Agreement; and (2) the Stormwater Master Plan references the scope of services to be performed, which includes

providing permitting services, said permits being a condition precedent to the construction of city infrastructure in the Development Agreement.⁹ Other Task Order Agreements, if not clearly a condition precedent to the construction of city infrastructure in the Development Agreement, clearly state that their purpose is to support the Fufeng Project.¹⁰ Moreover, the City Auditor's memorandum itself recognizes the interconnectedness of the Task Order Agreements and the Development Agreement. *See* (Ex. D at 29-30.)

Here, the Task Order Agreements and the Development Agreement are inextricably linked in purpose. As outlined above, the Development Agreement fundamentally relies on the Task Order Agreements; the Development Agreement could not stand as it exists now without the existence of the Task Order Agreements. Conversely, the Task Order Agreements would have no purpose without the Development Agreement as their purpose is the direct support of that agreement. This is unlike the impermissible situation in *Stern*, which the City Auditor relies heavily upon, where the waterworks facilities and the electrical facilities could be constructed, one without the existence of the other. *Stern*, 122 N.W. at 409. The situation here is instead analogous

⁹ City of Grand Forks Development Agreement, approved Feb. 22, 2022, § 8.1.3(a), (b), <https://www.grandforksgov.com/home/showpublisheddocument/42531/637808607067730000>; City of Grand Forks Staff Report, Task Order No. 4 for City Project No. 8481: Fufeng Group Ltd Area Stormwater Master Plan Update with AE2S in the Amount of \$50,000, approved Feb. 22, 2022, p. 2, <https://www.grandforksgov.com/home/showpublisheddocument/42587/637801900137830000>; Agreement Between City of Grand Forks, N.D. and Advanced Engineering and Environmental Services, Inc. § A1.03(3), Feb. 20, 2020, <https://www.grandforksgov.com/home/showpublisheddocument/42589/637801900145200000>; City of Grand Forks Development Agreement, approved Feb. 22, 2022, § 8.1.15, <https://www.grandforksgov.com/home/showpublisheddocument/42531/637808607067730000>.

¹⁰ *E.g.* City of Grand Forks Staff Report, Approve Amendment 1 to Task Order No. 8476 with WFW for Design and Bidding Engineering Services in the amount of \$232,230 and approve any associated budget amendments for City Project No. 8476 – Sanitary Lift Station 49 and Forcemain, approved Feb. 22, 2022, p. 1, <https://www.grandforksgov.com/home/showpublisheddocument/42537/637801899526530000>; City of Grand Forks Staff Report, Approve Amendment No.1 to Task Order No.1 for City Project No. 8478: Fufeng Group Ltd Program Support Services with AE2S and their subconsultant, Black & Veatch, in the amount of \$1,147,213, approved Feb. 22, 2022, p. 1, <https://www.grandforksgov.com/home/showpublisheddocument/42541/637801899544370000>.

to the other key finding in *Stern*, i.e., that the pumping station and filtration plant were naturally connected. *Id.* The Agreements in the Referendum Petition find their purpose in one another like the pumping station and filtration plant, they are naturally, and inextricably connected.

Because the Agreements in the Referendum Petition here are likely naturally connected measures, not distinct and unrelated measures, the City Auditor's finding of insufficiency on this ground is correspondingly improper. The City Auditor's decision, based on a misunderstanding and misapplication of the law, cannot be supported and thus cannot serve as the basis for rejecting the Referendum Petition. *Gowan*, 764 N.W.2d at 427 (an official's decision must be "the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation."). In improperly rejecting the Referendum Petition that clearly has one question, or at most two necessarily connected questions, the City Auditor violated Petitioners' rights. This Court must issue a writ of mandamus to rectify this grievous injury.

3. The Referendum Petition did not include any extraneous material and, regardless, North Dakota does not recognize such a prohibition for municipalities.

The City Auditor's decision to reject the Referendum Petition on the grounds that it contains extraneous matter rests on inapplicable cases and an improper assumption by the City Auditor regarding which matter is being referred. There is no express prohibition on extraneous matter in the Home Rule Charter. *See* City of Grand Forks, N.D., Home Rule Charter, Art. IV. Therefore, the City Auditor cannot rely on the Home Rule Charter to justify her decision. That should end the discussion, as the City Auditor has no discretion to add requirements for sufficiency beyond the Home Rule Charter; the decision to do so clearly violated Petitioners' rights. Even if the City Auditor could add additional requirements beyond the Home Rule Charter, the only case law on an "extraneous matter" prohibition in referenda and initiatives comes from state courts

interpreting state laws and thus is not applicable.

The case establishing the extraneous matter prohibition on the state level, *Haugland v. Meier*, held that extraneous material not required by law to be included in a petition *cannot* be included in a petition. 335 N.W.2d 809, 811 (N.D. 1983). The primary concern of the *Haugland* court was the inclusion of “misleading information and [] mudslinging and partisan tactics.” *Id.* The *Haugland* rule, however, is clearly inapplicable to the Home Rule Charter and does not control the City Auditor’s decision. First, *Haugland* applies to Article III of the North Dakota State Constitution, *id.*, and the North Dakota Supreme Court has held that the right to initiative and referendum granted by Article III does not apply to municipalities. *Pelkey v. City of Fargo*, 453 N.W.2d 801, 804 (N.D. 1990) (“it is clear that the power reserved to the people to initiate and refer laws applies only to state laws, not local laws.”). This means that *Haugland* does not, and cannot, control the City Auditor’s decision. Additionally, there is no analogous provision in the Home Rule Charter that equates to the procedural process the *Haugland* court reviewed in the North Dakota State Constitution. *Compare Haugland*, 335 N.W.2d at 811 *with* City of Grand Forks, N.D., Home Rule Charter, Art. IV. Finally, the *Haugland* holding has only been applied to the North Dakota Secretary of State’s approval of the *form* of a petition *before* the petition is circulated to electors, not the *sufficiency* of a petition *after* it has been circulated. *See* N.D. Const. art. III, § 2 (providing that the Secretary of State must approve the form of a petition before circulation). Therefore, the cases cited by the City Auditor provide no legal weight to the City Auditor’s finding of insufficiency on this issue.¹¹

Additionally, the City Auditor’s argument on this point assumed that the Referendum Petition seeks to have only the Development Agreement on the ballot and that the Task Order

¹¹ The second case cited by the City Auditor on this issue is analogous to *Haugland*. *Compare Haugland v. Meier*, 335 N.W.2d 809 (N.D. 1983) *with Lips v. Meier*, 336 N.W.2d 346 (N.D. 1983).

Agreements are extraneous matter. (Ex. D at 32-33.) This willfully mischaracterized the Referendum Petition. The Home Rule Charter states that a petition, “shall contain or have attached thereto throughout their circulation the full text of the . . . resolution proposed or referred.” Home Rule Charter, Art. IV § 4. The Referendum Petition, under a bold heading titled “FULL TEXT OF THE GRAND FORKS CITY COUNCIL RESOLUTION,” contained both the Development Agreement and the Task Order Agreements. (Ex. E at 1.) Thus, the Referendum Petition clearly contained the language of what it was actually asking City of Grand Forks electors to vote on: the approval of the Development Agreement and the Task Order Agreements. Indeed, the Home Rule Charter requires the full text to be of the resolution referred. If the Referendum Petition did not include both these Agreements, the City Auditor would have found the Referendum Petition to be insufficient. The Referendum Petition contained clear labels containing the actual matters to be voted on which cannot possibly be interpreted as “extraneous”. It was unreasonable of the City Auditor to supply any other interpretation.

There is no case law that supports finding a municipal Referendum Petition insufficient on the grounds that it contains extraneous material and no language in the Home Rule Charter supports such a decision. Further, the Referendum Petition did not include any extraneous material, but rather the very material needed to ensure compliance with the Home Rule Charter. Thus, the City Auditor’s finding of insufficiency on this ground was yet again beyond her discretion and impermissible under the law. Therefore, because the City Auditor had no authority to reject the Referendum Petition on this ground, this Court must issue Petitioners’ requested writ of mandamus.

4. The Referendum Petition contained the full text of the City Council’s resolution on the Agreements.

The Home Rule Charter states that each petition shall contain or have attached the full text

of the resolution referred. Petitioners have complied with this requirement under any reasonable interpretation. Home Rule Charter, Art. IV§ 4. Ignoring this reality, the City Auditor reached for irrelevant and inapplicable state law on state constitutional ballot petitions to impermissibly reject the Petitioners' Referendum Petition.

The City Auditor based her erroneous decision on *Haugen v. Jaeger*, 948 N.W.2d 1 (N.D. 2020), which in turn relied on *Dyer v. Hall*, 199 N.W. 754 (N.D. 1924). First, in *Dyer*, the court interpreted the North Dakota State Constitution's "full text of the measure" provision, which requires the same to be contained in a petition. *Id.* The *Dyer* court determined that a proposed constitutional referendum must be completely and fully set out in a petition, and the text of the measure cannot be incorporated by reference. *Id.* at 756-57. In *Haugen*, the court determined that a proposed ballot initiative was insufficient where it incorporated a state statute into the resolution. 948 N.W.2d at 4. However, the *Haugen* court ruled this way because of the particular concerns surrounding constitutions: statutes might change while the state constitution does not, potentially causing issues. *Id.* (noting the same was true for *Dyer*). Thus, *Haugen* and *Dyer* are completely irrelevant to the "full text" of the Home Rule Charter; if the Referendum Petition was to modify the Home Rule Charter, the municipal equivalent to a constitution, then they might have some applicability. *Id.* Patently, the Referendum Petition had nothing to do with the Home Rule Charter.

Further, even if the *Dyer/Haugen* rules were applicable, they could not be relied upon by the City Auditor. The North Dakota Supreme Court has expressly held that the section of the North Dakota State Constitution relating to initiatives and referenda, which *Haugen* and *Dyer* rely on, "applies only to state laws, not local laws." *Pelkey*, 453 N.W.2d at 804; *see also Dyer*, 199 N.W. at 756; *Haugen*, 948 N.W.2d at 3-4. Thus, any reliance on *Haugen* and *Dyer* by the City Auditor is impermissible in construing the Home Rule Charter and, as that was the sole justification for the

City Auditor's decision on this ground, it must be rejected.

Even if the City Auditor could somehow rely on *Haugen* and *Dyer*, those cases do not support the City Auditor's determination. The *Dyer* court stated that the purpose of the full-text requirement was to "obviate all uncertainty as to the subject-matter dealt with in the Constitution." 199 N.W. at 757. Thus, the "full text" requirement is not a rigid technical requirement that every page of a particular resolution be attached to a petition (a construction totally unrealistic and unnecessary in the area of massive omnibus bills and the widespread availability of internet accessibility), but rather a provision requiring the subject matter of a proposed referendum be clear. This understanding was bolstered by *Anderson*, where the North Dakota Supreme Court stated that a proposed measure will contain the "full text" of a measure when it contains the "full expression of the legislative will." *Anderson v. Byrne*, 242 N.W. 687, 691 (N.D. 1932). The "full expression" is not the same as "the exact text of the legislative will", it is instead a reflection that a petition must include enough information to show what the legislative action actually was. Petitioners met this requirement.

In this case, the Referendum Petition contained the full text of the City Council resolution approving the Development Agreement and the Task Orders, using the exact names used by the City Council in its February 22, 2022 vote. (*Compare* Ex. E *with* Ex. A at 1.) It would be absurd to construe the full text requirement of the Home Rule Charter as requiring the full text of the Development Agreement and the Task Orders – which total hundreds of pages – instead of the full text of the City Council resolution at issue. Yet this is exactly what the City Auditor has done. Even though the Petitioners included the full text of the City Council resolution, thus showing the full expression of the legislative will and making the subject matter of the Referendum Petition clear, the City Auditor has read an extra requirement into the Home Rule Charter to justify the

rejection of the Referendum Petition. This extrajudicial reasoning cannot be allowed to stand. Petitioners' Referendum Petition included the full text of the City Council resolution on the Development Agreement and the Task Orders, thus fulfilling the Home Rule Charter's full text requirement. Accordingly, this Court must issue Petitioners' requested petition for writ of mandamus.

5. The Referendum Petition was not required to present an affidavit of the circulator or names of committee members on every page.

The City Auditor relied exclusively on *Dawson v. Meier*, 78 N.W.2d 420, 422 (N.D. 1956) to justify the purported "each page of the petition" requirements. However, an objective analysis of *Dawson*, along with the North Dakota Secretary of State's interpretation of comparable state law, demonstrates that the "each page of each petition" requirement is not required by the Home Rule Charter. The City Auditor's rejection of Referendum Petition signatures on this basis was therefore improper and thus cannot serve as a basis to find the Referendum Petition insufficient.

The Home Rule Charter states that "each petition" must contain an affidavit signed by the circulator of that petition affirming that the individuals signing the petition is believed to be a qualified elector of Grand Forks. Home Rule Charter, Art. IV § 4. The same section of the Home Rule Charter similarly states that "each petition" must include the names of the committee for the petitioners (three electors acting for and representing the petitioners). *Id.* Unsurprisingly, this rule has not been construed by North Dakota courts. Critical to this issue is the interpretation of the phrase "each petition." The City Auditor, without any valid authority to do so, took the position that "each petition" means each *page* of a petition. (Ex. D at 2.) This position is clearly erroneous and impermissible under existing law. The rational, and only possible interpretation of the "each petition" provision is that it means the whole petition, not each page of each petition.

Before turning to case law, a standard use of textualism demonstrates the incongruity of

the City Auditor’s position. First, if the Home Rule Charter meant that each page of a petition must have the affidavit and committee names on it, it would say so. It does not. Home Rule Charter, Art. IV § 4. Further, Article IV lays out the requirements of a petition as a whole and thus it stands to reason that references to a “petition” is meant to modify an entire petition, not the specific pages of a petition. Second, the City Auditor’s decision to view the affidavit and committee names as “attachments” is no more sustainable. *See Wilkens v. Westby*, 931 N.W.2d 229, 233-34 (N.D. 2019) (when a word is not defined in a law, dictionary definitions “may provide a reliable starting point” for understanding the meaning of a word). The Home Rule Charter does not define “attach” or “attachment”. But definitions of “attach” necessarily imply fastening *separate* things together.¹² Because the affidavit and committee names here were a part of the text of the Referendum Petition and not separately fastened to it, (*see generally* Ex. E), they cannot reasonably be considered “attachments.” Further, there is no reasonable logic to support the concept that the affidavit and committee names being on every page rather than on the first and last page, would make the affidavit and committee names any more or less of an attachment. The City Auditor’s theory that excluding the attachment of the affidavit and committee names means, therefore, that they must be on every page, had no basis in logic or the law.

The City Auditor’s next argument is likewise inapplicable and misapplied. The City Auditor relied on *Dawson v. Meier*, which states:

Where separate sheets of paper on which have been written dates, names of persons, and names of towns or cities are attached to copies of the petition by staples and there is nothing on the sheets to indicate by whom or when they were so attached

¹² *E.g.*, “Fasten (a related document) to another” *Definition of Attach in English*, Oxford English Dictionary (last visited Apr. 20, 2022), <https://www.lexico.com/en/definition/attach>; “to fasten or join one thing to another” *Attach Definitions and Synonyms*, MacMillan Dictionary (last visited Apr. 20, 2022), https://www.macmillandictionary.com/dictionary/american/attach#attach_4; “If you attach something to an object, you join it or fasten it to the object.” *Definition of ‘Attach’*, Collins Dictionary (last visited Apr. 20, 2022), <https://www.collinsdictionary.com/dictionary/english/attach>.

and they are not otherwise identified as being a part of the petition, the signatures on such sheets will not be counted.

78 N.W.2d 420, 422 (N.D. 1956). As a preliminary matter, the *Dawson* court was interpreting a *state statute* pertaining to *state elections*, not municipal elections. See *Dawson*, 78 N.W.2d at 423; N.D.C.C. § 16.1-01-09. In other words, *Dawson* does not directly apply to the Grand Forks Home Rule Charter and the City Auditor had no right or authority to rely on it to interpret the Grand Forks Home Rule Charter. See *Pelkey*, 453 N.W.2d at 804 (the constitutional basis for N.D. Century Code, Chapter 16.1-01-09 does not apply to municipal ordinances). Assuming, *in arguendo*, the City Auditor could rely on *Dawson*, there is at least some merit in comparing N.D.C.C. § 16.1-01-09 and the Home Rule Charter as they have analogous language. Compare *Dawson*, 78 N.W.2d at 423-24 with Home Rule Charter, Art. IV § 4.

Here, it becomes clear that the City Auditor completely and fatally misapplies *Dawson*. First, the *Dawson* opinion does not indicate the form that the rejected petition pages took: were they handwritten, copies of blank petition pages, etc.? Without access to the appellate record, it is not clear. Regardless, a close reading of *Dawson* shows that the “each page” rule, to the extent one even exists, only applies when pages that had no means of identifying the circulators were *attached* to a petition. 78 N.W.2d at 425 (“Four copies of the petition have attached to them by staples sheets of paper on which have been written dates, names of persons, and names of towns or cities in North Dakota.”). In fact, the *Dawson* court never stated that each and every page of a petition must contain an affidavit or committee member names. *Id.* at 420. Reading such a rule into *Dawson* is nothing more than legal wish casting on behalf of the City Auditor, willing the case to say something that it does not. Rather, the *Dawson* court lamented that “[t]here is nothing on the sheets to indicate by whom they were circulated or by whom or when they were stapled to copies of the petition bearing the affidavit of the circulator” *Id.* at 420, 425 (emphasis added). Thus,

Dawson clearly stands for the rule that it must be clear who circulated all portions of a petition and to which signatures the affidavit pertains. In other words, pages that can clearly be attributed to a circulator and affidavit, e.g., by consecutive signature numbering or page numbering, should be considered valid. *See id.* at 425.

The City Auditor erred in relying on state courts interpretations of state law to guide her application of municipal law and should not have cherry-picked precedent to support the certificate of insufficiency. Further, the reasonable and obvious reading of the *Dawson* rule outlined above, to the extent that one even exists, has recently been reinforced by the North Dakota Secretary of State. *See* Alvin A. Jaeger, *Initiating and Referring Law in North Dakota* (May 2021) at p. 4, <https://vip.sos.nd.gov/pdfs/Portals/initiating.pdf>; *Sample Referendum Petition* (last visited Apr. 20, 2022), <https://vip.sos.nd.gov/pdfs/Portals/SampleReferral.pdf>. The North Dakota Secretary of State offers a guide for initiating and referring law in North Dakota: such state petitions are directly governed by *Dawson* and the state statute interpreted in *Dawson. Id.* This guide offers an exemplar petition. *Id.* Notably, this exemplar petition does not adhere to the City Auditor’s “each page” rule, but rather matches the form of the Referendum Petition. *Compare id. with* (Ex. E). Moreover, petitions matching the Referendum Petition’s form have been approved by the Secretary of State and ultimately made it on the ballot, successfully amending the North Dakota Century Code. *See Initiative Petition to the Secretary of State, State of North Dakota* (last visited Apr. 20, 2022), <https://vip.sos.nd.gov/pdfs/Measures%20Info/Petitions%20Being%20Circulated/Establish%20personalized%20vehicle%20plates%20for%20volunteer%20emergency%20responders.pdf>; N.D.C.C. § 39-04-10.16(2). Thus, if North Dakota state law could appropriately be considered by the City Auditor, it can only compel a decision that the “each page” interpretation of the City Auditor is impermissible.

The City Auditor's flawed analysis on this issue, along with the Secretary of State's interpretation of the affidavit and committee name requirements, clearly shows that the City Auditor improperly rejected the Referendum Petition on this ground.¹³ Because the City Auditor had no legal authority to reject the Referendum Petition on the basis that the affidavit and names of the petition committee must be on each page, this Court must issue a writ of mandamus compelling the certification of the Referendum Petition.

CONCLUSION

The City Auditor's decision was unsanctioned, unsupportable, and unacceptable. It was also arbitrary, capricious, and contrary to law. The Referendum Petition fulfilled every requirement of the Grand Forks City Charter, and thus the City Auditor had no discretion to reject it. This is especially so when the City Auditor relied on outside jurisdictions and inapplicable state law to justify the rejection. As such, this Court must correct the City Auditor's grievous error and issue a writ of mandamus compelling the City Auditor to issue a certificate of sufficiency to the City of Grand Forks City Council, so that the people of the City of Grand Forks can exercise their right to be heard on this critical issue.

¹³ An important angle this Court should be aware of is that the Home Rule Charter automatically suspends any resolution referred to the voters under Article IV until "thirty (30) have elapsed after the city election on the referral" or "if the *petitions are deemed to be insufficient.*" Home Rule Charter, Art. IV § 7(a), (d). In other words, the entire Fufeng Project would grind to a halt until the Referendum Petition was voted on by the citizen electors of Grand Forks unless the City Auditor ruled it insufficient. Thus, if the City Auditor was invested in ensuring the success of the Fufeng Project, the City Auditor had a strong incentive to rule the Referendum Petition insufficient, even if there were no legal grounds granted in the Home Rule Charter to do so.

Dated this 6th day of May 2022.

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