

## NEBRASKA

### CONSTITUTIONAL AND STATUTORY PROVISIONS

#### **Nebraska Constitution**

- NEB. CONST. art. 11, §2. City of 5,000 may frame charter; procedure.

Any city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state....

- NEB. CONST. art. 11, §5. Charter of city of 100,000; home rule charter authorized.

The charter of any city having a population of more than one hundred thousand (100,000) inhabitants may be adopted as the home rule charter of such city by a majority vote of the qualified electors of such city voting upon the question, and when so adopted may thereafter be changed or amended as provided in Section 4 of this article, subject to the Constitution and laws of the state.

#### **Nebraska Statutes**

- NEB. REV. STAT. § 14-102.1 (2017). Cities of the metropolitan class; ordinances, bylaws, rules, regulations, and resolutions; powers.

A city of the metropolitan class may make all such ordinances, bylaws, rules, regulations, and resolutions not inconsistent with the general laws of the state, as may be necessary or expedient, in addition to the special powers otherwise granted by law, for maintaining the peace, good government, and welfare of the city and for preserving order, securing persons or property from violence, danger, and destruction, for protecting public and private property, for promoting the public health, safety, convenience, comfort, morals, and general interests, and welfare of the inhabitants of the city.

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#### HOME RULE STRUCTURE

In 1912, Nebraska passed article 11, § 2, allowing cities with more than 5,000 to adopt a charter for their own governments. Eight years later, in 1920, Nebraska adopted § 5 of the same article that allows cities with more than 100,000 to adopt a “home-rule” charter. Only two cities, Lincoln and Omaha, have populations of greater than 100,000 and each has adopted a home-rule

charter.<sup>1</sup> No other city has its own charter to avail itself of the presumably more limited powers under article 11, § 2.<sup>2</sup> Nebraska statutes delegate to all cities “of the metropolitan class,” whether they have a charter or not, something like the police power. “Metropolitan class” includes those cities with more than 300,000, which is only Omaha.<sup>3</sup>

Pursuant to the Nebraska Constitution, home-rule charter cities have the “authority to exercise all powers of local self-government.”<sup>4</sup> Home rule charters “must be consistent with and subject to the Constitution and laws of th[e] state.”<sup>5</sup> An ordinance is inconsistent with a state statute if it permits or licenses that which a statute forbids or prohibits.<sup>6</sup> General laws of statewide concern will preempt any conflicting provision of a city home rule charter.<sup>7</sup> For example, the Nebraska courts have held that labor relations and practices are matters of statewide concern, and state legislation in those areas preempts any provisions in a home rule charter.<sup>8</sup>

Under Nebraska law, the state may also preempt local action through field preemption and “a city may not legislate in a field that the state has preempted. . . .”<sup>9</sup> The state may preempt a municipal law or charter in a field by expressly stating that no municipality or other governmental unit shall make any law, ordinance, or regulation in that area.<sup>10</sup>

#### IMMUNITY FROM STATE PREEMPTION

The Nebraska courts have repeatedly said that in “matters of strictly local concern,” a home-rule city’s ordinance or charter provision trumps state law.<sup>11</sup> Although this principle is oft-quoted in

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<sup>1</sup> Robert Blair, *Nebraska*, in *Political Encyclopedia of U.S. States & Regions* 597 (Donald P. Haider Markel ed. 2008).

<sup>2</sup> See A.B. Winter, *Nebraska Home Rule: The Record and Some Recommendations*, 59 NEB. L. REV. 601, 602 (1980) (noting that Grand Island took advantage of the 1912 constitutional provision by adopting a charter in 1928 but abandoned it in 1963). Interestingly, and perhaps because Grand Island dropped its charter, thus mooting the point, the case law in Nebraska does not methodically distinguish between the powers of a city under article 11, § 2, and those under article 11, § 5. Indeed, some cases refer to charters adopted under the former as “home-rule charters.” *E.g.*, *Nagle v. City of Grand Island*, 12 N.W.2d 540, 541 (Neb. 1943) (“Grand Island adopted a home rule charter in 1928 . . . under the provisions of section 2, art. XI of the Constitution . . .”).

<sup>3</sup> NEB. REV. STAT. § 14-101 (2017); *see also* *State v. Belitz*, 278 N.W.2d 769, 774 (Neb. 1979) (citing Omaha’s special powers under this statutory provision).

<sup>4</sup> *Mollner v. City of Omaha*, 98 N.W.2d 33, 40 (Neb. 1959).

<sup>5</sup> NEB. CONST. art. 11, § 2; *Retired City Civilian Employees Club of City of Omaha v. City of Omaha Employees’ Retirement System*, 260 N.W.2d 472, 474-75 (Neb. 1977).

<sup>6</sup> *State v. Salisbury*, 579 N.W.2d 570, 574 (Neb. 1998) (citing *Cincinnati v. Thompson*, 643 N.E.2d 1157 (Ohio 1994); *Richfield City v. Walker*, 790 P.2d 87 (Utah 1990)).

<sup>7</sup> *Nagle*, 12 N.W.2d at 541.

<sup>8</sup> *Midwest Employers Council, Inc. v. City of Omaha*, 131 N.W.2d 609, 615-16 (Neb. 1964).

<sup>9</sup> *Salisbury*, 579 N.W.2d at 573.

<sup>10</sup> *Midtown Palace, Inc. v. City of Omaha*, 229 N.W.2d 56, 58 (Neb. 1975) (holding that the state preempted the field of the regulation of obscenity where statute specifically stated that no municipality or other governmental unit shall make any law, ordinance, or regulation in that area).

<sup>11</sup> *In re App. of Lincoln Elec. Sys.*, 655 N.W.2d 363, 374 (Neb. 2003) (“[A] provision of a home rule charter must yield to a conflicting state statute, unless the provision relates to a matter of ‘strictly municipal’ concern”); *Nagle*, 12 N.W.2d at 541 (“[W]here the legislative act deals with a strictly local municipal concern, it can have no application

dicta, the Nebraska Supreme Court has only grappled with it extensively in one case: *Jacobberger v. Terry*.<sup>12</sup> In *Jacobberger*, the court upheld a state law requiring cities to elect their council members from districts rather than on an at-large basis even though it conflicted with an Omaha charter provision. Exploring the statute’s legislative history, the court took note of the sponsors’—including the well-known senator Ernie Chambers<sup>13</sup>—goal that district representation would ensure more “proportionate” representation of “socioeconomic” groups on city councils.<sup>14</sup> While reserving the ultimate authority to decide what is or is not a “statewide interest” sufficient to override a city charter’s structural provision, the court deferred to the legislature’s decision because it sought “to insure the fundamental right to vote and the right to proportionate representation,” which is a matter that transcends “local concern.”<sup>15</sup>

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to a city which has adopted a home rule charter.”) (quoting *Axberg v. City of Lincoln*, 2 N.W.2d 613, 614 (Neb. 1942)); *Consumers’ Coal Co. v. City of Lincoln*, 189 N.W. 643, 643 (Neb. 1922)(“The purpose of the constitutional provision is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter.”).

<sup>12</sup> 320 N.W.2d 903 (Neb. 1992).

<sup>13</sup> John Eligon, *Lawmaking Maverick Resumes Course in Nebraska*, N.Y. TIMES (Jan. 9, 2013), <http://www.nytimes.com/2013/01/10/us/ernie-chambers-nebraska-senator-returns-to-capitol.html>.

<sup>14</sup> *Jacobberger*, 320 N.W.2d at 905–06.

<sup>15</sup> *Id.* at 907.