

N.D.A.G. Letter to Vogelpohl (Nov. 10, 1992)

November 10, 1992

Mr. Steven L. Vogelpohl
Lincoln City Attorney
Beauclair & Cook
PO Box 2575
Bismarck, ND 58502-2575

Dear Mr. Vogelpohl:

Thank you for your August 31, 1992, letter asking several questions regarding N.D.C.C. § 40-08-08 regarding a petition for a special election to fill a vacancy on a chapter 40-08 city council. Your questions may be summarized as follows:

1. How many signatures are required on a petition calling for a special election to fill a vacancy on a chapter 40-08 city council?
2. What is the effect of the requests for withdrawal of certain names from the petition?
3. If the present petition is not sufficient to obligate the city council to call a special election and a sufficient petition is later received, is the city council obligated to call a special election?
4. If the present petition is not sufficient to obligate the city council to call a special election, and if the city calls or must hold a special city election for other reasons prior to the next general city election, must the city council office filled by appointment be filled by vote of the electorate at such special city election?

N.D.C.C. § 40-08-08 states:

40-08-08. Vacancies on council - How filled. If a vacancy occurs in a city council office by death, resignation, or otherwise, the city council may call a special city election to fill the vacancy for the unexpired term, or may, after fifteen days of the date of the vacancy appoint a person from the ward in which the council member previously holding was elected or appointed to fill the vacancy until the next city election, at which election the unexpired term must be filled. Upon petition of five percent of the qualified electors of the ward, as determined by the total number of votes cast in that ward in the last general election, the council shall call a special election to fill a vacancy occurring more than six months before the next city election, if the petition has been submitted within fifteen days and before four p.m. of the fifteenth day of the date of the vacancy or of the vacancy being

filled by appointment. If the petition is mailed it must be in the possession of the council or its representative before four p.m. on the fifteenth day after the vacancy occurs or after the vacancy was filled by appointment.

Your first question is addressed by the second sentence in N.D.C.C. § 40-08-08. If a general or special city election is not scheduled to take place within six months of the occurrence of a vacancy, the council shall call a special election if it receives a petition signed by "five percent of the qualified electors of the ward, as determined by the total number of votes cast in that ward in the last general election." N.D.C.C. § 40-08-08. Several parts of this quoted sentence require interpretation. First, does general election mean general city election or general statewide election? Second, since city council members in the city of Lincoln are elected at large and not by ward, how should the sentence be interpreted? Finally, what is the meaning of the phrase, "the total number of votes cast"?

Although it is somewhat unclear whether the term "general election" as used in N.D.C.C. § 40-08-08 refers to the general statewide election or the general city election, I believe the latter interpretation is more reasonable. N.D.C.C. § 40-08-08 refers solely to city elections of city officials. In my opinion the use of special election and general election within this section refers to a special or general city election and not to statewide elections. Thus, it is my opinion that the phrase "general election" in N.D.C.C. § 40-08-08 refers to the last general city election occurring in April of every even-numbered year. (After January 1, 1994, regular city elections will occur in June of every even numbered year. See Note following N.D.C.C. § 40-21-03.)

The second issue raised by your first question is, since city council members in the city of Lincoln are elected at large and not by ward, how should the second sentence of N.D.C.C. § 40-08-08 be interpreted? City council members may be voted for at large and not by wards. N.D.C.C. §§ 40-08-04 and 40-08-04.2. If city council members are voted for at large and not by ward, the only reasonable interpretation of "ward", as used in the second sentence of N.D.C.C. § 40-08-08, is that it means the election district from which council members are elected. Thus, it is my opinion that if city council members are voted for at large and not by ward, "ward", as that term is used in the second sentence of N.D.C.C. § 40-08-08, means the entire city.

Finally, the third issue raised by your first question is in regard to the meaning of "the total number of votes cast," as that phrase is used in the second sentence of N.D.C.C. § 40-08-08. The five percent needed for the petition is five percent of the qualified electors "as determined by the total number of votes cast." Consequently the number of votes cast would have to refer to the number of qualified voters who voted in the last general city election. Otherwise the "number of votes cast" would not necessarily relate to the number of qualified electors. If the phrase meant literally the total number of votes cast, the percentage of qualified electors required to sign a petition would depend upon the number of issues and offices being voted on at the general city election. Such a result would be arbitrary and unreasonable. In enacting a statute, it is presumed that a just and reasonable result is intended. N.D.C.C. § 1-02-38. Thus, it is my opinion that "the total number of

votes cast" means the total number of voters voting in the last general city election.

Your second question is in regard to the effect of the requests for withdrawal of names from the petition received from certain qualified electors who had signed the petition. The North Dakota Supreme Court has stated the rules in North Dakota governing the withdrawal of names from petitions:

- (1) [W]here the statute or constitutional provision requires notice and a hearing regarding a petition, the petitioners are entitled to withdraw their names until the notice and hearing on the petition are completed (the reason being that the governing body acquires jurisdiction only after the notice and hearing are completed), and (2) where the statute or constitutional provision contains no provision for notice or hearing and no provision for the withdrawal of signatures from a petition, the governing body acquires jurisdiction at the time the petition is filed with the proper authority and thereafter any withdrawal of signatures from a petition filed with the appropriate authority is of no effect.

Judson PTO v. New Salem School Board, 262 N.W.2d 502, 507 (N.D. 1978) (citations and footnote omitted). N.D.C.C. § 40-08-08 contains no provision for notice or hearing on the petition and makes no reference to withdrawals of signatures from the petition. Thus, the city council acquired jurisdiction when the petition requesting that a special election be held was timely filed with the city council. After that date no names could be withdrawn from the petition.

In answer to your third question, in order for a petition to be effective, it must have been submitted within the time period specified in N.D.C.C. § 40-08-08. Thus, if the present petition is not sufficient to obligate the city council to call a special election and a sufficient petition is later received outside of the time limit specified in N.D.C.C. § 40-08-08, it is my opinion that the city council would not be obligated to call a special election.

Finally, in response to your fourth question, N.D.C.C. § 40-08-08 clearly indicates that a council member appointed to fill a vacancy holds that office "until the next city election." The next city election may be either a special election or the general city election. See September 14, 1984, Attorney General's opinion to John D. Hovey, City Attorney for the City of Maddock. Thus, it is my opinion that if the present petition is not sufficient to obligate the city council to call a special election, and if the city calls or must hold a special city election for other reasons prior to the next general city election, the city council office filled by appointment must be filled by vote of the electorate at the special city election.

Sincerely,

Nicholas J. Spaeth

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