LETTER OPINION
93-L-78

March 11, 1993

Mr. Douglas G. Manbeck
Nelson County State's Attorney
P.O. Box 533
Lakota, ND 58344-0533

Dear Mr. Manbeck:

Thank you for your January 4, 1993, letter regarding school district restructuring, conflict of interest of public officials, and solid waste management.

Concerning school district restructuring, you state five contiguous districts out of seven districts in a consortium voted in favor of reorganizing under North Dakota Century Code (N.D.C.C.) ch. 15-27.6. Those five districts have developed another reorganization plan and tax levy under N.D.C.C. § 15-27.6-10(3). The tax levy adopted using this process is different than the levy appearing on the ballot concerning the seven district consortium. School board members for the new reorganized district will be elected from specific geographical areas within the new district. You ask:

1. Must the voters in the five districts who voted in favor of reorganization vote on the issue of the new tax levy devised under N.D.C.C. § 15-27.6-10(3)?

2. Must the voters in the five districts who voted in favor of reorganization vote on the new district reorganization plan devised after the vote in the seven district consortium?

3. Does a mill levy approved by voters in a reorganization proposal in excess of statutory mill limitations continue indefinitely?

4. Does the one-person one-vote rule apply where board members in a newly reorganized school district will be elected from specific geographical areas within the new district?

In pertinent part, N.D.C.C. § 15-27.6-08 provides:

> ". . . The interim district board shall submit the proposed tax levy to the county committee and the state board as part of the reorganization proposal, and if approved by the county committee and the state committee, the proposed tax levy must be included as part of the proposal and submitted to the electors of the proposed new district. Tax levies submitted as part of a reorganization proposal that is approved are not subject to mill levy limitations provided by law. . . ."

This language is very similar to language on the same subject in N.D.C.C. § 15-27.3-06. N.D.C.C. § 15-27.6-08 allows the voters to approve a reorganization plan and, in the same vote, authorize a mill levy in excess of the limits provided by law in N.D.C.C. ch. 57-15.

After the procedures of N.D.C.C. § 15-27.3-06 were followed, an election was held to determine whether a reorganized district should be created from the seven consortium member districts. Letter from Attorney General Nicholas J. Spaeth to Douglas G. Manbeck (November 2, 1992). In this case, the consortium proposition did not pass in all districts. The law provides if the majority of votes in each district taken individually does not favor the reorganization, those contiguous districts which receive a favorable majority vote must proceed to form a new district if they would otherwise qualify under N.D.C.C. § 15-27.6-11. (N.D.C.C. § 15-27.6-10(3).) N.D.C.C. § 15-27.6-10(3) requires the members of the interim board representing the districts that approved the reorganization, under certain circumstances, to make a determination and adjustment of property, assets, debts, and liabilities, and make another determination of tax levy and submit those matters to the state board for approval. If the state board approves, the county superintendent of schools performs the tasks necessary to form a new district. N.D.C.C. § 15-27.6-10 does not authorize the interim board members representing the districts which approved reorganization, to levy a tax in excess of the mill levy limits otherwise provided by law. That authority only exists where the county committee, the state board, and the voters act as provided in N.D.C.C. § 15-27.6-08 and § 15-27.3-06. Therefore, it is my opinion that if the tax levy decided upon by the interim board members under N.D.C.C. § 15-27.6-10(3) is within statutory mill levylimitations, an additional vote is not required to authorize the tax. However, if the tax is to be higher than the mill levy limitations provided by law, another vote is required. It should be noted, however, that should Senate Bill 2528, currently before the Fifty-third Legislative Assembly, pass, it could affect this opinion. I have enclosed a copy of that bill as it is pending before the House of Representatives in its second engrossment.

N.D.C.C. § 15-27.6-10(3) authorizes the interim board members representing the districts that approved the original proposal to submit to the state board a new proposal. If the state board approves the proposal, the county superintendent is to organize and establish the districts. No new election is referenced. It is therefore my opinion that no vote is required to approve the revised proposal devised under N.D.C.C. § 15-27.6-10(3), unless the proposed tax levy requires submission for a vote as discussed above.

If voters approve a tax levy under N.D.C.C. § 15-27.6-08 (or § 15-27.3-06), they may approve a specific levy above the levy otherwise required by law. There are some statutes that authorize taxing districts to raise their levy without voter approval such as portions of N.D.C.C. § 57-15-14 and 1991 N.D. Sess. Laws, ch. 653, but they relate to specific percentage increases. If a reorganized school district votes a specific levy above the statutory limit, the school district may take advantage of the percentage increases allowed by law. An unlimited mill levy authority is not created, however, unless the procedures provided under N.D.C.C. § 57-15-14 are followed. It is my opinion that the mill levy approved by voters in a reorganization proposal in excess of statutory limitations under N.D.C.C. § 57-15-14 continues until changed according to law.

A school district restructuring under N.D.C.C. ch. 15-27.6 must follow certain sections of N.D.C.C. ch. 15-27.3, including sections 15-27.3-12 and 15-27.3-19. N.D.C.C. § 15-27.3-12 requires that the first election for school board members in a reorganized district be conducted under N.D.C.C. ch. 15-28. Where rural membership on a school board is at issue, N.D.C.C. § 15-28-02 states that voters of a school district, whether or not it is reorganized, are entitled to vote for each candidate to the school board whenever the variance in population between any of the geographic voting areas of the district exceeds ten percent.

N.D.C.C. § 15-27.3-19 allows the school board of a reorganized school district to convert the voting system in the district to at-large voting by resolution of the board, instead of an election, whenever there is a population variance of greater than ten percent between any of the geographic voting areas of the district.

Both N.D.C.C. §§ 15-27.3-19 and 15-28-02 were amended in 1987 to include the language concerning voting areas and voting at-large if the requisite population variance existed. Under the equal protection clause of the Fourteenth Amendment to the United States Constitution, substantial equality in population among voting districts or units in political subdivisions is required. See 25 Am. Jur.2d, Elections, § 31 (1966). Reynolds v. Sims, 377 U.S. 533, 12 L. Ed.2d 506, 84 S. Ct. 1362 (1964). This requirement is referred to as the "one person-one vote" rule.

The 1987 amendments to N.D.C.C. §§ 15-27.3-19 and 15-28-02 were in response to an adverse federal court decision concerning a North Dakota school district and the one person-one vote rule. See Hurlbut v. Sheetz, 804 F.2d 462 (8th Cir. 1986). The amendments also allowed existing school districts to avoid litigation and its expense over the one person-one vote rule by converting to at-large voting by board resolution. Hearing on HB 1276 before the House Committee on Education, 50th N.D. Leg. (January 19, 1987) (Statement of Gary Thune).

Therefore, it is my opinion that school board members may be elected from geographic areas within a newly reorganized school district. However, the one person-one vote rule applies to school board elections, and compliance with it is required under N.D.C.C. §§ 15-27.3-19 or 15-28-02.

The second subject you raise is whether the mayor in a city council-governed city may be employed as the city street and water superintendent.

The governing body of a city with a city council is the city council, which is composed of the mayor and council members. N.D.C.C. § 40-08-01 (regular council cities), § 40-04.1-01 (modern council cities).

N.D.C.C. § 40-08-09 which applies to regular council cities provides:

> 1. Except as provided in subsection 2, no member of the city council shall:

a. Be eligible to any other office the salary of which is payable out of the city treasury;

b. Hold any other office under the city government; or

c. Hold a position of remuneration in the employment of the city.

2. A member of the city council may serve as an ambulance driver, employed by the city or under a contract with the city, and be remunerated for those services.

N.D.C.C. § 40-08-09.

Similar restrictions apply in modern council governed cities. N.D.C.C. § 40-04.1-04 provides:

> Restrictions on council member. No city councilman shall be eligible to any other office the salary of which is payable out of the city treasury, nor shall he hold any other office under the city government.

N.D.C.C. § 40-04.1-04.

The superintendent of city streets and water is a city office, the salary of which is payable out of the city treasury. The mayor is a member of the city council. In cities, under either the regular or the modern city council form of government, the mayor may not also be a paid employee of the city. Consequently, the mayor in a city governed by a city council may not be employed as the city street and water superintendent.

You further question whether N.D.C.C. § 40-13-05 provides an exception to the prohibitions of N.D.C.C. § 40-08-09. N.D.C.C. § 40-13-05 applies only in cities with a population of 10,000 or more, and only when the municipal officer is engaged in a business relationship with the city. This section does not apply to circumstances where a municipal officer is an employee of the city in question, and, therefore, it is not an exception to the prohibitionsof N.D.C.C. § 40-08-09. I am enclosing a 1969 opinion of this office which supports my conclusion in this opinion.

The third subject you raise involves the site suitability reviews by the state engineer and the state geologist for municipal waste landfills provided for by N.D.C.C. § 23-29-07.7. This section became effective on July 7, 1991, and requires the relevant reviews to be completed by July 1, 1995. However, the statute is ambiguous because it is unclear whether "existing municipal waste landfills" applies to all landfills existing on the date N.D.C.C. § 23-29-07.1 became effective, or only to those landfills which have not been closed and therefore still exist on the date of the inspection.

The goal of statutory construction is to determine the intent of the Legislature. Legislation is to be interpreted in furtherance of its purposes. Spectrum Emergency Care v. St. Joseph's Hospital, 479 N.W.2d 848 (N.D. 1992), Hayden v. Workers Compensation

Bureau, 447 N.W.2d 489 (N.D. 1989). When a statute is ambiguous, the criteria contained in N.D.C.C. § 1-02-39 may be used to resolve the ambiguity. That section provides:

> **1-02-39. Aids in construction of ambiguous statutes.** If a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters:
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> 1. The object sought to be attained.
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> 2. The circumstances under which the statute was enacted.
>
> 3. The legislative history.
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> 4. The common law or former statutory provisions, including laws upon the same or similar subjects.
>
> 5. The consequences of a particular construction.
>
> 6. The administrative construction of the statute.
>
> 7. The preamble.

N.D.C.C. § 1-02-39. The legislative history does not clarify the Legislature's intent concerning the meaning of the word "existing." However, other portions of the enactment and the rules adopted thereunder, indicate a legislative intent to increase the comprehensiveness of the municipal landfill monitoring and regulation program. See 1991 N.D. Sess. Laws ch. 277. This program will be conducted in conjunction with the Federal Environmental Protection Agency program, effective October 9, 1993, under 40 C.F.R., pt. 258 (1992). The broader rulemaking authority of the Health Department, creation of waste management districts statewide, dissemination of educational materials, and increased civil penalties for violation of the chapter, infer an intent for thorough regulation of municipal waste landfills. Consequently, it is my opinion that the state engineer and the state geologist are authorized to make site suitability reviews of any municipal waste landfill in existence on July 7, 1991, as well as any landfill currently in existence.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/rms/jfl
Enclosure