

N.D.A.G. Letter to Tollefson (Jan. 4, 1988)

January 4, 1988

Mr. Douglas Tollefson, Director
Pesticide/Noxious Weed Division
North Dakota Department of
Agriculture
State Capitol
Bismarck, ND 58505

Dear Mr. Tollefson:

Thank you for your letter of October 21, 1987, concerning North Dakota noxious weed law, specifically N.D.C.C. § 63-01 1-06 (Funding of Programs). I apologize for the delay in responding.

N.D.C.C. § 63-01.1-06 states, in part, as follows:

63-01.1-06. FUNDING OF PROGRAMS.

1. . . . The county weed board may certify annually to the board of county commissioners a tax, not to exceed two mills on the taxable valuation of all taxable property in the county, to carry out the provisions of this chapter The tax shall be levied by the board of county commissioners. All taxes levied and collected shall be held by the county treasurer in a separate fund to be known as the weed control fund, which shall be used only to carry out the provisions of this chapter The tax may be levied in excess of the mill levy limit prescribed by law for general purposes.

(Emphasis supplied.)

N.D.C.C. § 63-01.1-02(5) defines "county weed board" as "members of the board of each county as appointed by the county commissioners of the county pursuant to section 63-01.1-04." N.D.C.C. § 63-01.1-04 states that the "county weed board of each county in the state shall be the control authority for that county." "Control authority" is defined as including the county weed board.

N.D.C.C. § 63-01.1-02(4). N.D.C.C. § 63-01.1-04 also provides, among other things, for the appointment of the county weed board members by the county commissioners and states the conditions and procedures for removal of county weed board members.

N.D.C.C. ch. 63-01.1 establishes the county weed board as the local control authority with

extensive powers and duties relating to the operation and enforcement of the chapter, expenditure of funds for controlling noxious weeds, development and compilation of a county list of noxious weeds, and implementation and pursuit of an effective program for control of noxious weeds. See N.D.C.C. § 63-01.1-04.1 (Powers and Duties of County Weed Board).

The implication in your letter is that county commissioners may not be levying or may not want to levy the annual weed control program tax certified by county weed boards. The language of N.D.C.C. § 63-01.1-06 is, however, mandatory and not permissive. Once the county weed board certifies the amount, not to exceed two mills, the county commissioners must levy that tax, and that tax may be levied in excess of the general mill levy limitations.

The Legislative Assembly determined that any amount up to two mills may be levied for the funding of county noxious weed programs. However, it chose to leave determination of the exact amount necessary to a process within the control of the county weed board, which is to certify the amounts needed to the board of county commissioners.

This specific situation was dealt with previously by this office. Mr. Fabian E. Noack, in a July 21, 1982, letter asked "[i]s it mandatory for the Board of County Commissioners to levy 2 mills if the County Weed Board certify annually the need in accordance with N.D.C.C. § 63-01.1-06?" (letter attachment "A"). In a letter to Mr. Noack dated September 14, 1982 (letter attachment "B"), the Attorney General stated that "a county weed board does not have the authority to direct the board of county commissioners to levy a tax. In my opinion, the above-quoted provision (quoting part of section 63-01.1-06) simply means that the board of county commissioners is the proper body to levy the tax."

The September 14, 1982, opinion appears to rely entirely on Scott v. Donnelly, 133 N.W.2d 418 (N.D. 1965). That case found unconstitutional (based on section 175 of the North Dakota Constitution, now article X, § 3), a fee assessed and fixed by the North Dakota Potato Development Commission under the Potato Improvement, Marketing, and Advertising Act.

N.D. Const. art. X, § 3 states, in part, as follows:

Section 3. No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied. . . .

The Scott v. Donnelly case cites two old cases, Vallelly v. Board of Park Com'rs, 16 N.D. 25, 111 N.W. 615 (N.D. 1907) and Soliah v. Cormack, 17 N.D. 393, 117 N.W. 125 (N.D. 1908). In Scott v. Donnelly, complete discretion to fix assessed fees was given to an unelected statutory commission. In Vallelly v. Board of Park Com'rs a city council appointed park board commissioners which had virtually complete discretion and power to levy taxes on property within the park district. In Soliah v. Cormack, drain commissioners appointed by the board of county commissioners were given complete authority to levy

special assessments for local drain improvements. In Vallelly v. Board of Park Com'rs, the taxing activity in question was found unconstitutional, but in Soliah v. Cormack it was found constitutional. The Scott v. Donnelly court noted that the Soliah and Vallelly cases differed from it in that they dealt with a municipal corporation and a political subdivision, respectively, each a part of a constitutionally organized local government, whereas the Potato Development Commission was a statewide governmental entity.

Another, more recent case, has also dealt with this issue. See Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405 (N.D. 1971). In this case, the North Dakota Supreme Court found the provisions of the Poultry Improvement Act did not constitute an improper delegation of legislative power where the statute fixed the maximum fees to be charged by the Poultry Improvement Board, and the board had limited discretion to reduce the fees. *Id.* at 411. The court distinguished Scott v. Donnelly. It pointed out that in Scott v. Donnelly the law not only permitted the Potato Development Commission to fix fees, but it also authorized it to determine the area or areas in which such fees would be applied. It stated, "[t]his court in that case found that the statute delegated to the Potato Development Commission 'uncontrolled discretion' in determining these matters." *Id.*

Although it may not delegate purely legislative power, the Legislative Assembly may authorize others to do things and to exercise certain powers which are not exclusively legislative and which the Legislative Assembly itself might do but cannot because of the detailed nature of the things to be done. Ralston Purina, 188 N.W.2d at 410. The power to ascertain facts, which will bring the provisions of a law into operation by its own terms, is not a delegation of legislative power. If the law sets forth reasonably clear guidelines which will enable the Administrative Board to ascertain the facts, so that the law takes effect on such facts under its own provisions and not according to the discretion of the Administrative Board, the power so delegated is not legislative. The power to make a law is legislative, but the conferring of authority as to its execution, which authority is to exercised under the provisions of the law itself, as enacted by the Legislative Assembly, may be delegated. See *id.* at 410-411.

Under the Poultry Improvement Act, the Poultry Improvement Board, a legislatively created board, was authorized to determine the exact amount of fees necessary to supervise and regulate the various businesses mentioned since the Legislature determined that it would be almost impossible for the Legislature to do so. The supreme court stated, "[t]he law does not delegate to the board the power to enact any legislation as to the maximum fees to be paid, or as to whom the provisions of the statute shall apply. All that the Legislature has attempted to do is confer upon the Poultry Improvement Board the power to ascertain, under the law enacted by the Legislature, some fact upon which the law, by its own terms makes its action depend." Ralston Purina, 188 N.W.2d at 411.

The situation presented by the provisions of N.D.C.C. § 63-01.1-06 is similar to the situation involving the Poultry Improvement Act in the Ralston Purina Co. case. It is distinguishable from the Scott v. Donnelly case, and, perhaps, from the other cases cited, in that the county weed board is not given uncontrolled discretion in establishing and

levying a tax for noxious weed control purposes. Therefore, for that reason and because the provisions of N.D.C.C. § 63-01.1-06 do not clearly contravene the provisions of N.D. Const. art. X, § 3, nor any other provision of the state or federal constitution, I must declare the statute constitutional. Therefore, I reverse the September 14, 1982, opinion letter, to the extent that it can be read to mean that the board of county commissioners does not need to levy a tax certified by a county weed board pursuant to N.D.C.C. § 63-01.1-06. I believe a board of county commissioners is required to levy such a tax pursuant to that section if certified by a county weed board.

Finally, the solution to any disagreement between a board of county commissioners and a county weed board with regard to the amount levied pursuant to N.D.C.C. § 63-01.1-06 lies in the appointment process. Since the county weed board is appointed by the board of county commissioners and is subject to their control via the appointment and removal provisions of N.D.C.C. § 63-01.1-04, the board of county commissioners can at least indirectly implement its policy. Therefore, the ultimate power with regard to the mill levy may still reside in the board of county commissioners. Nevertheless, if disagreements between a county weed control board and a board of county commissioners arise, the board of county commissioners is obligated to levy the amounts certified by the county weed board.

Sincerely,

Nicholas J. Spaeth

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Enclosure