

**LETTER OPINION
2017-L-02**

May 5, 2017

Mr. Erik R. Johnson
Fargo City Attorney
505 Broadway St N Ste 206
Fargo, ND 58102

Dear Mr. Johnson:

Thank you for your April 11, 2017, letter requesting my opinion on a matter regarding the recall of elected officials of political subdivisions.

ANALYSIS

North Dakota Century Code § 44-08-21 sets forth the process to follow to recall elected officials of political subdivisions that are not subject to recall under Article III of the North Dakota Constitution.¹

Recall petitions must be filed with the relevant filing officer.² “Except as otherwise provided in this section, the filing officer shall call a special election to be held not sooner than ninety-five nor later than one hundred five days following the date the filing officer certifies the petition valid and sufficient.”³

Subsection 4 of N.D.C.C. § 44-08-21 provides:

The name of the official to be recalled must be placed on the ballot unless the official resigns within ten days after the filing officer certifies the petition is valid and sufficient. . . . An official whose office is on the ballot at a regularly scheduled election occurring *within one year* is not subject to recall.⁴

¹ N.D. Const. art. III, § 10 applies to the recall of “[a]ny elected official of the state, of any county or of any legislative or county commissioner district” Therefore, N.D.C.C. § 44-08-21 applies to the recall of elected officials of political subdivisions other than counties.

² See N.D.C.C. § 44-08-21(3).

³ N.D.C.C. § 44-08-21(3).

⁴ N.D.C.C. § 44-08-21(4) (emphasis added).

LETTER OPINION 2017-L-02

May 5, 2017

Page 2

Your question relates to the last sentence quoted above. This sentence does not specify within one year of what event an election must be held. It is ambiguous as to what that event is. Additionally, the sentence does not state what is meant by the phrase “subject to recall.”

When a statute is ambiguous, the administrative construction of the statute may be considered in determining the intent of the legislation.⁵ The Secretary of State supervises the conduct of elections in this state.⁶ The Secretary of State’s office has interpreted the last sentence quoted above to mean “within one year of the time the filing officer certifies the petition is valid and sufficient.” Thus, the Secretary of State’s office interprets N.D.C.C. § 44-08-21(4) as follows: An official whose office is on the ballot at a regularly scheduled election occurring within one year of the date the filing officer certifies the petition valid and sufficient, is not subject to recall.

The first sentence in subsection 4 of N.D.C.C. § 44-08-21, quoted above, refers to an official resigning “within ten days after the filing officer certifies the petition is valid and sufficient.” It is reasonable for the Secretary of State’s office to determine that this is the same triggering event in the last sentence in N.D.C.C. § 44-08-21(4). In addition, filing officers have relied on this interpretation and recall elections have been called based on this interpretation.

Also, “subject,” as used in the last sentence in N.D.C.C. § 44-08-21 means “to cause to experience something: *was subjected to cold.*”⁷ It is my opinion that the phrase, “is not subject to recall” in the last sentence of N.D.C.C. § 44-08-21, means “will not be caused to experience recall.”

It has been argued that the last sentence in N.D.C.C. § 44-08-21(4), quoted in this opinion, could be interpreted to mean that a recall election for a particular official may not be held within the year preceding a regularly scheduled election at which that official’s office is on the ballot. This interpretation would be based on using the same operative event, i.e., the proposed date of the recall special election, that is used in the following language in state law that applies to recall elections for elected officials subject to recall under N.D. Const. art. III, § 10. That language, in N.D.C.C. § 16.1-01-09.1(11) states:

An official may not be recalled if the recall special election would be held during the same year in which the official's office would be included on the ballot.

Section 44-08-21, N.D.C.C., is the state law that applies to elected officials of political subdivisions that are not subject to recall under N.D. Const. art. III, § 10.⁸ Although

⁵ See N.D.C.C. § 1-02-39.

⁶ See N.D.C.C. § 16.1-01-01.

⁷ The American Heritage Dictionary 1352 (3rd coll. ed. 1993).

⁸ N.D.A.G. 2010-L-08 and N.D.A.G. 2003-L-50.

N.D.C.C. §§ 44-08-21 and 16.1-01-09.1 apply to different elected officials, these laws specifically state that certain provisions apply to the other in the areas of signing and circulating, and determining the sufficiency, of recall petitions.⁹ Such cross references are absent from the language at issue here. Thus, there is nothing to indicate that the operative event in the language quoted above in N.D.C.C. § 16.1-01-09.1(11), which was passed in 2009, applies to the recall of elected officials under N.D.C.C. § 44-08-21(4), passed in 2007. In 2009, when the Legislature amended N.D.C.C. § 16.1-01-09.1(11), it did not use the language in N.D.C.C. § 44-08-21(4). For the foregoing reasons, I do not find this argument convincing.

Therefore, it is my opinion that the last sentence in N.D.C.C. § 44-08-21 should be interpreted to mean that an official whose office is on the ballot at a regularly scheduled election occurring within one year of the date the filing officer certifies the petition valid and sufficient, cannot be recalled.

You indicated in your letter, that the official's office is on the ballot at a regularly scheduled election on June 12, 2018. Thus, as long as the filing officer certifies the petition valid and sufficient prior to June 12, 2017, a recall election may take place.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹⁰

⁹ See N.D.C.C. § 44-08-21(1) (“The provisions of section 16.1-01-09.1, as they relate to signing and circulating recall petitions, apply to petitions under this section [44-08-21].”), N.D.C.C. § 44-08-21(3) (“The filing officer . . . shall pass on the sufficiency of a petition pursuant to section 16.1-01-09.1”), N.D.C.C. § 16.1-01-09.1(2) (“An individual may not sign a recall petition circulated pursuant to article III of the Constitution of North Dakota or section 44-08-21 unless the individual is a qualified elector.”), N.D.C.C. § 16.1-01-09.1(5) (“For the recall of an elected official under section 44-08-21, circulators have ninety days from the date the secretary of state approves the recall petition for circulation to submit the recall petition to the appropriate filing officer.”), and N.D.C.C. § 16.1-01-09.1(6) (“A petition may not be circulated under the authority of article III of the Constitution of North Dakota or section 44-08-21 by an individual who is less than eighteen years of age. . .”).

¹⁰ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).