

**LETTER OPINION
2020-L-04**

September 1, 2020

The Honorable Rich Wardner
State Senator, District 37
1042 12th Ave W
Dickinson, ND 58601-3654

Dear Senator Wardner:

Thank you for your letter asking for clarifications regarding how N.D.C.C. chapters 61-16.1 and 61-21 interact with regard to water resource districts' authority and special assessment projects.

I.

You first asked whether a water board may convert an "assessment drain" under N.D.C.C. ch. 61.21 to a "project" under N.D.C.C. ch. 61-16.1 or vice versa. It is my opinion that a water board may not convert an "assessment drain" under N.D.C.C. ch. 61-21 to a "project" under N.D.C.C. ch. 61-16.1 or vice versa without following the statutory process required under N.D.C.C. ch. 61-16.1 to start a new project.

II.

You next ask whether the term "maintenance," as defined by N.D.C.C. § 61-16.1-45, includes deepening and widening an existing drain and, if so, whether there is a limit to how much the drain may be deepened and widened. It is my opinion that maintenance under N.D.C.C. § 61-16.1-45 means "cleaning and repairing of [a] drain," which includes deepening and widening the existing drain, and there is no statutory limit on how much an existing drain can be deepened or widened under N.D.C.C. § 16-16.1-45. Whether there is a point at which deepening and widening an existing drain goes beyond "maintenance" is a factual determination. This office does not make factual determinations in legal opinions.¹

¹ N.D.A.G. 2002-L-17.

III.

You then inquire whether a water resource district may construct new flood control features adjacent to an “assessment drain” established under N.D.C.C. ch. 61-21 that is later converted to a “project” under N.D.C.C. ch. 61-16.1 by referring to it as “maintenance.” It is my opinion that new flood control features, such as vast water retention sites on land adjacent to a drain, would not typically constitute maintenance.

IV.

Next, you ask a number of related questions concerning whether a vote of the landowners is required before commencing a project under N.D.C.C. ch. 61-16.1 referred to as maintenance by a Resolution of Necessity when the project, as a whole, will exceed the maximum six-year levy under N.D.C.C. § 61-16.1-45, and also whether the maximum accumulated maintenance levy under N.D.C.C. §§ 61-16.1-45 and 61-21-46 are calculated on a project-by-project basis. It is my opinion that maintenance projects may be completed in phases without a vote as long as a phase does not obligate the district for costs beyond the maximum maintenance levy threshold and that the maximum accumulated maintenance levy under N.D.C.C. §§ 61-16.1-45 and 61-21-46 is calculated on a project-by-project basis.

V.

Next you question who is responsible for ensuring that the maximum six-year accumulated maintenance levy under N.D.C.C. §§ 61-16.1-45 and 61-21-46 is not exceeded. It is my opinion that the budget and levy process provides various levels of review by several county officials and the public, and ultimately, the board of county commissioners has authority to direct that any accounts of the county be audited and verified.

VI.

Finally, you inquire whether landowner voting procedures for a new assessment drain under N.D.C.C. ch. 61-21 and for a new project under N.D.C.C. ch. 61-16.1 are subject to the voting provisions of N.D.C.C. Title 16.1 (Elections), including the right to a secret ballot. It is my opinion that N.D.C.C. chs. 61-21 and 61-16.1 have specific voting requirements that do not adopt the provisions of N.D.C.C. Title 16.1 (Elections) and do not authorize secret ballots.

BACKGROUND

The majority of N.D.C.C. ch. 61-21 (previously entitled Drainage Projects, now entitled Drainage Assessment Projects) was created in 1955. Senate Bill 33 (1955) “completely revise[d] in both form and substance chapter 61-21 of the North Dakota Revised Code of 1943, as amended, which is the chapter of the North Dakota Code governing the operation of drainage districts.”² Because numerous bills were being introduced each session regarding drainage, “laws governing the operation of drainage districts ha[d] grown obsolete, making it very difficult for the drainage districts to function properly” and carry out their statutory responsibilities.³ “In addition, the large number of amendments made to the chapter on drainage over the years has resulted in many conflicts of law and ambiguities, and in many instances has made the drainage law almost unintelligible.”⁴

In 1981, most of N.D.C.C. ch. 61-16.1 was created through H.B. 1077, 1981 N.D. Leg., in an attempt to re-organize how water management functioned from the local level through water resource districts. Over time, N.D.C.C. chs. 61-16.1 and 61-21 have been amended so that now there are overlapping and sometimes contradictory provisions between the two chapters, which creates confusion.

DEFINITIONS

Specifically, relative to this opinion, the scope, applicability, and use of certain definitions requires analysis and consideration to address your concerns.

Section 1-01-09, N.D.C.C., states that “[w]henver the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears.” The North Dakota Supreme Court has also stated that definitions in one section of the Century Code will ordinarily apply to other sections of the Century Code.⁵

But, “[w]hen a statutory definition . . . is limited by prefatory language such as ‘in this [chapter]’ . . . the legislature has expressly evidenced its intent that the definition have no application beyond that act.”⁶

² *Report of the North Dakota Legislative Research Committee*, 34th N.D. Legis. Sess. at 50 (1955), <https://www.legis.nd.gov/files/resource/33-1953/legislative-management-final-reports/1955finalreport.pdf>.

³ *Id.* at 22.

⁴ *Id.*

⁵ *State v. Jessee*, 919 N.W.2d 335 (N.D. 2018).

⁶ *Id.* (citations omitted); see also, *Edinger v. Governing Auth. of Stutsman Cnty. Corr. Ctr. & Law Enforcement Ctr.*, 695 N.W.2d 447 (N.D. 2005); *State v. Pacheco*, 506 N.W.2d

As noted in a concurrence by then Chief Justice VandeWalle, the Legislature typically now limits definitions to a particular code chapter, indicating its intent that definitions should not be applied outside that chapter.⁷ Thus, to give effect to N.D.C.C. § 1-01-09, he advised “[w]here there is doubt as to the sense in which a given word is used in a statute, it is proper to refer to cognate or related legislation to determine the sense in which the word was employed in a particular statute.”⁸

Assessment Drain

Section 61-16.1-02(2), N.D.C.C., defines “assessment drain” as:

any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage, and any artificial drain of any nature or description constructed for the purpose of drainage, including dikes and appurtenant works, which are financed in whole or in part by special assessment. This definition may include more than one watercourse or artificial channel constructed for the purpose of drainage when the watercourses or channels drain land within a practical drainage area.

“Assessment drains” are a specific subcategory of “projects” and “drains” (discussed below) regulated under N.D.C.C. ch. 61-16.1. However, N.D.C.C. ch. 61-21, which specifically addresses assessment drains and their procedures and regulation, does not include a definition of an assessment drain. Despite the limitation in N.D.C.C. ch. 61-16.1 that limits its definitions to that chapter, I conclude that N.D.C.C. chs. 61-16.1 and 61-21 are so interrelated and the term is used in the same sense in both chapters that there is no doubt the term “assessment drain” for purposes of N.D.C.C. ch. 61-21 means the same as the definition provided at N.D.C.C. § 61-16.1-02(2).

Cleaning Out and Repairing of Drain

Section 61-21-01(3), N.D.C.C., defines “cleaning out and repairing of drain” as “deepening and widening of drains as well as removing obstructions or sediment, and any repair necessary to return the drain to a satisfactory and useful condition.” Though found in the Drainage Assessment Projects chapter of the Century Code, this definition isn’t limited to only assessment drains, but also applies to drain projects generally. This term is also used in N.D.C.C. ch. 61-16.1, but there is no definition provided in that chapter.

408 (N.D. 1993); *Ames v. Rose Twp. Bd. of Twp. Supervisors*, 502 N.W.2d 845 (N.D. 1993).

⁷ *Northern X-Ray Co., Inc. v. State, ex. rel. Hanson*, 542 N.W.2d 733 (N.D. 1996).

⁸ *Id.* (quoting *Grabow v. Bergeth*, 229 N.W. 282, 283 (N.D. 1930)).

Again, despite the limitation in N.D.C.C. ch. 61-21 that limits its definitions to that chapter, I conclude that N.D.C.C. chs. 61-16.1 and 61-21 are so interrelated and the term is used in the same sense in both chapters that there is no doubt the term “cleaning out and repairing of drain” for purposes of N.D.C.C. ch. 61-16.1 means the same as the definition provided at N.D.C.C. § 61-21-01(3).

Drain

Section 61-21-01(4), N.D.C.C., defines “drain” as:

any natural watercourse opened, or proposed to be opened, and improved for drainage and any artificial drains of any nature or description constructed for that purpose, including dikes and appurtenant works. This definition may include more than one watercourse or artificial channel constructed for the aforementioned purpose when the watercourses or channels drain land within a practical drainage area as determined by the written petition called for in section 61-21-10 and the survey and examination called for in section 61-21-12.

Surface “drains” are a specific subcategory of “projects” (discussed below) and are regulated under N.D.C.C. ch. 61-16.1. Additionally, “assessment drains” are a specific subcategory of “drains.” However, N.D.C.C. ch. 61-16.1 does not include a definition for “drain.” In addition, N.D.A.C. art. 89-02 (Drainage of Water) defines “drain” by reference to N.D.C.C. § 61-21-01.⁹ Despite the limitation in N.D.C.C. ch. 61-21 that limits its definitions to that chapter, I conclude that N.D.C.C. chs. 61-16.1 and 61-21 are so interrelated and the term is used in the same sense in both chapters that there is no doubt the term “drain” for purposes of N.D.C.C. ch. 61-16.1 means the same as the definition provided at N.D.C.C. § 61-21-01(4).¹⁰

⁹ N.D.A.C. § 89-02-01-02.

¹⁰ N.D.C.C. ch. 61-16.1 defines “assessment drain,” but does not define “drain,” even though N.D.C.C. ch. 61-16.1 generally regulates a broad swath of “projects,” including both assessment drains and non-assessment drains. Conversely, N.D.C.C. ch. 61-21 defines “drain,” but does not define “assessment drain,” even though the entirety of N.D.C.C. ch. 61-21 generally regulates “assessment drains.” Further, although N.D.C.C. ch. 61-21 regulates assessment drains, the term “assessment drain” is only used in one section in the entire chapter (N.D.C.C. § 61-21-02.1), with other sections using the generic term “drain.” Because “drain” wholly encompasses the subset “assessment drains,” the borrowing of definitions between chapters does not change the analysis in this opinion. However, the imprecise use of the terms “drain” and “assessment drain” is an issue the Legislative Assembly may wish to address in a future legislative session.

Lateral Drain

Lateral drain is defined in both N.D.C.C. chs. 61-16.1 and 61-21. While similar, the two definitions of lateral drain are not the same, as indicated by the italicized passages.

For purposes of N.D.C.C. § 61-16.1-49 (the only place in chapter 61-16.1 where the term is used), “lateral drain” means:

a drain constructed after the establishment of an original *assessment* drain or drainage system and which flows into such original drain or drainage system from outside the limits of the *assessed area* of the original drain; provided, that a determination by a *water resource* board as to whether an existing or proposed drain is a lateral or a new drain shall be conclusive when entered upon the records of the board.¹¹

Under N.D.C.C. § 61-21-01(5), “lateral drain” means:

a drain constructed after the establishment of the original drain or drainage system and which flows into such original drain or drainage system from outside the limits of the original drain; provided, that a determination by the board as to whether an existing or proposed drain is a lateral or a new drain *within the meaning of this subsection* shall be conclusive when entered upon the records of such board.¹²

Because the definition in N.D.C.C. § 61-16.1-49 only applies to that section and because it is more limited than the definition found at N.D.C.C. § 61-21-01(5), I conclude that the definitions of “lateral drain” in N.D.C.C. chs. 61-16.1 and 61-21 are limited to their respective chapters. Establishing a consistent definition for “lateral drain” as it is used in N.D.C.C. chs. 61-16.1 and 61-21 is an issue the Legislative Assembly may wish to address in a future legislative session.

Maintenance

The only place “maintenance” is defined is at N.D.A.C. § 89-02-01-02, where it means “removal of silt and vegetation from a drain. Maintenance does not include deepening or widening a drain.” Because “maintenance” is a generic term and may have a different meaning depending on context, the definition of maintenance in N.D.A.C. § 89-02-01-02 is limited to its use in N.D.A.C. art. 89-02, which generally addresses drainage permitting requirements, which are not addressed in this opinion.

¹¹ Emphasis added.

¹² Emphasis added.

Similarly, “maintenance” as it is used in N.D.C.C. ch. 61-16.1 and N.D.C.C. ch. 61-21 can have different meanings, depending on the context. As a general matter, “maintenance” as it is used in N.D.C.C. ch. 61-16.1 is a broad term that applies to the maintenance of “projects,” including dams, water supply systems, and sewage treatment projects. “Maintenance” as it is used in N.D.C.C. ch. 61-21 is necessarily more narrow and limited to the context of the chapter – assessment drain projects – and will have a different meaning than within N.D.C.C. ch. 61-16.1. Additional discussion below will address this term.

Obstruction to a drain

Section 61-16.1-51, N.D.C.C., defines “obstruction to a drain” as “a barrier to a watercourse, as defined by section 61-01-06, or an artificial drain, including if the watercourse or drain is located within a road ditch, which materially affects the free flow of waters in the watercourse or drain.” The definition is limited to N.D.C.C. § 61-16.1-51, but N.D.C.C. § 61-21-43.1 also uses the term “obstruction to a drain” in a similar context. Despite the limitation in N.D.C.C. § 61-16.1-51 that limits its definition to that section, I conclude that N.D.C.C. §§ 61-16.1-51 and 61-21-43.1 are so similar that there is no doubt the term “obstruction to a drain” has the same meaning in both statutes.

Project

Chapter 61-16.1, N.D.C.C., generally regulates water resource district “projects.” “Projects” is a broad term, meaning:

any undertaking for water conservation, flood control, water supply, water delivery, erosion control and watershed improvement, drainage of surface waters, collection, processing, and treatment of sewage, or discharge of sewage effluent, or any combination thereof, including incidental features of any such undertaking.¹³

“Project” includes a subcategory of “drains,” which itself includes subcategories of “lateral drains” and “assessment drains.” Because “project” is a broad term and is used in many different contexts throughout N.D.C.C. ch. 61-21, I conclude that the definition in N.D.C.C. § 61-16.1-02(8) is generally limited to chapter 61-16.1. Use of the term “project” in chapter 61-21 takes its ordinary and regular meaning within the context of a particular statute, which could take the meaning from N.D.C.C. § 61-16.1-02(8) on a case-by-case basis, if appropriate.

¹³ N.D.C.C. § 61-16.1-02(8).

Using the clarification of definitions above, I will now address the concerns expressed in your letter.

ANALYSIS

I.

You asked whether a water board may convert an “assessment drain” under N.D.C.C. ch. 61-21 to a “project” under N.D.C.C. ch. 61-16.1 or vice versa. As explained below, a water board may not convert an “assessment drain” under N.D.C.C. ch. 61-21 to a “project” under N.D.C.C. ch. 61-16.1 or vice versa.

“Projects” established under N.D.C.C. ch. 61-16.1 and “assessment drains” established under N.D.C.C. ch. 61-21 must be operated and maintained “pursuant to the appropriate statutory authority under which [they] were established.”¹⁴

The processes by which assessment drains are managed under N.D.C.C. chs. 61-16.1 and 61-21 are similar, but have important differences. The first substantive difference is that “projects” under N.D.C.C. ch. 61-16.1 can be initiated by a water resource board “either upon request or by its own motion.”¹⁵ Conversely, “assessment drains” under N.D.C.C. ch. 61-21 are landowner-initiated, requiring a minimum of either “six property owners or a majority of the landowners within the proposed district whose property will be drained.”¹⁶ While both chapters generally involve votes and hearings, their procedures vary.

For example, an initial hearing must be held under each chapter prior to a vote on whether to proceed with the proposal.¹⁷ Under N.D.C.C. § 61-16.1-18, notice of the hearing must be published once a week for two consecutive weeks in the newspaper, and notices with the proposed assessment list must be mailed to landowners at least 20 days prior to the hearing. However, under N.D.C.C. § 61-21-13, notice of the hearing must be published only once in the newspaper at least 10 days before the hearing, and notices with the proposed assessment list must be mailed to landowners. The statute is silent regarding when the landowner notices must be mailed, though a reasonable interpretation would be that the notices must also be mailed at least 10 days before the hearing. Additionally, landowners have 30 days to vote on whether to approve the project under N.D.C.C. § 61-16.1-19, but a minimum of 10 days under N.D.C.C. § 61-21-13.

¹⁴ N.D.A.G. 84-22.

¹⁵ N.D.C.C. § 61-16.1-15.

¹⁶ N.D.C.C. § 61-21-10.

¹⁷ N.D.C.C. §§ 61-16.1-18, 61-21-13.

Perhaps the most important difference is between the two chapters' appeals procedures. After an assessment hearing under N.D.C.C. ch. 61-16.1, "affected landowners and any political subdivision subject to assessment, having not less than *twenty percent* of the possible votes, . . . who believe that the assessment had not been fairly or equitably made, or that the project is not properly located or designed, may appeal to the state engineer by petition, within ten days."¹⁸ Under N.D.C.C. § 61-21-22, an appeal to the state engineer involving an assessment drain requires a *majority* of the possible votes within ten days.¹⁹ Notably, these differing appellate thresholds also apply to any reassessments that may occur after the project has existed for one year²⁰ or any new assessments for the costs of cleaning and repairing drains.²¹

Because the procedures for which "projects" under N.D.C.C. ch. 61-16.1 and "assessment drains" under N.D.C.C. ch. 61-21 differ, landowners make decisions throughout the process with particular expectations in mind regarding the hearing, voting, and appeal procedures. This is particularly true when a project is initiated by the landowners under a specific chapter. It cannot be known how those landowners' decisions would change if they knew they could be subject to a different chapter of the Century Code moving forward.

Finally, this office is aware that some water resource districts have formally "converted" drains from one chapter to the other (typically from a 61-21 drain to a 61-16.1 drain) by resolution subject to appeal under N.D.C.C. § 61-16.1-54, which allows an appeal to district court from any decision by a water resource board by any aggrieved person. While this office has not reviewed any of these formal resolutions, it is assumed that they would conceptually "abandon" the drain under one chapter and "reestablish" the drain under the alternative chapter. It is clear the Legislature did not intend this process. Under both chapters 61-16.1 and 61-21, even drains that have been abandoned must be reestablished under the chapter whereby they were originally created.²²

For these reasons, it is my opinion that "projects" that are established under N.D.C.C. ch. 61-16.1 must remain ch. 61-16.1 projects, and "assessment drains" established under N.D.C.C. ch. 61-21 must remain ch. 61-21 assessment drains.

¹⁸ N.D.C.C. § 61-16.1-23 (emphasis added).

¹⁹ N.D.C.C. § 61-21-22 (emphasis added).

²⁰ N.D.C.C. §§ 61-16.1-26, 61-21-44.

²¹ N.D.C.C. §§ 61-16.1-48, 61-21-43.

²² N.D.C.C. §§ 61-16.1-46, 61-21-41.

II.

You next ask whether the term “maintenance,” as defined by N.D.C.C. § 61-16.1-45, includes deepening and widening an existing drain and, if so, whether there is a limit to how much the drain may be deepened and widened. “Maintenance” under N.D.C.C. § 61-16.1-45 includes deepening and widening the existing drain.

Under N.D.C.C. ch. 61-21, the meaning of “cleaning out and repairing of drain” means “deepening and widening of drains as well as removing obstructions or sediment, and any repair necessary to return the drain to a satisfactory and useful condition.”²³ Additionally, as noted in your letter, N.D.A.G. 97-F-09 states that within the context of N.D.C.C. ch. 61-21, “[c]leaning out and repairing a drain is broader in scope than maintenance because it not only encompasses returning a drain to a satisfactory and useful condition, but also includes ‘deepening and widening’ a drain.” Consistent with the definition in that chapter and N.D.A.G. 97-F-09, maintenance (when referring to drains) is a term more limited in scope than “cleaning out and repairing a drain” and does not include deepening and widening an existing drain under N.D.C.C. ch. 61-21. In other words, “cleaning out and repairing of drain” is a broad term that includes the two distinct subcategories: 1) “deepening and widening” plus 2) “maintenance,” which means “removing obstructions or sediment, and any repair necessary to return the drain to a satisfactory and useful condition.”²⁴ Installation or improvements to culverts would also be considered part of “maintenance,” and thus part of “cleaning out and repairing of drain.”²⁵

Conversely, under N.D.C.C. ch. 61-16.1, “maintenance” is used as an extremely broad term that applies to the general maintenance of all “projects,” including dams, water supply systems, sewage treatment projects, and assessment drains established under this chapter. In other words, the use of “maintenance” in N.D.C.C. ch. 61-16.1 is a catch-all term that would include the sub-category of “cleaning out and repairing of drain.” As noted above, “cleaning out and repairing of drain” takes the same meaning in N.D.C.C. ch. 61-16.1 as in N.D.C.C. ch. 61-21.

Thus, for purposes of N.D.C.C. § 61-16.1-45, the broad use of the term “maintenance” (in the context of drain projects) actually means “cleaning out and repairing of drain.” This is further supported by a comparison of N.D.C.C. § 61-16.1-45 with N.D.C.C. § 61-21-46, which are nearly identical statutes providing assessment levy limits.²⁶ Because “cleaning

²³ N.D.C.C. § 61-21-01(3).

²⁴ *Id.*

²⁵ N.D.C.C. § 61-21-32. (“[T]he necessary expense [of culverts] shall be deemed a part of the cost of keeping such drain open and in repair.”).

²⁶ Compare N.D.C.C. § 61-16.1-45, with N.D.C.C. § 61-21-46.

out and repairing of drain” includes “deepening and widening” in accordance with N.D.C.C. § 61-21-01 and N.D.A.G. 97-F-09, “deepening and widening” is included within the broad use of “maintenance” under N.D.C.C. § 61-16.1-45.

As stated in Section II of N.D.A.G. 97-F-09, there is no statutory limit on how much a drain may be deepened or widened.

Because “maintenance” as used in N.D.C.C. § 61-16.1-45 means “cleaning out and repairing of drain” in the context of drain projects, the maintenance funds collected under N.D.C.C. § 61-16.1-45 can be used for deepening and widening because “deepening and widening” is a subcategory of “cleaning out and repairing of drain.” Thus, for the reasons articulated in N.D.A.G. 97-F-09, the limit on deepening and widening is limited by the cost and the availability of funds under N.D.C.C. § 61-16.1-45. Additionally, the costs of deepening and widening could be assessed, without statutory limits,²⁷ pro rata against the benefitted lands under N.D.C.C. § 61-16.1-48.

You also ask whether there is a point at which a project is no longer “maintenance.” While certainly a situation could arise where “maintenance” becomes more than mere maintenance, the answer to that question would necessarily involve the specific facts related to a project. The resolution of fact question is not one that can be provided in a legal opinion from this office.²⁸

III.

You then inquire whether a water resource district may construct new flood control features adjacent to an “assessment drain” established under N.D.C.C. ch. 61-21 that is later converted to a “project” under N.D.C.C. ch. 61-16.1 by referring to it as “maintenance”.

It is theoretically possible that a new flood control feature could be considered maintenance under some set of factual circumstances, however the type of project you generally describe would not be considered maintenance under either N.D.C.C. chs. 61-16.1 or 16-21, but rather a new project. Additionally, as noted in response to your initial question, projects cannot be “converted” from one chapter of the North Dakota Century Code to the other.

²⁷ This opinion does not address permitting limits that may be imposed by the Office of the State Engineer.

²⁸ N.D.A.G. 99-L-68.

IV.

Further, you ask a number of related questions concerning whether a vote of the landowners is required before commencing a project under N.D.C.C. ch. 61-16.1 referred to as maintenance by a “Resolution of Necessity” when the project, as a whole, will exceed the maximum six-year levy under N.D.C.C. § 61-16.1-45, and also whether the maximum accumulated maintenance levy under N.D.C.C. §§ 61-16.1-45 and 61-21-46 are calculated on a project-by-project basis.

Several assumptions must be made to answer the initial portion of this question. First, because you have limited your question to projects under N.D.C.C. ch. 61-16.1, the provisions of N.D.C.C. ch. 61-21 do not apply; however, for drains managed under that chapter, N.D.C.C. §§ 61-21-46 and 61-21-47 could be relevant to your question.

Second, I am assuming the “project” is not one constructed by a federal agency such that N.D.C.C. § 61-16.1-40.1 (dealing with federally constructed projects) would apply to this question.

Third, as discussed above, “project” is defined quite broadly in N.D.C.C. § 61-16.1-02. Because your question explicitly references N.D.C.C. § 61-16.1-45, and due to the context of the remainder of your questions, I will assume your request is limited to drains/assessment drains, rather than the entire scope of “projects” defined in N.D.C.C. § 61-16.1-02.

Finally, I am aware that some water resource boards use a “Resolution of Necessity” simply as a means to “authorize” particular actions or projects the board wishes to undertake. Therefore, I presume the term “Resolution of Necessity” does not imply a particular legal meaning within the context of this question, but is just a formal substitute for the term authorization.

Under N.D.C.C. § 61-16.1-45,²⁹ water resource districts may establish a fund for the costs of clean out and repair of assessment drains. Each fund established under this section would be specific to a given assessment project. In other words, a water resource district could establish several distinct funds, each containing levy amounts that could only be expended on clean out and repairs for the specified project.

Each year, the water resource district may levy up to the maximum amount authorized by the statute, per drain fund, regardless of whether there is any planned clean out or repairs

²⁹ This analysis would equally apply to N.D.C.C. § 61-21-46 because these statutes are identical in all material respects.

for that year. The water resource district may accumulate up to six years' worth of levies in an account per drain fund.

Your questions all relate to the funding of a project that would cost more than the maximum allowable fund balance, how that project can be funded, and whether additional voting is required. A project such as this could be funded in several ways, which will determine whether additional voting is required.

The relevant portion of N.D.C.C. § 61-16.1-45 states: “[i]f the cost of, or obligation for, the cleaning and repairing of any drain exceeds the total amount that may be levied by the board in any six-year period, the board shall obtain approval of the majority of the landowners [by vote] *before obligating the district for the costs.*”³⁰

V.

Next you ask who is responsible for ensuring that the maximum six-year accumulated maintenance levy under N.D.C.C. §§ 61-16.1-45 and 61-21-46 is not exceeded.

When a levy is sought, a water resource board must file with the county auditor of each county in the district a financial report for the preceding calendar year showing the ending balances of each fund held by the water resource district during that year.³¹ The report and the proposed budget are provided to the county commission for approval.³² Initial responsibility for all water resource district budget related items falls to the board of the water resource district. The county auditor has oversight responsibility for a district's financial expenditures, as does the board of county commissioners.³³ Additionally, the county treasurer has some oversight responsibility.³⁴ Thus, the budget and levy process provide many opportunities for review by various county officials.³⁵ Ultimately, it is the county commission that has the authority to direct that any accounts of the county be audited and verified.³⁶

³⁰ N.D.C.C. § 61-16.1-45(3) (emphasis added).

³¹ N.D.C.C. § 61-16.1-06.

³² *Id.*

³³ N.D.C.C. § 61-16.1-06; *see also*, N.D.C.C. §§ 11-13-02, 11-13-04.

³⁴ N.D.C.C. §§ 11-14-06 through 11-14-10.

³⁵ All county records regarding its accounts and levy status are subject to the North Dakota open record laws. *See*, N.D.C.C. § 44-04-18.

³⁶ N.D.C.C. § 11-11-11(3).

VI.

Last, you inquire whether landowner voting procedures for a new assessment drain under N.D.C.C. ch. 61-21 and for a new project under N.D.C.C. ch. 61-16.1 are subject to the voting provisions of N.D.C.C. Title 16.1 (Elections), including the right to a secret ballot.

The chapters you mention both have very specific sections on voting.³⁷ These statutes do not state specifically that ballots must be secret. For elections other than those elections to an actual public office, when the Legislature has intended that a secret ballot be used, it has so stated.³⁸ Therefore, it is my opinion that secret ballots are not authorized by law for the voting procedures provided in chapters 61-21 and 61-16.1.

Sincerely,

Wayne Stenehjem
Attorney General

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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.³⁹

³⁷ See §§ 61-16.1-19 and 61-16.1-20.

³⁸ N.D.A.G. 93-L-352. See N.D. Const. Art. 2, § 1. See N.D.C.C. §§ 4.1-44-06(5); 10-15-33(2)(a), 34-09-01, 34-12-07, 54-44.3-05.

³⁹ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).