LETTER OPINION
2001-L-32

August 20, 2001

Mr. Jerry Renner
Kidder County State's Attorney
PO Box 229
Steele, ND 58482-0229

Dear Mr. Renner:

Thank you for your letter requesting my opinion on N.D.C.C. § 11-28.2-01 dealing with recreation service district elections. That statute provides, in part, that "[i]f a majority of the qualified voters approve of the establishment of a recreation service district, such district shall then be organized." Id. You ask whether approval by a "majority of the qualified voters" means approval by a majority of those persons voting in the election or approval by a majority of those persons eligible to vote.[1]

Section 11-28.2-03, N.D.C.C., alternately defines a qualified voter as a person 18 years of age or older who "is a resident of the county for all other purposes of voting and maintains a permanent residence within the recreation service district" or a person who "owns real property within the recreation service district." The phrase "majority of the qualified voters" as used in N.D.C.C. § 11-28.2-01 has not been construed by the North Dakota Supreme Court or by this office. In addition, the legislative history of this provision does not shed any additional light on its meaning.

However, a similar question was raised about language in another statute in N.D.C.C. ch. 11-28.2 in a prior opinion by this office. The pertinent language in N.D.C.C. § 11-28.2-04, as it existed at the time of the opinion, stated that "[a]ll projects and services to be provided by a recreation service district shall first be approved by a majority of the qualified voters of the district affected by such special assessment and present and voting at an annual or special meeting called as provided in this chapter." See Letter from Attorney General Allen Olson to John Romanick (July 20, 1979). The question posed in that opinion was

[1] In H.B. 1299 passed by the Legislative Assembly in 1997, a number of similarly worded statutes were amended to clarify that the pertinent measures would pass if approved by a majority of qualified electors voting on the question. (Emphasis supplied.) See 1997 N.D. Sess. Laws ch. 108. For some reason, N.D.C.C. § 11-28.2-01 was not included in this group of amended statutes. The omission of this section may have been inadvertent.

whether the language in the 1979 version of N.D.C.C. § 11-28.2-04 meant that a project must be approved by a majority of the qualified voters of the district or by a majority of those qualified voters present and voting at the annual or special meeting. Because N.D.C.C. § 11-28.2-04 clearly provided that it dealt with those voters present and voting at an annual or special meeting, the letter concluded that "this means that they must necessarily be 'present and voting' in order to be included in the group from whom the majority is to be ascertained and from whom the approval need be attained. Those persons, otherwise qualified voters who are affected by the special assessments, but are not present and voting, would not be included in determining whether a majority vote has been accomplished since they have not met the complete specifications of the statute." Id.

The question you present is not quite as easily resolved since the "present and voting" language is not included in N.D.C.C. § 11-28.2-01.

A somewhat similar question was also raised in a more recent letter opinion issued by this office dealing with a vote on a tax levy for senior citizen programs provided for in N.D.C.C. § 57-15-56, which had a phrase similar to the one in question that provided for a tax levy to be imposed or removed "only by a vote of a majority of the qualified electors of the county or city directing the governing body to do so." See 1997 N.D. Op. Att'y Gen. L-1. In discussing this language, the opinion stated:

> Read literally, the levy authorized by N.D.C.C. § 57-15-56 may only be imposed by a vote of the majority of the qualified electors of the county, i.e., those persons in the county who are citizens of the United States, 18 years or older, and residents of North Dakota. However, there is no provision in the statute which gives any guidance regarding how the qualified electors are to be determined and counted. . . . [I]n enacting a statute it is presumed that a just and reasonable result feasible of execution is intended. N.D.C.C. § 1-02-38(3) and (4).
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> Since the statute does not contain any mechanism for measuring the number of qualified voters in the county, I conclude that the vote of the majority of the qualified electors of the county authorizing the imposition of a levy for senior citizens programs means the majority of qualified electors voting in the election.[2]

[2] Unlike the situation in 1997 N.D. Op. Att'y Gen. L-1, it might be argued that N.D.C.C. ch. 11-28.2 provides a mechanism for measuring the number of qualified voters in the district and thus it would be feasible to require a majority of those voters eligible to vote in order to determine if a recreation service district should be established. See N.D.C.C. § 11-28.2-01 (requiring a petition calling for an election to list the "approximate number of qualified voters" and requiring that the county commission give notice of the election "by certified mail to all qualified voters") and N.D.C.C. § 11-28.2-02 (which provides for notice

Id. at L-2. Importantly, the letter opinion also cited an older North Dakota Supreme Court case which discussed election statutes from other jurisdictions phrased similarly to N.D.C.C. § 57-15-56. In State v. Langlie, 67 N.W. 958, 959 (N.D. 1896), the court stated:

> There was a plain statement in the law that, to carry the measure before the people . . . a majority of the electors or voters of the county or city or town must vote in favor of it. When a majority of the electors is spoken of, the highest number of votes cast at the election must furnish the standard for determining whether the particular measure which must have such a majority has been carried.

"In the absence of a statutory provision to the contrary, voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result. This is true whether the matter is submitted at a meeting under a statute requiring the assent of a majority . . . or is submitted to a decision of a majority of the voters at the polls. Thus, a law requiring a question to be decided . . . by the votes of the majority or other proportion of the voters does not require that the majority or other proportion of all the persons entitled to vote actually vote affirmatively, but only that the result be decided by a majority or other specified proportion of the votes cast." 26 Am.Jur.2d Elections § 406 (1996).

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of meetings of a recreation service district to "be mailed to property owners of the district as recorded in the county treasurer's office").

However, I am unaware that counties have the type of records necessary to readily and definitively determine the exact number of all qualified voters under N.D.C.C. § 11-28.2-03, that is, all persons who are county residents and who maintain permanent residence within the recreation service district, and all persons having an ownership interest in real property within the recreation service district. Even in states that have voter registration lists which could be used to determine qualified electors, some courts have declined to use the list as a basis for computing the number or proportion of electors necessary for the adoption of a measure. "[S]ince the body of electors is constantly changing from day to day, the registration list, even though complete when made, does not necessarily show the exact number of qualified electors in the district at the time of holding the election." 26 Am.Jur.2d Elections § 407 (1996).

Because of the difficulty in ascertaining an exact number of qualified electors for a recreation service district, basing the outcome of an election on such a number could create uncertainty about the actual result. It would run counter to the rule of construction that in enacting a statute it is presumed that a reasonable result feasible of execution is intended. N.D.C.C. § 1-02-38(3) and (4).

"Laws requiring a majority or a two-thirds, three-fourths, or three-fifths vote, usually are construed to mean the requisite proportion of those voting at the election or on the proposition involved, and not of all the qualified electors of the municipality." 15 Eugene McQuillin, The Law of Municipal Corporations § 40.13 (3d ed. 1995) (citing, inter alia, Logan v. Bismarck, 194 N.W. 908 (N.D. 1923)); State ex rel. Byerley v. State Board of Canvassers, 172 N.W. 80 (N.D. 1919). "[I]n the absence of clear legislative language to the contrary, where the applicable statute provides for a vote to be decided by a majority of the electorate, all that is required is a majority of those actually voting on the question as long as the election is available to all qualified voters; absentees and abstainers are thus regarded as assenting to the will of the majority of those actually voting. Accordingly, to adopt or amend a charter by a 'majority vote of the qualified voters of the city,' means a majority of the votes polled." 3 Eugene McQuillin, The Law of Municipal Corporations § 12.18 (3d ed. 2001).[3]

In view of the foregoing, and because there is no clear language in the Constitution or statute that indicates otherwise, it is my opinion that a vote for creation of a recreation service district under N.D.C.C. § 11-28.2-01 is established by a majority of the qualified voters voting at the election.

Sincerely,

Wayne Stenehjem
Attorney General

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[3] See also Tracy v. Barnes County, 289 N.W. 377, 381 (N.D. 1939) ("'A majority of the votes cast upon a question submitted to a vote, if in the affirmative, carries it, unless the legislative will to the contrary is clearly expressed in the Constitution or the law.'") (quoting State v. Blaisdell, 119 N.W. 360, 361 (N.D. 1909)). "The elector who does not participate in an election acquiesces in the result of the votes cast by those who do participate." 119 N.W. at 361.