

**LETTER OPINION
2004-L-08**

January 30, 2004

Mr. Stuart A. Larson
Traill County State's Attorney
PO Box 847
Hillsboro, ND 58045-0847

Dear Mr. Larson:

Thank you for your letter asking whether members of the Traill County Economic Development Commission may vote by proxy. You indicated to a member of my staff that this Commission was created under N.D.C.C. ch. 11-11.1 as a Job Development Authority ("JDA").

The meeting process for a JDA is not addressed in N.D.C.C. ch 11-11.1¹. No mention is made of the frequency of the meetings, whether a quorum is needed to conduct business, or how it may conduct voting during meetings. Similarly, there is nothing in its legislative history to indicate the Legislature's intent regarding this issue.

The Legislature has specifically addressed the authority of many state and other entities to conduct business via proxy. See, e.g., N.D.C.C. § 4-09-03(3) (state seed commission may be represented by a proxy who has written authorization); N.D.C.C. § 4-14.2-02(4) (northern crops council may be represented by a person who has a written proxy); N.D.C.C. § 7-01-12(1) (building and loan association may take a vote of those present in person or by proxy); N.D.C.C. § 10-33-06(5)(r) (non-profit corporation members may vote by proxy);² N.D.C.C. § 26.1-12-16 (members of a mutual insurance company may vote by proxy); N.D.C.C. § 26.1-16-17 (each member of a benevolent

¹ The only reference made to the voting process by JDA members is to indicate that members who do not reside in the area subject to taxation are nonvoting members. N.D.C.C. § 11-11.1-01(3).

² A county may contract with an active industrial development organization to perform the functions of a JDA in lieu of establishing a JDA. See N.D.C.C. § 11-11.1-06. Since an industrial development organization may well be organized as a non-profit corporation, its members could vote by proxy. N.D.C.C. § 10-33-06(4)(r).

society may vote in person or by proxy); N.D.C.C. § 30.1-18-15(12) (personal representative may vote stocks or other securities in person or by general or limited proxy); N.D.C.C. § 30.1-29-24(3)(m) (conservator may vote a security, in person or by general or limited proxy); N.D.C.C. § 61-29-04 (county representative of Little Missouri River Commission unable to attend a meeting of the commission may be represented by a person who has a written proxy). Clearly, when the Legislature has intended that a state entity have this power, it has provided it.

“Like political subdivisions and state agencies, a job development authority (JDA) created under N.D.C.C. ch. 11-11.1 is a creature of state statute and therefore possesses only those powers expressly granted to it by the Legislature or those necessarily implied from the powers expressly granted.” N.D.A.G. 96-L-205 (citing Ebach v. Ralston, 469 N.W.2d 801 (N.D. 1991) (cities); American Federation of State, County, and Municipal Employees, Council No. 95 v. Olson, 338 N.W.2d 97 (N.D. 1983) (public officials); Murphy v. Swanson, 198 N.W. 116 (N.D. 1924) (counties); N.D.A.G. 93-L-175 (rural fire protection districts)).

The purpose of a JDA is to “encourage and assist in the development of employment and promotion of tourism within the county.” N.D.C.C. §11-11.1-03. The express powers of a JDA are listed in N.D.C.C. § 11-11.1-03 and do not contain the power to vote by proxy. Since the authority to vote by proxy is not an express power, it must be determined whether this power is necessarily implied from those powers expressly granted or is otherwise necessary to carry out the purpose of the JDA.

In cases where the North Dakota Supreme Court has found an incidental or implied power to exist, there appears to be a direct correlation between the express and incidental or implied power. For example, in one case, the Court found that a county court had incidental authority to resolve an issue of paternity because the resolution was reasonably necessary to enable the court to effectively adjudicate who should inherit the estate in question. Matter of Estate of Sorensen, 411 N.W.2d 362 (N.D. 1987). In another case, the Court found that the general powers conferred upon a city to contract for electrical energy necessarily includes implied powers, such as the power to engage engineering and legal services to explore the feasibility of such undertaking. Anderson v. City of Hankinson, 157 N.W.2d 833 (N.D. 1968). Similarly, the Court found that the power of a drainage board to continue a hearing on petition to establish a drain was an implied power of the board. Chester v. Einarson, 34 N.W.2d 418 (N.D. 1948).

In the cases referenced above, the express power could not be fully exercised without the implied power; however, in this case, there is no such direct correlation. The JDA could easily “encourage and assist in the development of employment and promotion of

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tourism within the county” without the power to vote by proxy; a JDA is not dependent upon the ability to vote by proxy to fulfill its purpose.

Since the power to vote by proxy is neither an express or implied power given to a JDA by the Legislature, it is my opinion that it cannot allow its members to vote by proxy.

Sincerely,

Wayne Stenehjem
Attorney General

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