

**LETTER OPINION
2009-L-16**

October 13, 2009

Mr. Terry W. Elhard
McIntosh County State's Attorney
PO Box 248
Ashley, ND 58413-0248

Dear Mr. Elhard:

Thank you for your correspondence questioning the qualifications required under state law for board members of rural fire protection districts and the duty of a state's attorney to advise such a district. Based on the following, it is my opinion that under N.D.C.C. § 18-10-04, a board member of a rural fire protection district must have, among other requirements, an ownership interest in taxable real or personal property in the district in order to be qualified for election to the board. It is my further opinion that because a rural fire protection district is a governmental district, the state's attorney must give, when required and without fee, an opinion in writing to the district under N.D.C.C. § 11-16-01(9).

ANALYSIS

State law provides for the qualifications of electors as well as for qualifications of the board of directors for a rural fire protection district:

1. At the time and place fixed by the county auditor for the public meeting as provided in section 18-10-03, the electors who are owners of any interest in real or personal property assessed for taxation in the district and who are residing within the boundaries of the district may decide by majority vote of those present whether the organization of the district may be completed. Permanent organization must be effected by the election of a board of directors consisting of not less than five residents of the district, at least one of whom must represent each township by having an interest in real or personal property assessed for taxation in the township the director is representing, if the district includes more than one township. If the district is composed of more than seven townships, the board may

elect to have only seven members, but no more than two members may be from any township.¹

As you note, this statute provides that rural fire protection district electors must be “owners of any interest in real . . . property assessed for taxation in the district and who are residing within the boundaries of the district.”² However, in the second sentence of that provision, it states that the “board of directors [must consist] of not less than five residents of the district, at least one of whom must represent each township by having an interest in real . . . property assessed for taxation in the township the director is representing.”³ As you indicate, the second sentence does not explicitly require an ownership interest in real property assessed for taxation in order for an individual to be elected as a member of the board of directors.

You state that the voters of the Zeeland Rural Fire Protection District elected a board member who has no ownership interest in real or personal property assessed for taxation in the district, although he does reside in the township he represents and has a leasehold interest in a farmstead in that township. Because the statute does not explicitly state that a board member must have an ownership interest in real property, you question whether a leasehold interest is sufficient for this board member to lawfully serve.

In interpreting a statute, the primary goal is to determine the intent of the Legislature.⁴ Ordinarily, in seeking to determine legislative intent courts will look first to the language used by the Legislature in a statute.⁵ In this instance, when discussing the qualifications of electors of a rural fire protection district, the Legislature used the phrase “owners of any interest in real . . . property.” In the second sentence, when discussing the qualifications of members of the board of directors, the Legislature just referred to having an “interest in real . . . property.”

As the North Dakota Supreme Court has stated:

Generally, the law is what the Legislature says, not what is unsaid. . . .

It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and

¹ N.D.C.C. § 18-10-04(1).

² Id. (emphasis added).

³ Id. (emphasis added).

⁴ Northern X-Ray Co., Inc. v. State ex rel. Hanson, 542 N.W.2d 733, 735 (N.D. 1996).

⁵ Id.

unambiguous, the “court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.”⁶

Thus, the strict letter of the statute would indicate that while an elector of a rural fire protection district must have an ownership interest in real property, a director need not have an ownership interest. And, as you point out in this particular case, the director in question merely holds a leasehold interest. A “leasehold” interest has been defined as an “estate in real property held by leasee/tenant under a lease,”⁷ and thus while a leasehold interest would qualify as an interest in real property, it generally is not treated as an ownership interest.

Nevertheless, there are situations where a statute may be considered to have a latent ambiguity when read together with another statutory provision or when applied to a particular situation.⁸ If an ambiguity exists, then consideration may be given to extrinsic sources, such as the legislative history.⁹ It is unclear why the Legislature would require a voter to own land, while a governing board member would merely have to rent it. Resort to the legislative history is warranted here.

The language in N.D.C.C. § 18-10-04(1) as originally enacted provided:

At the time and place fixed by the county auditor for the public meeting . . . , the electors who are owners of any interest in real or personal property assessed for taxation in the district and who are residing within the boundaries of the district shall have the opportunity to decide by majority vote of those present whether the organization of the district shall be completed. Permanent organization shall be effected by the election of a president, a vice-president, a secretary-treasurer, and a board of directors consisting of five residents of the district . . . ; provided, that if the district shall embrace more than one township each township shall be represented on the board of directors.¹⁰

Based on the plain meaning of the statute, only “electors who are owners of any interest in real or personal property assessed for taxation in the district and who are residing within the boundaries of the [proposed] district” may vote in an election to determine whether to

⁶ Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993).

⁷ Black’s Law Dictionary, 890 (6th ed. 1990).

⁸ See Kroh v. Am. Family Ins., 487 N.W.2d 306, 308 (N.D. 1992).

⁹ See N.D.C.C. § 1-02-39; Walker v. Schneider, 477 N.W.2d 167, 172 (N.D. 1991).

¹⁰ 1957 N.D. Sess. Laws ch. 165, § 4.

establish the district.¹¹ But the original statute contained no property ownership requirement regarding membership on the board of directors, stating simply: [the organization of a rural fire district] “shall be effected by the election of a . . . board of directors consisting of five residents of the district . . .”¹²

In 2003, however, the requirements for a member of the board of directors of a rural fire district were amended to require a director to be a property owner. Enrolled Senate Bill No. 2243 amended N.D.C.C. § 18-10-04(1) as follows:

SECTION 1. AMENDMENT. Subsection 1 of section 18-10-04 of the North Dakota Century Code is amended and reenacted as follows:

1. At the time and place fixed by the county auditor for the public meeting as provided in section 18-10-03, the electors who are owners of any interest in real or personal property assessed for taxation in the district and who are residing within the boundaries of the district ~~shall have the opportunity to~~ may decide by majority vote of those present whether the organization of the district ~~shall~~ may be completed. Permanent organization must be effected by the election of a board of directors consisting of not less than five residents of the district, at least one of whom must ~~reside in and~~ represent each township by having an interest in real or personal property assessed for taxation in the township the director is representing, if the district includes more than one township. If the district is composed of more than seven townships, the board may elect to have only seven members, but no more than ~~one member~~ two members may be from any township.¹³

Actually, the language in the second sentence of the amendment to N.D.C.C. § 18-10-04(1) requiring that a director “hav[e] an interest in real or personal property assessed for taxation in the township the director is representing” did not appear in Senate Bill No. 2243 as introduced but was added as an amendment to the legislation.¹⁴ In a hearing on Senate Bill No. 2243, a member of a rural fire protection district offered amendments to the bill containing this language. The statements in the legislative history described that the amendments were offered to require a director to have an ownership or

¹¹ Id. (emphasis added).

¹² Id. (emphasis added).

¹³ S.B. 2243, 2003 N.D. Leg. (First Engrossment), enacted as 2003 N.D. Sess. Laws ch. 180, § 1.

¹⁴ See Proposed Amendments to Senate Bill No. 2243, adopted by the Senate Political Subdivisions Committee (Jan. 30, 2003).

freehold¹⁵ interest in property within the township being represented in order to be able to serve, as long as the director lived somewhere in the fire protection district.¹⁶

Thus, while the pertinent amendments added to the statute in 2003 were more concerned with allowing a director who no longer resides in a particular township to serve on the fire protection district's board of directors, it is also clear from the legislative history that the director also must own land in the township. In fact, the individual who offered the amendments with the language in question repeatedly referred to a director having an ownership or freehold interest in real property in the township the individual wishes to represent on the board of directors.¹⁷

¹⁵ "Freehold" means an "estate for life or in fee . . . (as distinguished from a leasehold)." Black's Law Dictionary 665 (6th ed. 1990); see also N.D.C.C. § 58-01-01.1 (with respect to a township, unless the context or subject matter requires otherwise, "freeholder" means "the legal title owner of the surface estate in real property").

¹⁶ See Hearing on S.B. 2243 Before the Senate Comm. on Political Subdivisions, 2003 N.D. Leg. (Jan. 30) (Testimony of Leon Samuel) ("What the amendment would do is change the language of the present North Dakota Century Code, as related to Fire Districts, to state that an individual would be eligible to be a candidate for a directorship and could be elected as such if he or she owned a freehold interest in real or personal property that was assessed for taxation in a township which they wish to represent. The amendment would eliminate the requirement of having to reside in the respective township but would still require them to live within the fire district. The reason for this request for change is that it is becoming more difficult to find willing and qualified candidates for the positions that meet the requirements of having to own a freehold interest in real property and also reside within the township."); Hearing on S.B. 2243 Before the Senate Comm. on Political Subdivisions, 2003 N.D. Leg. (Jan. 30) (Statement of Leon Samuel) ("The bill that was introduced last year (sic) said that they had to own land within the township and there was no mention as to where they had to live. In this bill we are saying that they still have to live within that fire district."); Hearing on S.B. 2243 Before the House Comm. on Political Subdivisions, 2003 N.D. Leg. (Feb. 28) (Statement of Rep. Glen Froseth) ("The new language in lines 13 & 14 will allow them not to be a resident in the township. It says reside in [the district]."); Hearing on S.B. 2243 Before the House Comm. on Political Subdivisions, 2003 N.D. Leg. (Feb. 28) (Statement of Leon Samuel) ("The problem is as the farmers retire they move into town. They would like to stay on the board and still live within the city. He owns land out there yet but according to the statute the way it is, he's not supposed to be serving on the board and that's where the situation comes from."; "All we're saying is, you might have a township where no one is living, so if you own land then you would have the ability to serve on the district. This is the only change.");

¹⁷ See the testimony cited in n.16.

In addition, “[t]he right to hold public office is generally restricted to those who are qualified voters.”¹⁸ Thus, in other analogous contexts of state election law, the statutes commonly require that a member of a governing board or other elected official possess the qualifications of electors for that governmental entity,¹⁹ as does the state constitution for constitutional offices.²⁰ Moreover, “[s]ome jurisdictions consider it to be a fundamental principle of popular government, even in the absence of any constitutional or statutory restriction, that one who is not a qualified elector cannot legally hold an elective office.”²¹ Consequently, one could rationally construe N.D.C.C. § 18-10-04(1) to require board members to possess all the qualifications of electors, including an ownership interest in real property.

Based on the foregoing, it is my opinion that under N.D.C.C. § 18-10-04, a board member of a rural fire protection district must have, among other requirements, an ownership interest in taxable real or personal property in the district in order to be qualified for election to the board.

You also ask whether the state’s attorney is required to provide an opinion to a rural fire protection district. State law requires the state’s attorney to give, when required and without fee, an opinion in writing to the district on matters relating to the duties of the respective offices.²² It is certainly not unheard of for state’s attorneys to address questions received from rural fire protection districts;²³ in fact, several opinions of this office requested by state’s attorneys have addressed issues related to rural fire protection districts.²⁴

¹⁸ 26 Am. Jur. 2d Elections § 251 (2d ed. 2004).

¹⁹ See, e.g., N.D.C.C. § 61-06-01 (board of directors of an irrigation district “must be residents of the state and electors of the district”); N.D.C.C. § 61-24-03 (candidate for director of Garrison Diversion Conservancy District must be “a resident and qualified elector of the county” aspired to be represented); N.D.C.C. § 40-49-07 (“The members of the board of park commissioners shall possess the qualifications of electors of the city and must be elected by the qualified electors of the park district.”); N.D.C.C. § 40-13-01 (“person is not eligible to hold an elective municipal office unless that person is a qualified elector of the municipality”); N.D.C.C. § 40-08-14 (“mayor shall be a qualified elector within the city”); N.D.C.C. § 40-08-05 (“person is not eligible to the office of council member if the person: 1. Is not a qualified elector of . . . the ward for which the person was elected . . .”).

²⁰ See N.D. Const. art. V, § 4 (“[t]o be eligible to hold an elective office established by this article, a person must be a qualified elector of this state . . .”).

²¹ 3 Eugene McQuillin, The Law of Municipal Corporations § 12.61 (3d ed. 2001).

²² See N.D.C.C. § 11-16-01(9).

²³ See, e.g., N.D.A.G. Letter to Hagerty (Apr. 11, 1985).

²⁴ See, e.g., N.D.A.G. 94-F-24; N.D.A.G. 94-F-11; N.D.A.G. 93-L-175; N.D.A.G. Letter to Sillers (July 8, 1991); N.D.A.G. Letter to Slorby (Mar. 29, 1985); N.D.A.G. 75-72.

Rural fire protection districts are created and governed by state law and perform a public function.²⁵ The term “district” has been defined as “[o]ne of the territorial areas into which an entire state or country, county, municipality or other political subdivision is divided, for judicial, political, electoral, or administrative purposes.”²⁶ It should be noted that the board of county commissioners of each county in which a proposed rural fire protection district is to be organized must hold a hearing regarding the formation and boundaries of the proposed district and must “determine whether the proposed district is suited to the general fire protection policy of the county . . . [and] determine the boundaries of the proposed district.”²⁷ Requiring the board of county commissioners to determine if a proposed rural fire protection district is suited to the general fire protection policy of the county suggests that the Legislative Assembly considered a rural fire protection district to be a governmental district of a county. Thus, it is apparent that a rural fire protection district is a “district” both in name as well as within the meaning of the state law requiring the state’s attorney to give opinions to various political subdivisions and governmental entities in matters relating to the duties of their respective offices.²⁸ Consequently, it is my further opinion that because a rural fire protection district is a governmental district, the state’s attorney must give, when required and without fee, an opinion in writing to the district under N.D.C.C. § 11-16-01(9).

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

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.²⁹

²⁵ See N.D.C.C. ch. 18-10.

²⁶ Black’s Law Dictionary 476 (6th ed. 1990).

²⁷ N.D.C.C. § 18-10-02; see also N.D.C.C. § 18-10-13 (similar duties of the board of county commissioners).

²⁸ See generally N.D.C.C. ch. 18-10.

²⁹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).