

Date Issued: January 28, 1985 (AGO 85-5)

Requested by: Representative Lyle Hanson

- QUESTIONS PRESENTED -

I.

Whether a water resource district may adopt rules that modify the provisions of N.D.C.C. section 61-16.1-41.

II.

Whether a water resource district may adopt rules requiring a permit for drainage of less than eighty acres.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a water resource board may not adopt rules that modify the provisions of N.D.C.C. section 61-16.1-41.

II.

It is my further opinion that a water resource board may adopt rules that require the procurement of a permit for drainage of less than eighty acres within their respective districts.

- ANALYSES -

I.

The State Constitution authorizes the Legislature and, through the initiative and referendum processes, the people to legislate. N.D. Constitution Article III, Section 1, (1981). Generally, the Legislature may not delegate its legislative power. See *Nord v. Guy* 141 N.W.2d. 395 (N.D. 1966); *Wilder v. Murphy* 218 N.W. 156 (N.D. 1928). However, the Legislature may delegate authority to legislate on local matters to local governmental agencies. In *Re Garrison Diversion Conservancy District* 144 N.W.2d. 82, 92 (N.D. 1966). This exception is based upon the rationale that the Legislature cannot know all the details and facts applicable to a particular situation. The local entity, on the other hand, is assumed to have knowledge of local facts. See, *Ferch v. Housing Authority of Cass County* 59 N.W.2d. 849, 861 (N.D. 1953) citing *Chapman v. Huntington Housing Authority* 3 S.E.2d., 502, 509 (W. Va. 1939). Thus, the Legislature declares the general policy and legal principles and the local entity applies those policies and principles to the local situation through its rulemaking authority.

It is appropriate to delegate powers which are ordinarily exercisable only by the Legislature to counties or county boards. In *Re Garrison Diversion Conservancy District* at 92 (quoting text now found at 16 Am. Jur.2d., Constitution Law Section 350, p. 894, (1979)).

However, in exercising the legislative authority delegated to it, the water resource board (or county board) may not make rules which conflict with the policy and legal principles enunciated by the Legislature.

Therefore, it is my opinion that a water resource board may not adopt rules that modify the provisions of N.D.C.C. section 61-16.1-41.

## II.

A water resource board's authority to make and enforce rules concerning drainage is clear. The Legislature has authorized water resource boards to make rules "concerning the management, control, regulation and conservation of waters." N.D.C.C. section 61-16.1-09(8). A board may close a drain which "has been opened or established by a landowner or tenant contrary to . . . any rules or regulations promulgated by the board." N.D.C.C. section 61-16.1-52.

Water policy, as stated by the Legislature, requires a board to, among other things, encourage the retention of water on land (N.D.C.C. section 61-16.1-10(4)), and manage, conserve, protect, develop and control water resources (N.D.C.C. section 61-16.1-01). These water policies are the Legislature's statement of a water resource board's goals. In order to achieve these goals the Legislature has granted the local boards authority over all aspects of water development within their respective districts, including drainage. See N.D.C.C. section 61-16.1-09.

N.D.C.C. section 61-16.1-41 is the Legislature's recognition that the state may have an interest in drainage of eighty acres or more. To protect the state's interest, the Legislature requires a drain applicant to submit an application to the state engineer for his review. If the state engineer determines the proposed drain is of "statewide or interdistrict significance", he has final authority to approve, deny or condition the permit. If the state engineer determines the proposed drain is not of "statewide or interdistrict significance", the local board has exclusive authority to approve, deny or condition a permit. N.D.C.C. section 61-16.1-41 removes from the local board's exclusive jurisdiction only proposed drains which are eighty acres or greater and which have been declared of "statewide or interdistrict significance."

The only restriction placed upon a board's authority over drains of less than eighty acres is found in the final sentence of N.D.C.C. section 61-16.1-41, which states that a permit is not required for an area not in excess of eighty acres "when temporary ponding of water occurs due to spring runoff or heavy rains." If N.D.C.C. section 61-16.1-41 is interpreted to remove all authority over drainage from the local board, this sentence would be superfluous.

N.D.C.C. section 1-02-38(2) states that when a statute is enacted "the entire statute is intended to be effective." N.D.C.C. section 1-02-38(2). To give effect to this sentence, N.D.C.C. section 61-16.1-41 must be interpreted so the board retains jurisdiction over drainage of less than eighty acres except when it involves temporary

ponding of water occurring "due to spring runoff or heavy rains."

As stated previously, the board has a mandatory duty to encourage the retention of water on land. N.D.C.C. section 61-16.1-10(4). If the local board determines that it can best fulfill that duty or any other duty required of it, by implementing a permitting process for drainage permits of less than eighty acres, it is my opinion that it may adopt and promulgate rules to implement that procedure. It is my further opinion that a water resource board may not adopt rules requiring permits for drainage of areas less than eighty acres within their respective districts if the water to be drained is a result of temporary ponding of water occurring due to "spring runoff or heavy rains."

- EFFECT -

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

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