STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-22

Date issued: September 16, 1988

Requested by: Representative Jack Murphy
Joseph Kubik, Dunn County State's Attorney
Senator Dean Meyer
Representative Ron Anderson

- QUESTIONS PRESENTED -

I.

Whether the petition calling for the retention of Manning as the Dunn County seat or the petition calling for the removal of Manning and declaring one of three alternative sites as the new Dunn County seat complies with the requirements of N.D.C.C. ch. 11-04.

II.

Whether the ballot form for the Dunn County seat removal question, asking voters whether the county seat should remain at Manning or should be moved to one of three alternative sites, complies with N.D.C.C. ch. 11-04.

III.

Whether the name of the incumbent county seat, if it is one of the two towns receiving the highest number of votes at the primary election on the question of county seat removal, should be placed on the general election ballot.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the petition calling for the retention of Manning as the Dunn County seat does not comply and the petition calling for the removal of Manning and declaring one of three alternative sites as the new Dunn County seat does comply with the requirements of N.D.C.C. ch. 11-04.

II.

It is my further opinion that the ballot form for the Dunn County seat removal question, asking voters whether the county seat should remain at Manning or should be moved to one of three alternative sites, complies with N.D.C.C. ch. 11-04.

III.

It is my further opinion that the name of the incumbent county seat, if it is one of the two towns receiving the highest number of votes at the primary election on the question of county seat removal, should be placed on the general election ballot.

Because Manning, the Dunn County seat, is not located on an interstate river or a railroad, N.D.C.C. § 11-04-12, on its face, appears to govern the manner in which Manning would be removed as the Dunn County seat. That statute states, in part, as follows:

> 11-04-12. **County seat not on railroad -- Election any year.** In counties where the county seat is not located on a railroad or interstate river, the question of county seat removal may be voted on at any primary election. The provisions of sections 11-04-02 and 11-04-03 shall be applicable to proceedings under this section.

The last sentence of section 11-04-12 (referring to sections 11-04-02 and 11-04-03) was added to the statute not by legislative action but by the 1943 code reviser. The original source for the substance of that addition (and sections 11-04-02 and 11-04-03) can be found in two chapters of the 1917 N.D. Sess. Laws.

The first chapter, 1917 N.D. Sess. Laws ch. 101 (which amended 1913 Compiled Laws § 3208), provided the procedure to be followed in establishing the permanent location of a county seat when there had previously been no permanent location for the county seat. That chapter included the following language:

> [I]f more than two towns are contending for the location of the county seat at such election, then the two towns receiving the highest vote at such primary election, and these two towns only, shall be placed on the official ballot at the first following general election, and the town then receiving the highest number of votes cast for the county seat location at such general election, shall be designated the county seat of such county.

1917 N.D. Sess. Laws ch. 101.

The second chapter in question, 1917 N.D. Sess. Laws ch. 102 (which amended 1913 Compiled Laws § 3239), established the procedure to be followed for the removal of county seats not located on a railroad or interstate river. Chapter 102 provided, in part, as follows:

> [I]n counties where the county seat is not located on a railroad or interstate river, the question of county seat removal may be voted on at any primary election and <u>if more than two towns are contending for the location of the county seat at such election, then the two towns receiving the highest vote at such primary election and these two towns only shall be placed on the official ballot at the first following general election, and the town then receiving the highest number of votes cast for the county seat location at such general election shall be designated the county seat of such county</u>, and the county seat located thereat, and the question of county seat removal must not again be voted on for four years in any county where the county seat is so located.
>
> The provisions as to petition, notice, ballot, etc., provided by law for election for the removal of county seats shall be applicable to the primary election therein provided for, as well as the general elections.

(Emphasis supplied.)

The language of chapter 102 emphasized above is nearly identical to the language of chapter 101 previously quoted.

The provisions of these two chapters remained substantially the same until 1943. In the 1943 Revised Code the code revisor placed the provisions of 1917 N.D. Sess. Laws ch. 101 (concerning the permanent location of a county seat) at sections 11-0401, 11-0402 and 11-0403. See 1943 Code Revisor's Note at 11-0401, 11-0402, and 11-0403. The 1943 code revisor placed the provisions of 1917 N.D. Sess. Laws ch. 102 (discussing the removal of county seats not located on railroads or interstate rivers) at section 11-0412 of the 1943 Revised Code. See 1943 Code Revisor's Note at 11-0412.

However, in revising the two 1917 statutes into the form in which they appeared in the 1943 Revised Code, the code revisor made a significant change in the language of chapter 102. The code revisor deleted the language of chapter 102 that is emphasized above and, instead, substituted a reference to sections 11-0402 and 11-0403. The resulting language of section 11-0412 of the 1943 Revised Code was virtually identical to the current section 11-04-12.

In his note to section 11-0412, the code revisor stated that "[t]his section [was] revised for clarity and brevity without change in meaning." 1943 Code Revisor's Note at 11-0412. Yet, by exchanging the reference to sections 11-0402 and 11-0403 (taken from chapter 101) for the language of chapter 102, the code revisor changed, apparently inadvertently, the substance of the statute. The code revisor mistakenly established that the procedure that should be followed to remove a county seat not located on an interstate river or railroad was the procedure for locating permanent county seats (taken from 1917 N.D. Sess. Laws ch. 101) rather than the removal procedure established by the Legislature in 1917 N.D. Sess. Laws ch. 102.

Because of the similar language in the two chapters, the code reviser obviously confused chapters 101 and 102 of the 1917 North Dakota Session Laws. Thus, the reference in N.D.C.C. § 11-04-12 to the provisions of sections 11-04-02 and 11-04-03 was an error.

To resolve the questions presented within this opinion, therefore, it will be necessary to review applicable statutory and case law to determine whether statutory code revisions which change substantively statutes which had not been amended by the Legislature must be honored.

- LEGAL ANALYSES -

I.

N.D.C.C. § 1-02-25 states as follows:

> **1-02-25. Continuations of existing statutes.** For purposes of historical reference and as an aid to interpretation, the provisions of this code, so far as they are substantially the same as previously existing statutes, must be construed as continuations thereof, and not as new enactments except that a revised version of such statutes contained in this code supersede all previous statutes.

See also Section 1-0225, N.D.R.C. 1943.

In City of Fargo v. Annexation Review Commission, 148 N.W.2d 338 (N.D. 1966), the North Dakota Supreme Court considered the applicability of a 1915 statute that had been

rewritten by the code revisor in 1943. The 1943 revision, which was not the result of any legislative action, resulted in a potential substantive change in the statute's provisions. The court found that the Legislature had not intended to change the 1915 statute when it adopted the Revised Code of 1943 and, subsequently, when it adopted the same statute within the North Dakota Century Code. The court wrote:

> Since the original enactment is unambiguous as to its intent and meaning, the subdivisions and changes appearing in the North Dakota Revised Code of 1943, and subsequently appearing in the North Dakota Century Code, do not change the original intent and meaning as embodied in the original enactment of the 1915 statute.

148 N.W.2d at 348. The court decided that, thus, the current statute had to be construed as a continuation of the previously existing statute, and the court applied the statute as it had appeared in 1915. Id.

1917 N.D. Sess. Laws ch. 102 unambiguously established the procedure for removal of a county seat not located on an interstate river or railroad. There have been no substantive legislative changes to that statute. Applying the rule announced in City of Fargo, the 1943 revisions may not be given effect where they changed the operation, effect, or meaning of the statutes, given the absence of a clear legislative intent to change the 1917 law. The provisions of 1917 N.D. Sess. Laws ch. 102 are, thus, controlling in responding to the questions presented despite the changes made in the statute by the 1943 code reviser.

I am asked to decide here the legality of two separate petitions filed in Dunn County. The first petition called for the retention of Manning as the Dunn County seat. Specifically, the preamble to petition No. 1 read as follows:

> The undersigned qualified electors of Dunn County hereby petition the County Commissioners of Dunn County, pursuant to Section 11-04-02 of the North Dakota Century Code, to designate the City of Manning as the proposed county seat of Dunn County on the ballot at the next primary election.

There are two problems with petition No. 1. First, the petition requested the board of county commissioners to act pursuant to N.D.C.C. § 11-04-02 to designate the city of Manning as the proposed Dunn County seat. As previously discussed, N.D.C.C. § 11-04-02 applies only to the permanent location of temporary county seats. Manning does not fall within this category of county seats. Thus, the petition incorrectly referenced N.D.C.C. § 11-04-02.

More importantly, the petition requested only that Manning, the current Dunn County seat, be designated as the proposed county seat. N.D.C.C. ch. 11-04 contains no procedure permitting voters to vote on reaffirming an incumbent county seat. That statute only authorizes elections on the issues of removal or the original placement of the permanent county seat.

Petition No. 2, on the other hand, did seek the removal of the current county seat pursuant to N.D.C.C. ch. 11-04. However, petition No. 2 provided three alternative sites should removal occur. The preamble to petition No. 2. provided as follows:

> The undersigned qualified electors of Dunn County hereby petition the County Commissioners of Dunn County to submit the issue of whether the Dunn County Seat should be removed from Manning to the City of Dunn Center, the City of Halliday or the City of Killdeer, or whether the Dunn County

> Seat should remain in Manning to the electors of Dunn County at the next primary election.

As previously noted, the provisions of 1917 N.D. Sess. Laws ch. 102 control the manner in which county seats not located on an interstate river or railroad are to be removed. By the last paragraph of chapter 102, all of the general provisions of North Dakota law providing for the removal of county seats are applicable except as otherwise provided within chapter 102. See Bugbee v. Steele County, 170 N.W. 321, 322-23 (N.D. 1918),

N.D.C.C. § 11-04-04 requires a petition seeking removal of a county seat to designate in the petition the place to which the county seat should be moved. Petition No. 2 did not designate a single place to which the Dunn County seat should be moved but, instead, provided three alternative locations for the county seat.

In Bugbee v. Steele County the North Dakota Supreme Court specifically authorized the use of a removal petition which did not specify any new proposed county seat location. Although the court's decision in Miller v. Norton, 132 N.W. 1080 (N.D. 1911), seems to conflict with Bugbee, Bugbee appears to be controlling because Bugbee was rendered after Miller.

As Bugbee specifically authorized the use of a petition which called for the removal of the current county seat without identifying any proposed new county seat location, I conclude that, similarly, the use of three alternative proposed county seat sites is permissible. This conclusion adheres to section 3233, C.L. 1913, as it existed at the time of the adoption of 1917 N.D. Sess. Laws ch. 102 ("they may present a petition to the board of county commissioners of their county praying such removal and that an election be held to determine whether or not such removal shall be made").

In summary, petition No. 1 does not comply with the provisions of N.D.C.C. ch. 11-04, but petition No. 2 does comply with the provisions of N.D.C.C. ch. 11-04, even though the petition provides a list of three alternative sites.

II.

The current statutory provision for the ballot form for the county seat removal question is found at N.D.C.C. § 11-04-07. That statute states as follows:

> **11-04-07. Form of ballot on county seat removal.** The ballot to be used at an election for the removal of a county seat shall be in substantially the following form:
>
> Shall the county seat of _____ County be removed from _____ to _____.
>
> Yes __
> No __

N.D.C.C. § 11-04-07 does not appear to authorize the use of alternative county seat locations on the ballot. However, as a review of the historical evolution of this particular statute shows, the ballot form provided by N.D.C.C. § 11-04-07 was set not by legislative action, but by the 1943 code reviser.

Section 1883 of the Revised Codes of 1895 stated, in part, as follows:

> In voting on the question, each elector must vote for the place in the county which he prefers by placing opposite the name of the place the mark X.

This statutory language was continued and reprinted in section 3236 of the Compiled Laws of 1913 and in section 3236 of the 1925 supplement.

In preparing the 1943 Revised Code, the code revisor changed section 11-0407 to provide for the ballot form now found at N.D.C.C. § 11-04-07. The reviser's notes concerning the source of section 11-0407 cite 1925 Supp., § 3236, and state that "the portion here shown is rewritten to prescribe the form of ballot to be used and thus indicates how the ballots shall be marked on the question of county seat removal." 1943 Code Revisor's Notes at 11-0407. The 1925 statute cited by the reviser states, in relevant part, that "[i]n voting on the question, each elector must vote for the place in the county which he prefers by placing opposite the name of the place the mark (X)."

Clearly, the current ballot form provided by N.D.C.C. § 11-04-07 is not an accurate reflection of the ballot requirements established by the Legislature. The ballot form set forth in N.D.C.C. § 11-04-07 occurs by action of the code reviser rather than the Legislature. Because there was no legislative intent to change the prior statutes or to require the ballot form now appearing in N.D.C.C. § 11-04-07, I must apply the rule announced in City of Fargo and construe N.D.C.C. § 11-04-07 as a continuation of the previously existing statutes.

Thus, under the statutory requirement concerning the ballot form for county seat removal, the question must ask the elector to vote for the elector's county seat location choice by placing the mark X opposite the name of the chosen place. The Dunn County ballot form submitted to this office for review satisfies this requirement.

III.

As previously noted, the provisions of 1917 N.D. Sess. Laws ch. 102 control the manner in which county seats not located on an interstate river or railroad are removed.

Chapter 102 states that the two towns receiving the highest vote at the primary election shall be placed upon the official ballot of the first following general election. At that election, the town then receiving the highest number of votes shall be designated the county seat of that county. The issue here is whether the incumbent county seat may be one of the "towns" referred to in chapter 102.

Because 1917 N.D. Sess. Laws ch. 102 does not distinguish between proposed new county seat locations and the incumbent county seat with respect to the general election runoff between the two towns receiving the highest votes at the primary election, I must give the word "town" its ordinary sense meaning. N.D.C.C. § 1-02-02. Thus, "town" as used in chapter 102 would include any town, including the incumbent county seat.

A secondary issue has arisen concerning the need for the county seat removal question to appear on the general election ballot when the incumbent county seat received the most votes at the primary election. 1917 N.D. Sess. Laws ch. 102 provides that where two or more towns are contending for the location of the county seat in counties not located on a railroad or interstate river, the two towns receiving the highest votes at the primary election, and these two towns only, shall be placed on the official ballot at the first following general election. The statute does not provide for the county seat removal question to not appear on the general election ballot when the incumbent county seat receives the most votes at the primary election.

Therefore, it is my opinion that if the incumbent county seat is one of the two sites receiving the highest number of votes at the primary election on the question of the removal of a county seat not located on a railroad or interstate river, the name of the incumbent county seat shall be placed upon the general election ballot. Thereafter, the town receiving the highest number of votes at the general election shall be designated the county seat of that county. (The majority vote provision is found in 1917 N.D. Sess. Laws ch. 102 and renders inapplicable the two-thirds provision of N.D.C.C. § 11-04-08.)

To the extent that it conflicts with this opinion, 1981 N.D. Att'y Gen. 274 (Attorney General's opinion 81-97) is hereby overruled.

Because of confusion surrounding the status of the statutory language found within N.D.C.C. ch. 11-04, legislative review and clarification is strongly recommended. Without legislative attention, the statutes found at chapter 11-04 will continue to produce uncertainty in the minds of the public.

- EFFECT -

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.

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