LETTER OPINION
2002-L-73

December 24, 2002

Honorable John Andrist
State Senator
PO Box E
Crosby, ND 58730-0660

Dear Senator Andrist:

Thank you for your letter concerning extraneous or surplus language appearing on some city and school district election ballots. You indicate that some cities and school districts include estimates of publishing costs on ballots containing the question of whether these political subdivisions should publish the minutes or proceedings of their governing bodies in their official newspapers. You ask about the propriety of including these cost estimates on the ballots.

Section 15.1-09-31, N.D.C.C., provides, in part:

> Every two years, at the time of a school district's annual election of board members, the electors of the district shall determine whether a record of the board proceedings must be published in the official newspaper of the district.

Similarly, N.D.C.C. § 40-01-09.1 provides that every four years:

> [A]ll cities in North Dakota, regardless of their form of government, must put on the ballot the question of whether the minutes of its governing body shall be published in its official newspaper.

You included with your letter sample ballots that have been published in newspapers showing that together with the question of publication of minutes, ballot language had been added estimating annual publication costs.

As you also noted, the school districts' practice of including the cost of publishing minutes was addressed in prior correspondence issued by this office. See Letter to

Leon Johnson (May 11, 1967). The letter discussed an initiated measure which was a predecessor provision to N.D.C.C. § 15.1-09-31. See 1999 N.D. Op. Att'y Gen. L-112. The 1967 letter concluded that the "Measure makes no provision for including the cost of publishing the minutes on the ballot and we do not believe it is proper to include same on the ballot." Likewise, the current versions of N.D.C.C. §§ 15.1-09-31 and 40-01-09.1 make no provision for including the cost of publishing the minutes.

The North Dakota Supreme Court has not addressed this issue; however, according to one authority, "[t]he appearance on the ballot of words of surplusage which could not mislead the voters will not require the invalidation of a local election. . . . The test is whether surplusage 'would tend to confuse or misinform a voter so as to affect his free choice.'" 6 Sandra M. Stevenson, Antieau on Local Government Law § 86.16[3] (2d ed. 2002). In addition, the use of language that is "'in the nature of a persuasive argument in favor of or against the issue . . .'" is prohibited. State ex rel. Bailey v. Celebrezze, 426 N.E.2d 493, 495 (Ohio 1981), quoting Beck v. City of Cincinnati, 124 N.E.2d 120, 121 (Ohio 1955). See also 42 Am. Jur. 2d Initiative and Referendum § 21 (the summary of an initiated measure generally must be clear, concise, and a true and impartial statement as to the intent of the proposed law; not an argument, nor likely to create prejudice for or against the measure.).

While publishing good faith estimated publication costs would not necessarily confuse or misinform a voter to such a degree that it would call into question the results of an election, such statements are clearly surplusage that is not authorized by either N.D.C.C. §§ 15.1-09-31 or 40-01-09.1. Furthermore, to the extent that such estimated costs of publishing are included in the ballot language in order to influence the voters to vote against publication because of the costs involved, the additional language would be argumentative or prejudicial. While presumably the school district or city officials who placed the estimated costs of publication on the ballots you enclosed would assert that they were only trying to fully inform the voters on the ballot measure and not trying to improperly influence them, many of the voters are likewise taxpayers who may be less inclined to vote for publication if reminded in the voting booth of the estimated costs involved.[1] As the court in Beck noted:

[1] Whether including cost estimates constitutes a violation of North Dakota's electioneering statute, N.D.C.C. § 16.1-10-06, would require a determination by the trier of fact in a case as to whether the persons responsible for the surplus ballot language were "asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for . . . any measure submitted to the people . . ." within the meaning of that statute. Such determinations of fact are beyond the scope of an Attorney General's opinion.

> If argumentation, promises, misrepresentations or coercive statements should be permitted on the face of the ballot, one could not predict the limits of such practice and the confusion which may ensue. Certainly if the proponent of such issue be permitted to introduce such material, the opponent should have the same privilege.

Beck v. City of Cincinnati, 124 N.E.2d at 121.

Consequently, it is my opinion that N.D.C.C. §§ 15.1-09-31 and 40-01-09.1 do not permit the inclusion of surplusage such as the estimated costs of publication on the ballot and that it is improper for a city or a school district to include them.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg