

**LETTER OPINION
2005-L-20**

August 18, 2005

Mr. Brian Grosinger
Assistant State's Attorney
Morton County State's Attorney's Office
210 2nd Ave NW
Mandan, ND 58554

Dear Mr. Grosinger:

Thank you for your letter asking whether a local board of health is authorized under N.D.C.C. § 23-35-08(7) to issue administrative rules regarding public health and welfare.¹ In N.D.A.G. 97-F-05, this office stated that the power of a health unit or department to make rules under the predecessor to N.D.C.C. § 23-35-08(7) was limited to rules for the governance of the health unit or department. For the reasons explained below, it is my opinion that a local board of health is authorized to issue administrative rules to protect public health and safety. To the extent N.D.A.G. 97-F-05 conflicts with this opinion, it is overruled.

ANALYSIS

The rulemaking authority² of a local board of health is expressly addressed in North Dakota's public health laws:

Except when in conflict with a local ordinance or a civil service rule within a board of health's jurisdiction, each board of health . . . [m]ay make rules

¹ Your inquiry asked if a health district has the authority to promulgate regulations "for the protection of public health and welfare." For the purposes of this opinion, we assume that you intended to inquire about "public health and safety," which is the statutory term that defines the rule-making authority of a board of health. See N.D.C.C. § 23-35-08(7).

² The rulemaking provisions of N.D.C.C. ch. 28-32, the Administrative Agencies Practice Act, only apply to state agencies, not local governmental units. N.D.C.C. § 28-32-01(2) and (4).

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in a health district or county public health department, as the case may be, and in the case of a city public health department may recommend to the city's governing body ordinances for the protection of public health and safety.

N.D.C.C. § 23-35-08(7). A statute is ambiguous if it is susceptible to differing, but rational meanings. Zuger v. North Dakota Insurance Guaranty Association, 494 N.W.2d 135, 137 (N.D. 1992). This statute is ambiguous because it is not clear whether "for the protection of public health and safety" modifies the board's authority to make rules in a health district or county public health department or just modifies a board's authority to recommend ordinances to the city's governing body. In addition, a previous opinion from this office concluded that "[t]he power to make rules 'in' health units or departments" limited the rulemaking authority to rules for the governance of the health unit or department. N.D.A.G. 97-F-05.

Interpreting the meaning of a statute presents an issue of legislative intent. State v. Higgins, 680 N.W.2d 645, 649 (N.D. 2004). "Words in a statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. N.D.C.C. § 1-02-02." N.D.A.G. 2004-L-65. See also Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990) ("[u]nless words in a statute are defined in the code, they are to be given their plain, ordinary, and commonly understood meaning").

When a statute is ambiguous, the Legislature's intent may be determined by examining the objects sought to be obtained, the circumstances under which the statute was enacted, the legislative history, former or similar statutory provisions, the consequences of the construction of the statute, the administrative construction of the statute, and the preamble, if any. N.D.C.C. § 1-02-39; N.D.A.G. 94-F-31; see also Moskal v. United States, 498 U.S. 103, 108 (1990) (in determining legislative intent, courts will "resort to 'the language and structure, legislative history, and motivating policies' of the statute") (citations omitted); State v. Burr, 598 N.W.2d 147, 163 (N.D.1999) (courts may "look[] to the legislature's declared purpose as well as the structure and design of the statute for evidence of [the legislature's] intent") (citation omitted); State v. Brossart, 565 N.W.2d 752, 756 (N.D.1997) (court will consider text and structure to determine legislative intent).

In determining the legislative intent, "[a court] may consider . . . former statutory provisions, including laws upon the same or similar subjects." N.D.C.C. § 1-02-39(4). "Statutes relating to the same subject matter should be construed, if possible, to harmonize them. Dickinson Public School District No. 1 v. Scott, 252 N.W.2d 216 (N.D. 1977)." State v. Nording, 485 N.W.2d 781 (N.D. 1992). The Supreme Court has also observed that:

Different sections, amendments, or provisions [of a constitution or statute] relating to the same subject, or of the same matter so that they can be said to be in pari materia, are to be construed together and read in the light of each other.

State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977) (citation omitted). "Statutes should be read in relation to other statutes involving the same or similar subject matter in an attempt to discern legislative intent. Johnson v. Johnson, 527 N.W.2d 663, 668 (N.D. 1995); Kroh v. American Family Ins., 487 N.W.2d 306, 308 (N.D. 1992)." Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc., 2001 ND 116, 628 N.W.2d 707 (N.D. 2001).

Prior to 1989, N.D.C.C. § 23-05-01, the predecessor to N.D.C.C. § 23-35-08, provided:

Powers and duties of local board of health. The county, city, and township boards of health shall be known as local boards of health, and each board shall have the following powers and duties within its jurisdiction:

...

To make such rules and regulations as are necessary and proper for the preservation of public health and safety.

N.D.C.C. § 23-05-01(6) (1978).

Under this section, each local board of health had the authority to adopt substantive rules for the preservation of public health and safety. See also N.D.A.G. 1945-134 (interpreting this language to give local boards substantive rulemaking authority to address issues relating to the public health of the district). In 1989 the Legislature changed the law to provide:

Powers and duties of local board of health. The district, county, and city boards of health subject to the supervisory control of the state department of health and consolidated laboratories and state health officer, are local boards of health and each board shall have the following powers and duties within its jurisdiction:

...

To make rules and regulations in district health units and county health departments and to recommend to city

councils or city commissions, as the case may be, ordinances for the protection of public health and safety.

1989 N.D. Sess. Laws, ch. 301, § 17.

It appears the change in 1989 was not meant to affect the local board's authority to adopt substantive rules relating to public health and safety. The director of the Health Department's Division of Local Health Services, who was involved in drafting the bill, explained the amendments to the powers and duties of local boards of health as being "housekeeping" changes. Hearing on S.B. 2200 Before the Senate Comm. on Human Services and Veterans' Affairs, 1989 N.D. Leg. (Mar. 2) (Testimony of Edward Sypnieski). There is no discussion in the written legislative history of any intent to change the rulemaking authority of local boards of health. In fact, the administrator of the First District Health Unit discussed his unit's duty to enforce rules relating to home prepared food. Id. (Testimony of Molla Romine.)

In 1999, the law was again changed. The various chapters of the North Dakota Century Code governing local health units were combined into one chapter, N.D.C.C. ch. 23-35. 1999 N.D. Sess. Laws, ch 242. Section 23-35-08, N.D.C.C., was created and contained the powers and duties of health unit boards. It provides, in part:

Except when in conflict with a local ordinance or a civil service rule within a board of health's jurisdiction, each board of health:

...

May make rules in a health district or county public health department, as the case may be, and in the case of a city public health department may recommend to the city's governing body ordinances for the protection of public health and safety.

During the hearings, Richard Bendish from Morton County questioned whether the health districts or units should continue to have rulemaking power. He was concerned that each unit or county would adopt a different set of rules. In addition, the chairman of the committee expressed her view that health issues, for example addressing a measles outbreak, be addressed locally. Hearing on S.B. 2045 Before the Senate Comm. on Political Subdivisions, 1999 N.D. Leg. (Jan. 14) (Testimony of Richard Bendish and Chairman Judy Lee). From this discussion it seems clear that the committee was discussing substantive rulemaking authority addressing public health and safety, rather than rules regarding governance of the health department or unit.

In addition, the 1999 changes to the provision giving local health units the power to adopt rules were minor. The words “as the case may be” were moved; however, it does not appear that the change was made to affect a health unit’s authority to adopt substantive rules. The legislative history also indicates that the consolidation was not intended to change the then existing local boards’ rulemaking authority. In response to a question by Representative Glassheim asking whether there were new items in the powers and duties section of the bill or whether that section was simply a clarification of existing powers of boards of health, a representative of the Department of Health responded that it was a clarification - no new powers or duties were being added. Hearing on S.B. 2045 Before the House Comm. on Political Subdivisions, 1999 N.D. Leg. (Mar. 5) (Testimony of Debra Anderson, Department of Health).

An interpretation that N.D.C.C. § 23-35-08(7) gives local boards substantive rulemaking authority to address public health issues is also supported by reviewing the origins of the rulemaking authority. The origins of this authority go back at least as far as 1885. In 1885 the State Board of Health, predecessor to the State Health Council, had the authority to “make and enforce any and all needful rules and regulations for the prevention and cure, and to prevent the spread of any contagious, infectious or malarial diseases among persons and domestic animals.” 1885 Laws of Dakota Terr., ch. 63, § 4. Local boards of health were given identical authority. Id. at § 10. In other words, within its geographic jurisdiction, a county board of health had the same authority as the territorial board of health to adopt substantive rules relating to public health and safety. The rulemaking authority of state and local boards of health has been carried forward with only minor revisions in various codifications of North Dakota law. See, e.g., North Dakota Revised Code of 1943 §§ 23-0103(3) and 23-0501(6); and N.D.C.C. §§ 23-01-03(3) and 23-05-01(6) (1960).

The conclusion that a local board of health has substantive rulemaking authority is further supported by two structural features of N.D.C.C. ch. 23-35 and its predecessors. First, N.D.C.C. § 23-35-13 provides that “[a] person who violates any order, ordinance, or rule prescribed by any board of health or health officer or any rule adopted under this chapter is guilty of a class B misdemeanor.” It would be highly unusual to provide that the violation of an internal housekeeping rule is a misdemeanor. Second, if the authority of a local board of health had been restricted to internal, housekeeping rules, there would have been no need for the requirement, since repealed, that the rules be published in the official newspaper or posted in five public places within the jurisdiction of the board. See N.D.C.C. § 23-05-03 (1960) (repealed effective August 1, 1999, by 1999 N.D. Sess. Laws ch. 242).

Therefore, it is my opinion N.D.C.C. §23-35-08(7) gives local boards of health the authority to adopt substantive rules for the protection of public health and safety. Reliance on the word “in” to imply that the rulemaking authority of a local board of health

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is limited to internal governance, as indicated in N.D.A.G. 97-F-05, is misplaced. To the extent N.D.A.G. 97-F-05 conflicts with this opinion, it is overruled.

Sincerely,

Wayne Stenehjem
Attorney General

mjm/vkk

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