

LETTER OPINION
2014-L-05

February 28, 2014

The Honorable Alvin A. Jaeger
Secretary of State
600 East Boulevard Avenue, Dept. 108
Bismarck, ND 58505

Dear Secretary of State Jaeger:

Thank you for your letter about Senate Bill 2144 passed by the 63rd Legislative Assembly concerning the authority of professional corporations practicing architecture and landscape architecture to permit stock ownership by nonprofessional minority owners. You raise several specific questions relating to filing requirements involved in authorizing nonprofessional minority stock ownership in these professional corporations.¹

Based on the following, it is my opinion that the Secretary of State may accept articles of amendment or restated articles of incorporation to add nonprofessional minority owners to existing professional corporations practicing architecture and landscape architecture. It is my further opinion that the Secretary of State may not accept an annual report which lists nonprofessional minority owners serving on the board of directors of these professional corporations. It is also my opinion that the certifications required by N.D.C.C. § 10-31-02(2),² must be submitted at the time of the filing of the articles of amendment or restated articles, and that it is not sufficient for the corporation to merely wait until the annual report is due and then submit for filing the statement and certification required by N.D.C.C. § 10-31-13(1).³

¹ Senate Bill 2144 limits stock ownership by nonprofessional minority owners to professional corporations practicing architecture and landscape architecture under N.D.C.C. ch. 43-03. See N.D.C.C. §§ 10-31-04(3) and 10-31-07.4.

² N.D.C.C. § 10-31-02(2)(a) and (b) mandate certification from the regulating board of the profession of the corporation that each of the directors and shareholders of voting shares practicing in this state is so licensed to practice, and a certificate from the corporation identifying the minority owners who are exempt from the licensing requirement.

³ N.D.C.C. § 10-31-13(1)(a)(3) and (d) require that if the corporation has minority owners it must include in its annual report a statement of the issued shares, itemized by minority owner and nonminority owner and the certification required by N.D.C.C. § 10-31-02 from the applicable regulatory board.

ANALYSIS

Senate Bill 2144, 2013 N.D. Leg. (“S.B. 2144”) amended several sections of N.D.C.C. ch. 10-31 to permit nonprofessional minority ownership in a professional organization practicing architecture and landscape architecture.⁴ However, your questions only pertain to professional corporations already chartered under state law.

You first ask whether you may accept for filing articles of amendment or restated articles of incorporation which add nonprofessional minority owners to a professional corporation.

Section 10-31-02(1), N.D.C.C., provides that a professional organization may be incorporated by filing articles of incorporation with the secretary of state and that these articles must meet the requirements of N.D.C.C. ch. 10-19.1.⁵ While chapter 10-19.1 applies to a professional organization created in the form of a corporation and enjoys the powers and privileges and is subject to the duties, restrictions, and liabilities of other corporations, chapter 10-31 will take precedence in the event of any conflict with chapter 10-19.1.⁶

⁴ See N.D.C.C. § 10-31-07.4, which provides that “if minority owners are expressly authorized under subsection 3 of section 10-31-04, a professional organization may issue shares and membership interests to minority members and an owner may transfer shares or membership interests to minority owners. In the case of issuance or transfer of shares or membership interests to a minority owner, the organization is exempt from the certificate filing requirements under sections 10-31-07, 10-31-07.2, and 10-31-07.3. However, if a professional organization has minority owners, an issuance or transfer of shares or membership interests may not result in minority owners having a majority ownership in the organization.” (Emphasis added.)

⁵ N.D.C.C. § 10-31-02(1) states:

1. One or more individuals may incorporate a professional organization in the form of a corporation for the practice of a profession by filing articles of incorporation with the secretary of state. The articles of incorporation must meet the requirements of chapter 10-19.1 and contain the following:
 - a. The profession to be practiced through the professional corporation; and
 - b. The names and residence addresses of all of the original shareholders of the professional corporation who will practice the profession in this state and of the original shareholders of the professional corporation who are minority owners.

⁶ N.D.C.C. § 10-31-03.

Chapter 10-19.1 permits articles of incorporation to be amended at any time to include or modify any provision that is required or permitted to appear in the articles.⁷

Articles of incorporation may also be amended to restate the existing articles and to include any amendments.⁸

Consequently, an existing professional corporation does not necessarily have to file new articles of incorporation to add nonprofessional minority shareholders; it may also effect the change by amending the articles of incorporation or restating the articles of incorporation with the amendment permitting nonprofessional minority members in compliance with chapter 10-19.1.⁹

Thus, it is my opinion that the Secretary of State may accept articles of amendment or restated articles of incorporation to add nonprofessional minority owners to an existing professional corporation as permitted by chapter 10-19.1.

You next ask whether the provisions of N.D.C.C. ch. 10-31 permit the Secretary of State to accept an annual report that lists nonprofessional minority owners as serving on the board of directors of a professional corporation operating under N.D.C.C. ch. 43-03.

Implicit in your question is whether a nonprofessional minority owner may serve on a board of directors of a professional corporation. The changes made to chapter 10-31 by S.B. 2144 do not specifically allow nonprofessional minority owners to serve on the board of directors, although it is theoretically possible for a minority shareholder under N.D.C.C. ch. 10-19.1 to be elected as a director, if allowed under the articles or bylaws.¹⁰

The legislative history for S.B. 2144 is not particularly helpful in resolving this governance issue. The main sponsor of S.B. 2144 testified both to the purpose of the bill and very briefly to governance issues:

⁷ N.D.C.C. § 10-19.1-17 states:

The articles of a corporation may be amended at any time to include or modify any provision that is required or permitted to appear in the articles or to omit any provision not required to be included in the articles, except that when articles are amended to restate them, the name and address of each incorporator and each initial director may be omitted. . . . Unless otherwise provided in this chapter, the articles may be amended or modified only in accordance with sections 10-19.1-18, 10-19.1-19, and 10-19.1-20

(emphasis added).

⁸ N.D.C.C. §§ 10-19.1-17 and 10-19.1-19(5).

⁹ Id.

¹⁰ See generally N.D.C.C. §§ 10-19.1-10, 10-19.1-31, and 10-19.1-32 through 10-19.1-39, and 10-31-03.

The purpose of SB2144 is to allow some ownership of an architecture firm by non-licensed technical staff. Current ND allows only licensed architects to have any ownership share of an architecture corporation. This bill would allow non-licensed professionals to own up to 49% of the company while keeping licensed architects as the majority owners. . . .

Do not confuse “ownership” of the firm with “Architecture Licensure”. The two are completely separate. Architects would still be responsible for the practice of the profession and for Health Safety and Welfare. An architect would still be required to be licensed in ND and stamp and seal every set of plans. That is a responsibility taken seriously. Firm ownership simply gives an individual the ability to share the wealth (or lose in it as well). In fact ownership doesn’t even insure a seat at the governance table. That too would need to be “given or elected” by the majority ownership - whom are still architects. . . .

Lastly - this bill does not mandate any firm to offer ownership to their staff. It just gives them that opportunity if they choose.¹¹

Based on the somewhat sparse legislative history of this law, it would seem that the primary purpose for nonprofessional staff to be permitted to own stock is to retain vital nonprofessional personnel and permit them to share in the financial risks and rewards of ownership. The statements by the legislator implying that the minority shareholders might be granted a seat on the board of directors are not supported by the changes actually made to chapter 10-31. Moreover, isolated comments by a legislator or interested party in the record must be viewed cautiously and might not be sufficient

¹¹ Hearing on S.B. 2144 Before the House Comm. on Indus., Bus. & Labor, 2013 N.D. Leg. (Mar. 6) (Statement of Sen. Laffen). In earlier testimony, Senator Laffen similarly noted that “[c]urrent ND [law] allows only licensed architects to have any ownership share of an architecture corporation. This bill would allow non-licensed professionals to own up to 49% of the company while keeping licensed architects as the majority owners. . . . Architecture practices have changed. With North Dakota’s recent success we have become bigger. Our firms now include specialists who play very important roles in our success - and they are not architects. They are accountants, marketing professionals, construction managers, information technologists and graphic designers. . . . Simply put we don’t want to lose these people and the best way to do that is to give them ownership of the company. We want to reward them with stock appreciation and the ability to create wealth. . . . Firm ownership simply gives an individual the ability to share the wealth (or lose in it as well). In fact ownership doesn’t even insure a seat at the governance table. That too would need to be “given” by the majority ownership - whom are still architects.” Hearing on S.B. 2144 Before the Senate Comm. on Indus., Bus. & Labor, 2013 N.D. Leg. (Jan. 21) (Statement of Sen. Laffen).

proof of legislative intent.¹² The plain language of a statute is paramount and controls over broad statements of legislative intent.¹³ There is no clear indication in the plain wording of S.B. 2144 that the Legislature intended to permit nonprofessional minority shareholders to be able to serve on a board of directors. Moreover, the only references to shareholders being directors in S.B. 2144 are to professional shareholders licensed to practice the profession in this state.¹⁴

Having concluded that there is insufficient indicia that the Legislature intended nonprofessional minority owners to serve on a board as minority directors, it must be determined whether you may accept an annual report under N.D.C.C. § 10-31-13 purporting to show such minority shareholders as board members. Since there is no clear provision in S.B. 2144 permitting minority shareholders to serve on the board of directors, and since the only references to director in the pertinent statutes concern directors who are licensed professionals,¹⁵ it is my opinion that an annual report purporting to show minority owners as directors would not be in conformance with the law¹⁶ and you may not accept such an annual report for filing.

Finally, you ask if articles of amendment may be used to add nonprofessionals as minority owners, must the certifications required in N.D.C.C. § 10-31-02(2) be made at the time of filing articles of amendment (or restated articles). As noted above, I have determined that articles of amendment or restated articles may be used to add nonprofessional minority owners.

“Articles” include articles of amendment in the case of a corporation “incorporated under or governed by this chapter.”¹⁷ Section 10-31-02(2) plainly provides for the certifications called for in that provision to be made at the time articles are filed with the Secretary of State. Since the term “articles” includes articles of amendment, and since articles of

¹² N.D.A.G. 87-19 (in determining legislative intent one may only cautiously rely on comments of a legislator or interested party) (citing Snyder’s Drug Stores Inc. v. N.D. State Bd. of Pharmacy, 219 N.W.2d 140, 147 (N.D. 1974)).

¹³ Teigen v. State, 749 N.W.2d 505, 513-14 (N.D. 2008).

¹⁴ See N.D.C.C. §§ 10-31-02(2) and 10-31-13. Section 10-31-02(2) differentiates between the certifications required for directors and shareholders of voting shares who are professionals licensed to practice in this state and non-professional minority shareholders, which implies that non-professional minority shareholders are not included in the group of individuals that are directors or shareholders of voting shares.

¹⁵ See N.D.C.C. §§ 10-31-02(2)(a) and (b) and 10-31-13(1)(b).

¹⁶ See N.D.C.C. § 10-19.1-146(4). Section 10-19.1-146 indicates that the Secretary of State need only accept and file an annual report if it conforms to law and all fees have been paid.

¹⁷ N.D.C.C. § 10-19.1-01(4).

amendment merge with and become a part of the articles of incorporation,¹⁸ N.D.C.C. § 10-31-02 can be fairly construed to provide that the certifications must be made at the time articles of amendment are filed.

Therefore, the certifications required in N.D.C.C. § 10-31-02 must be made at the time restated articles of incorporation or articles of amendment are filed, and appropriate certifications must also be submitted later, at the time the professional corporation is required to file its annual report under N.D.C.C. § 10-31-13.¹⁹

Based on a plain reading of the certification requirements contained in N.D.C.C. § 10-31-02(2), it is my opinion that a professional corporation must file certifications required thereunder at the time articles of amendment or restated articles of incorporation are filed;²⁰ it is not sufficient for the corporation to merely wait until the annual report is due and submit the statement and certification required under N.D.C.C. § 10-31-13(1) for filing at that time.²¹

Sincerely,

Wayne Stenehjem
Attorney General

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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.²²

¹⁸ Articles of amendment are effective upon due acceptance by the Secretary of State or a later date of adoption, if the articles so provide. See N.D.C.C. §§ 10-19.1-22 and 10-19.1-24. An amendment does not generally affect existing rights of persons other than shareholders. See N.D.C.C. § 10-19.1-22.

¹⁹ See N.D.C.C. § 10-31-13(1)(d).

²⁰ N.D.C.C. § 10-31-02(a) and (b).

²¹ N.D.C.C. § 10-31-13(1)(a)(3) and (d).

²² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).