

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-10

Date Issued: April 15, 1996

Requested by: Charles Peterson  
Golden Valley County State's Attorney

- QUESTION PRESENTED -

Whether the phrase "residents upon farms" in N.D.C.C. § 15-28-02 refers to a school board member's legal residence or actual physical residence.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the phrase "residents upon farms" in N.D.C.C. § 15-28-02 refers to a school board member's legal residence rather than the member's actual physical residence.

- ANALYSIS -

According to the facts presented, a person applying as a "rural" member of a school board under N.D.C.C. § 15-28-02 previously resided on a farmstead outside the limits of an incorporated city. Although the person claims to be maintaining the person's residence in the rural township for the purpose of voting there, the person has moved to a home within the limits of an incorporated city. Thus, the person no longer physically lives on a farm. The question presented is whether this person is a "rural" resident of the school district for purposes of N.D.C.C. § 15-28-02.

"Every elector is eligible to the office for which he is an elector, except when otherwise specially provided." N.D.C.C. § 44-01-01. To be a qualified elector, a person must be at least eighteen years old, a citizen of the United States, and a resident of North Dakota. N.D. Const. art. II, § 1. In addition, a school board member must be a resident of the school district the member represents. N.D.C.C. § 15-47-05. Finally, N.D.C.C. § 15-28-02 imposes a fifth requirement under certain circumstances:

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When a school district is composed of six or more sections of land having a city within its boundaries and when the population of the school district does not exceed two thousand persons, at least two members of the school board must be residents upon farms outside the corporate limits of the city.

(Emphasis added). I will assume for the purpose of this opinion that a person applying as a "rural" member of a school board satisfies the first four qualifications and the sole question is whether the person is a resident upon a farm under N.D.C.C. § 15-28-02. I will also assume that the person's legal residence is properly located on a farm as determined under N.D.C.C. § 54-01-26 (discussed later in this opinion).

"[N.D.C.C. § 15-28-02] does not indicate whether 'reside upon farms' refers to actual physical residence or legal residence," nor has this question been addressed by the North Dakota Supreme Court. Letter from Assistant Attorney General Patricia Moen to Gerold Busche (February 5, 1988).

The primary purpose of statutory construction is to ascertain the intent of the Legislature. The Legislature's intent initially must be sought from the language of a statute. Unless words in a statute are defined in the code, they are to be given their plain, ordinary, and commonly understood meaning.

Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990) (citations omitted).

Residence is often used to express different meanings according to the subject-matter. . . . "Residence" is a word whose statutory meaning depends upon the context and the purpose of the statute . . . . In ascertaining the meaning of this word in a particular statute, the legislative purpose, as well as the context, must be kept in view.

Anderson v. Breithbarth, 245 N.W. 483, 485 (N.D. 1932) (quotation omitted). Thus, one cannot rely on dictionary definitions of "resident" alone to answer this question without also reviewing the context and purpose of the statute.

Attorneys in this office have addressed the question presented on several occasions. In 1962, a special assistant attorney general

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concluded that a person who physically lived in town but maintained a rural voting residence "could not be considered a rural member [of the school board] insofar as meeting the requirements of Section 15-28-02 because this section provides for board members that actually live upon the farm." Letter from Special Assistant Attorney General Vance Hill to Mrs. Joe Rensch (May 8, 1962). In 1971, then Assistant Attorney General Gerald VandeWalle reached the opposite conclusion, stating that N.D.C.C. § 15-28-02 refers to "legal residence and not to actual physical residence." Letter from Assistant Attorney General Gerald VandeWalle to L.D. Christensen (May 13, 1971). This conclusion was repeated in 1976 despite the contrary opinion of the Pierce County State's Attorney. Letter from Chief Deputy Attorney General Gerald VandeWalle to Charles Orvik (March 25, 1976).

"A statutory provision is ambiguous if it is susceptible to differing, but rational, meanings. Zuger v. North Dakota Insurance Guaranty Assoc., 494 N.W.2d 135, 137 (N.D. 1992). As this office's previous conclusions indicate, the phrase "residents upon farms" could reasonably be interpreted to mean either legal residence or actual physical residence. Compare Anderson, 245 N.W. at 485 ("residing in the district" in statute providing for free and open public schools means actual physical residence) with State v. Moodie, 258 N.W. 558, 564 (N.D. 1935) ("resided" as used in constitutional provision entitling person to vote or hold office means legal residence). The phrase therefore is ambiguous and extrinsic aids may be used to interpret the meaning of the statute. Kim-Go, 460 N.W.2d at 696; N.D.C.C. § 1-02-39. The Legislature may wish to resolve this ambiguity in the next legislative session.

Before considering the context and purpose of N.D.C.C. § 15-28-02, it is important to note that whether this section refers to legal residence or actual physical residence should affect only a few people. A person's legal residence will generally be the same as the person's actual physical residence. As discussed later in this opinion, legal residence is created by the union of actual physical residence with the intent to establish a new legal residence at that location. In addition, "[a] residence cannot be lost until another is gained," N.D.C.C. § 54-01-26(3). However, unless there is a reason why an indefinite change in actual physical residence is temporary, the intent to establish a new legal residence should exist at the same time or shortly after the person physically moves to that location. Thus, the question presented should affect only those persons who recently lived on a farm and have not yet established a new legal residence.

The context of N.D.C.C. § 15-28-02 suggests that "resident" refers to legal residence. "[T]he word 'residence' or 'resident,' when used in . . . statutes relating to the subject of voting and eligibility to office . . . is in nearly every case synonymous with 'domicile' [or legal residence]." State v. Moodie, 258 N.W. 558, 565 (N.D. 1935) (quotation omitted). Here, the phrase "residents upon farms" refers to the eligibility of school board members to hold that office. Consistent with the general rule stated in Moodie, it therefore appears that the term "resident" when used in N.D.C.C. § 15-28-02 as an additional requirement for school board membership means legal residence rather than actual physical residence.<sup>1</sup>

According to at least one legislator, the purpose of requiring rural membership on school boards was "to maintain the representation of people who will be paying the biggest part of the property taxes that were levied by school board members." Hearing on H.B. 1276 Before the House Comm. on Education 50th N.D. Leg. (January 19, 1987) (Statement of Representative Myrdal). I suspect an additional purpose was to obtain rural insight on issues that are unique or more important to farm children such as busing. To fulfill these purposes, it is not necessary that rural school board members physically reside on farms. As discussed earlier in this opinion, for a person to maintain legal residence but not actual physical residence at a rural location, the person generally would have recently lived on a farm and not yet established a legal residence somewhere else. Under these circumstances, the person would not be so far removed from the person's rural legal residence that the person would no longer be personally familiar with rural issues.

Interpreting the phrase "residents upon farms" in its ordinary sense, in the context in which the words are used, and in light of the apparent purpose of N.D.C.C. § 15-28-02, it is my opinion that the phrase "residents upon farms" in N.D.C.C. § 15-28-02 refers to a school board member's legal residence rather than the member's actual physical residence.

A person's residence for voting purposes is determined according to the rules for determining a person's legal residence under N.D.C.C.

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<sup>1</sup> The decision in Dietz v. City of Medora is not inconsistent with this interpretation because the statutes in that case required that a city officer be both a qualified elector of the municipality and a resident of or within the city. 333 N.W.2d 702, 703 (N.D. 1983). Construing "resident" in that statute to mean actual physical residence was necessary to avoid redundancy and give meaning to all the statutory language. Id.

§ 54-01-26. N.D.C.C. § 16.1-01-04(3). In other words, residence for voting purposes is synonymous with legal residence. Therefore, a claim that a person's rural residence is being maintained "for the purpose of voting" simply assumes the location of the person's legal residence and is relevant only as evidence of the person's intent.

The location of a person's legal residence is a question of fact that is beyond the scope of this opinion. N.D.C.C. § 54-01-26 provides:

Every person has in law a residence. In determining the place of residence, the following rules must be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.
2. There can be only one residence.
3. A residence cannot be lost until another is gained.
- . . . .
7. The residence can be changed only by the union of act and intent.

Legal residence under this statute is a union of actual physical residence and the person's intent to establish a new legal residence at that location.

A legal residence is not lost until another is gained. N.D.C.C. § 54-01-26(3). Therefore, because the person described in this opinion has physically moved to a home within the limits of an incorporated city, the question is whether the person has intended at any time to establish a legal residence at that location. In examining whether this intent exists,

[t]he question of residence must be determined from all the facts and circumstances surrounding the person, as related to his residence, and the intention must be accompanied by acts in harmony with the declared intention, and, notwithstanding one may testify that his intention was to make his home in a certain place, if his acts are of a character to negative his declaration or inconsistent with it, it is clear that the court cannot be governed by his testimony as to intention.

. . . . .

. . . To entertain a doubtful, vague, or equivocal purpose to return does not prove the fact of "intention" as used in the statute, when reasonably construed in view of the legislative object and the general law on the subject of domicile. That a person may live in one voting district and do business there and at the same time retain a right to vote in another district is undoubtedly true; but the right depends upon a reasonable intention to resume his former home and to rebut the presumption that he had abandoned it.

Moodie, 258 N.W. at 563-64 (quotation omitted) (emphasis added). As concluded by the court in Moodie, supra, and recently by a district court in Hope v. Olson, Civil No. 9557 (N.D. Northeast Jud. Dist., September 7, 1995), a person's declared intent is unreasonable and not controlling if the facts are inconsistent with that intent and indicate that a change in legal residence was actually intended.

- 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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