

N.D.A.G. Letter to Koppy (March 26, 1991)

March 26, 1991

Mr. Allen Koppy
Morton County State's Attorney
210 Second Avenue NW
Mandan, ND 58554

Dear Mr. Koppy:

Thank you for your March 7, 1991, letter requesting my opinion on whether the Morton County Board of Commissioners can legally call a special election for the electorate to vote on imposing a county-wide tax for Emergency 911 service. In your letter you state that the electorate defeated a similar provision presented on the general election ballot in November, 1990. You further state that the Board of Commissioners now desires to either call a special election or to put the issue to the rural electorate at the school district election.

The basic legal issue involved is whether a county board of commissioners has authority to call special elections for this purpose. Counties in North Dakota are created by the state constitution and are limited to the powers and authority granted them by the constitution and the state statutes. N.D. Const. art. VII, § 2 provides: "[t]he legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law." The constitution does provide under Article VII, § 7 that optional forms of government may be submitted to the electorate at a special or general election.

A review of the North Dakota Century Code reveals that the board of commissioners of a county (hereafter "Board") is granted authority to call special elections in certain circumstances. N.D.D.C. § 27-26-04 authorizes the Board to call a special election to fill the vacancy in the office of county court judge. N.D.D.C. § 40-38-02 authorizes the Board to call a special election at any time for the purpose of voting on whether it should increase the mill levy for public library service. N.D.D.C. § 44-08-21 requires the call of a special election upon receipt of a sufficient petition for recall of any elected official. Should the official resign, the Board is authorized by this section to call a special election. N.D.D.C. § 57-15-22.2 authorizes the Board for an unorganized township to call a special election upon being presented with a petition by the electorate for the purpose of voting on authorizing an excess levy on property within the township. N.D.D.C. § 57-17-02 authorizes the Board to call a special election for the purpose of voting on authorizing an excess levy for the current year. N.D.D.C. § 11-11-18 requires the Board to submit to the electors "at any regular or special election any proposal for an extraordinary outlay of money by the county when the proposed expenditure is greater in amount than can be provided for by the annual tax levies." This same section authorizes the Board to submit to the electors of the county at any regular or special election the proposal for construction

of a courthouse jail or other public building by establishing a building fund. N.D.D.C. § 11-06-03 authorizes the Board to call a special election when presented with a petition to change the county's boundaries. N.D.D.C. § 11-13-16 authorizes the county auditor to call a special election "whenever the board of county commissioners fails or refuses to call a special election required by any law of this state." No statutory section provides a general authorization for the Board to call a special election.

This office has interpreted N.D.D.C. § 40-21-16 as showing the legislature's clear intent to allow municipalities to hold special elections whenever they so desire. See 1983 N.D. Op. Att'y Gen. 34.

N.D.D.C. § 40-21-16 provides:

Special municipal elections to fill vacancies or for any other purposes shall be held and conducted by the inspectors and judges of election of the several precincts in the same manner and the returns shall be made in the same form and manner as at regular municipal elections.

No similar provision exists in statutes relating to county elections.

N.D.D.C. § 57-40.6-02 does call for the county board of commissioners to submit "the proposed excise tax to the electors of the county" before imposition of the tax is effective. This section however does not specify how or at what type of election the matter is to be submitted to the voters. However, since there is no generalized authority for a county to call a special election, it is my opinion that the issue can only be put before the electors at a general election.

In your letter you mention the possibility of using the school district election as a vehicle through which you could present this issue to the rural electorate. Public school district elections are regulated by N.D.C.C. ch. 15-28. I am unable to locate any statutory authority which would allow the placing of such an issue on the ballot for the school district election. Further, because the boundaries of the school districts which include portions of Morton County do not coincide with the boundaries of Morton County, it would not seem feasible to use the school district elections to present this issue to the rural electorate.

Because I do not feel that the calling of a special election is necessarily implied under N.D.D.C. § 57-40.6-02, in my opinion the Morton County Board of Commissioners must wait until the next general election to place the issue of the excise tax on the ballot.

Sincerely,

Nicholas J. Spaeth

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