

N.D.A.G. Letter to Slorby (Sep. 23, 1987)

September 23, 1987

Mr. Tom P. Slorby
Ward County State's Attorney
Ward County Courthouse
Minot North Dakota 58701

Dear Mr. Slorby:

Thank you for your letter of September 3, 1987, inquiring as to the ability of the board of county commissioners to place a question upon the next primary or general election ballot as to whether the people of Ward County desire a particular tax levy to be continued. We assume from your inquiry that the question desired to be placed before the voters is in the nature of a nonbinding advisory poll or, as it has been called in the past, a straw vote. We assume the board of county commissioners desire to gain knowledge as to the wishes of its constituents on this question.

In 1968, Attorney General Johanneson gave an opinion to North Dakota Governor Guy on a similar question. A copy of that opinion is enclosed. Essentially, the opinion noted that so-called "straw" votes have been held by various political subdivisions in North Dakota on a variety of questions although there is no specific statutory procedure or authorization for such votes. However, the opinion noted the authority of the board of county commissioners to supervise the fiscal affairs of the county as well as the conduct of county officials. N.D.C.C. § 11-11-11. As such, the opinion concluded that in pursuing this statutory authority the county would have sufficient legal interest to permit them to seek the advisory vote of the electors in order to secure information on a particular issue.

Insofar as counties are concerned, they have only such powers as are specifically granted them by the Legislature or necessarily implied from the powers specifically granted. However among these powers are those of superintending the fiscal affairs of the county and supervising the conduct of the respective county officers. See section 11-11-11 of the North Dakota Century Code. The latter power includes the determination of the hours county official's offices will be open. While the county commissioners may not have authority to seek a plebiscite on the time issue merely for the convenience of the residents of the county, we do believe they have sufficient formal interest in the matter, insofar as the function of county government is concerned, to seek such a plebiscite for the purpose of submitting information on the petition filed by this office pursuant to House Concurrent Resolution "E-1" of the 1967 Legislature.

Letter from Attorney General Johanneson to Governor Guy (May 24, 1968) at 2.

This particular Attorney General's opinion was acknowledged by the North Dakota Supreme Court in State ex rel. Askew v. Meier, 231 N.W.2d 821 (N.D. 1975). In a footnote, the court noted the 1968 straw vote which occurred as to the preference as to time zones.

However, we take judicial notice of Associated Press stories printed in the Bismarck Tribune of May 27, 1968, and the Fargo Forum of June 23, 1968, and of a letter from the Attorney General to the Governor dated May 24, 1968, and find that the 1968 vote was conducted by county commissioners of the separate counties, at the suggestion of the Governor but at county expense, pursuant to an opinion of the Attorney General that such a nonbinding straw vote was a matter of legitimate county concern, but that no State funds could be spent. We therefore conclude that the 1968 vote does not assist us in deciding the issue before us, which involves the use of the constitutional referendum procedure to refer a ratification of a constitutional amendment.

Id. at 825.

There are few reported decisions of other jurisdictions on the same issue. In Southeastern Mich. Fair Budget v. Killeen, 395 N.W.2d 325 (Mich. App. 1986), a Michigan court noted that advisory questions are not per se excluded from a ballot absent prohibitions to such straw votes. In that case, the city council attempted to place a request for an advisory opinion before the voters as to federal military intervention in Central America and federal military spending. The Michigan court concluded that neither the Legislature nor the city's home rule charter conferred any authority on a city council to place these particular advisory questions on a ballot.

Two decisions from the state of New York hold that an advisory referendum by a city is not authorized in the absence of specific statutory authority. Fossella v. Dinkins, 494 N.Y.S.2d 1012 (Sup. Ct. 1985); Meredith v. Monahan, 304 N.Y.S.2d 638 (Sup. Ct. 1969). In Fossella, the proposed advisory opinion concerned the use of city property for the maintenance of nuclear weapons. In Meredith, the question was whether the city council could prepare a new city charter. The effect of an affirmative vote on the question in Meredith would have resulted in the preparation of a city charter in violation of the procedures set forth by the Legislature in accomplishing such a task. Based upon the specific facts surrounding both of these decisions, their precedential value in North Dakota is limited.

In conclusion, I believe a board of county commissioners may seek a nonbinding, advisory opinion of its constituents in implementing a specific statutory authority given to the board by the constitution or a statute. Examples of such authorities can be found at N.D.C.C. §§ 11-11-11, 11-11-14. However, the board may not seek an advisory opinion or straw vote of the electorate on matters not within its statutory or constitutional authority.

Sincerely,

Nicholas J. Spaeth

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