

## **N.D.A.G. Letter to Freed (Oct. 23, 1990)**

October 23, 1990

Mr. Robert A. Freed  
Stutsman County Assistant  
State's Attorney  
511 2nd Avenue S.E.  
Jamestown, ND 58401

Dear Mr. Freed:

Thank you for your October 1, 1990, letter concerning problems you have discovered in the incorporation of the city of Spiritwood Lake. According to your letter, the 1974 incorporation of the city of Spiritwood Lake is defective in several respects and is not in full compliance with statutory requirements. You ask for assistance and advice on how to proceed in resolving these compliance problems.

Your letter indicates that a census of the territory to be incorporated as a city occurred less than 60 days prior to the time the petition for incorporation was submitted to the board of county commissioners in violation of N.D.C.C. § 40-02-02. You also state that the census and the survey were not left at a convenient place within the to-be-incorporated territory for at least 30 days prior to action by the board of county commissioners in violation of N.D.C.C. § 40-02-04. Your letter indicates that no order of incorporation was issued by the board of county commissioners as required by N.D.C.C. § 40-02-12 and that the requirements of N.D.C.C. ch. 40-50 concerning plats have not been satisfied.

Initially, you asked whether the statutes in effect in 1974 pertinent to the issues raised by your letter differ from those statutes in effect today. I have checked the relevant statutes and have determined that although they differ in certain respects from the statutes in effect today, the pertinent requirements (i.e., a census taken not less than 60 days prior to submission of the petition, public display of the census and the survey for at least 30 days, and filing an order for incorporation issued by the county commission with the register of deeds and the Secretary of State's Office) have not changed.

Certain defects in the incorporation procedure, such as the failure to take the census within the required time period before the submission of the petition and the failure to display the survey and the census within the time period required, cannot be addressed at this time. However, I have determined that these defects do not affect the validity of the corporate existence of the city of Spiritwood Lake.

Precise compliance with all of the requirements of statutes concerning the incorporation of a city is not necessary for an incorporation to be valid. 1 McQuillin Mun. Corp. § 3.46 (3rd ed. 1987).

Departures and irregularities relating to form, in incorporating under a general statute, ordinarily do not affect the validity of the proceedings to incorporate so as to make the incorporation void or subject to attack.

Id. at 372-73. Instead, a corporation with defects in its proceedings of incorporation may be viewed as a de facto corporation. Id. at § 3.48. Furthermore, the validity of a municipal corporation may only be challenged by the state and may not be instituted by any citizen directly or collaterally. Hazelton-Moffit Special School Dist. No. 6 v. Ward, 107 N.W.2d 636 (N.D. 1961); Ward v. Gradin, 109 N.W. 57, 58-9 (N.D. 1906).

The requisites for a de facto municipal corporation are:

1. A charter or general law under which such a corporation as it purports to be is organized;
2. An attempted good faith compliance with the requirements of the incorporation statute;
3. Colorable compliance with those statutory requirements; and
4. An assumption of corporate powers.

1 McQuillin Mun. Corp. § 3.48a (3rd ed. 1987).

The Minnesota case of Bowman v. City of Moorhead, 36 N.W.2d 7 (Minn. 1949), is very similar to the situation involving the city of Spiritwood Lake. In City of Moorhead, the proposed new home rule charter was not published as many times as required by Minnesota law. In addition, there were irregularities in the manner in which the charter was submitted to the voters at the special election, and the preparation and wording of the ballot presented to the voters.

The Minnesota Supreme Court applied the above rules concerning the existence of a de facto municipal corporation. The court concluded that the reason for the rule of de facto corporations was the importance of stability and certainty in matters involving public corporate franchises and the serious consequences which might occur if the existence of a municipal corporation should be called into question resulting in potential void actions between corporations and private parties. 36 N.W.2d at 9. Applying the rules of a de facto corporation, the court concluded that the city of Moorhead was a de facto municipal corporation and could exist as if the irregularities surrounding its incorporation process had never occurred.

I am confident that the North Dakota Supreme Court would follow the lead of the Minnesota Supreme Court as well as courts from other jurisdictions in applying the rules of a de facto corporation in North Dakota. I defer to your judgment as to whether the various requirements of a de facto corporation exist in the attempted incorporation of Spiritwood Lake.

You may also wish to consider drafting curative legislation before the next session of the Legislature. Through such legislation, any defect in the proceedings creating the municipal corporation may be remedied by the Legislature. Such curative legislation is common in remedying defective incorporation procedures. 1 McQuillin Mun. Corp. § 3.47 (3rd ed. 1987).

Finally, your letter notes problems which can still be remedied through additional action. Because no order of incorporation was ever issued, I suggest that such an order be issued by the county commission and filed in the register of deeds office as well as the office of Secretary of State. Furthermore, other requirements of N.D.C.C. ch. 40-50 should also be satisfied as soon as possible. Although the theory of de facto municipal corporations protects the integrity of the city of Spiritwood Lake, the element of good faith requires every attempt to comply with statutory requirements whenever possible.

I hope this discussion is helpful to you and to the officials of the city of Spiritwood Lake.

Sincerely,

Nicholas J. Spaeth

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