

OPINION
69-533

December 10, 1969 (OPINION)

Mr. Robert L. Eckert

State's Attorney

Richland County

RE: Waters - Water Management Districts - Definition

of Resident Freeholder

This is in reply to your letter of December 3, 1969, with regard to the application of the term "resident freeholder."

Your letter informs us that your board of county commissioners would like to consider the reappointment of an individual to the county water management district board of commissioners. It further informs us that the individual in question is presently living in another county but voted most recently in your county. He owns real estate in your county and formerly lived in your county. The farm he previously lived on is now occupied by his sons. His residential personal property is assessed in the other county. You are informed that he has disposed of all of his personal property in your county.

Your question is whether the board of county commissioners of your county can appoint this individual to serve as a member of the board of commissioners for your county's water management district.

You call our attention to the provision of section 61-16-08 of the 1969 Supplement to the North Dakota Century Code which provides, in part:

"* * * any resident freeholder in the district shall be eligible for appointment to the board of commissioners thereof.
* * *."

The term "resident freeholder" is not commonly used in prescribing qualifications for office in this state. The word "freeholder" has long been recognized in our system of law. Thus, we note at 17A, Words and Phrases, Permanent Edition, 309, the statement that:

"A tenant who held by a free tenure under the feudal system had a right to the enjoyment of the land for his life, at least, and could not be dispossessed even for the nonpayment of rent or nonperformance of his services, and hence he was called a 'freeholder.' Turner v. Dawson, 80 Va. 841, 844."

We also find the more qualified term "resident freeholder" defined. 37 Words and Phrases, 1969 Cumulative Annual Pocket Part Supplement, 55, informs us that:

"A 'resident freeholder' qualified to protest annexation is one who is a resident within the area to be annexed, holding a

present legal title to a freehold estate in real property located within the area to be annexed. *Kunesh v. City of Great Falls*, 317 P.2d. 297, 301, 132 Mont. 285.

"To be 'resident freeholder' of proposed town which would be composed of contiguous territory which was part of two other towns, the person was required to be a freeholder and domiciliary of the territory which was to compromise (sic) the new town, but it was not necessary that such person spend majority of his time at location of the freehold interest. In *re Town of Spread Eagle*, 116 N.W.2d. 165, 168, 17 Wis. 2d 200.

"'Resident freeholders' within meaning of statute providing that after approval of commissioner of education of plan for formation of consolidated school district, election on consolidation shall be held on presentation to county superintendent of petition or petitions asking for formation of consolidated school district by at least twenty-five percent of 'resident freeholders' of each school district, means persons who are residents of school district involved, and who own freehold interest in land situated in such school district, and not residents who own land in other parts of the state. *Sullivan v. Joint Independent Consol. School Dist. No. 102 of Swift and Chippewa Counties*, 88 N.W.2d. 1, 5, 251 Minn. 378."

From the facts given in your letter, we would assume that there is no question but that the individual in question owns real estate in your county and thus is a freeholder of your county. The problematical question would, therefore, apparently be whether he is a "resident" freeholder of your county. It is our opinion that residence for purpose of this qualification should be determined under the provisions of section 54-01-26 of the North Dakota Century Code. We are, of course, not familiar with all background circumstances, however, from the information you submit we would assume that while the individual has physically moved to another county he has not formed the necessary intent to make the new county his permanent residence. On such basis he would be permitted to vote under residence requirements only in your county, not in the county where he is usually physically present. If this is the basis upon which he votes in your county, we would assume such voting is valid, that he is a legal resident of your county, and that he therefore is also a "resident freeholder" of your county within the meaning of the statutory language previously quoted herein. The converse is also true, i.e., if he has physically moved to the new county with the intention of establishing his permanent legal residence in that county, he is a legal "resident" of that county, he may not vote in the former county, and he is not a "resident freeholder" of a district within your county within the meaning of the statutory language heretofore quoted. Voting in a county other than that of one's residence is a criminal offense, and we would not assume that the individual has performed an illegal act in the absence of direct proof that he has done so.

On the basis of the facts you give, the question would appear to turn upon the "intent" of the individual who has physically moved to another county. Perhaps the best evidence of such intent would be his own statement as to what that intent is. If he has performed

acts inconsistent with an intention to retain your county as his county of legal residence, such as voting in the new county, his declaration might be open to serious question. However, the facts you give do not contain any item that would necessarily militate against his declaring that it is and has been his intention that your district is his place of legal residence.

On such basis, if he declares that it is his intention that your district is and remains his legal residence and the real property interests mentioned are owned by him in your district, we would assume on the basis of the facts given that he is a "resident freeholder" of that district and, on this basis, that he may be appointed to the board of commissioners of that district.

HELGI JOHANNESON

Attorney General