



North Dakota Century Code chapter

61-24.2?

No \_\_\_\_\_

In the event you do not deem the above proposed ballot question sufficient, I would appreciate your propounding a suitable ballot question.

Regarding your first question, it is our opinion that your proposed ballot is legally sufficient, since it includes both the question of creation of the district and authorization of a mill levy. This opinion is based on interpretation of section 61-24.2-03 in accordance with chapter 1-02 of the North Dakota Century Code, since neither case law nor the minutes of the legislative hearings provide guidance to answer this question.

As you indicated in your letter, section 61-24.2-03 contains the enabling language for creating the West River Water Supply District by election:

61-24.2-03. CREATION OF DISTRICT BY ELECTION - SECRETARY OF STATE TO CERTIFY RESULT - DISTRICT TO BE CORPORATE AGENCY OF STATE. A vote upon the question of the creation of the district and authorization of a mill levy may be held. . . . (Emphasis added).

Another portion of section 61-24.2-03 provides:

If so created, the district shall be a corporate agency of this state, a body politic and corporate with the authority to exercise the powers specified in this chapter, including the power to certify a mill levy as provided by section 61-24.2-08. . . . (Emphasis added).

It seems quite clear that the Legislative Assembly intended the voters to approve a single question which includes both creation of a district and authorization of a mill levy. As you can see by the second quoted portion of section 61-24.2-03 above, the Legislature expressly provided that the district, if created, shall have the power to certify a mill levy. If the Legislature had intended the voters to pass only on the question of creation of a district, and not on the authority to certify a mill levy, it would have been a simple matter to delete the phrase "and authorization of a mill levy" from the first-quoted portion of section 61-24.2-03 above. However, the Legislature approved section 61-24.2-03 as quoted above, clearly indicating that while the district should have the power to levy up to one mill if created, the voters should approve both the actual creation of the district and the authorization of a mill levy. Apparently the Legislature intended that the ballot question itself serve to notify the voters that if they vote yes they are voting for creation of a district and authorization of a mill levy to support the district.

Your letter states your second question as follows:

Question No. 2

North Dakota Century Code 57-15-10.1 authorizes a city to levy a tax not exceeding one-half mill for the purpose of "advertising the resources and opportunities" in the City "and promoting the industrial development thereof." The City of Dickinson has levied such tax and has funds available from that levy. The City desires to expend part of those funds for the purpose of advertising the question of creation of the West River Water Supply District at the forthcoming municipal election. The advertising expenditures would be for the dual purpose of explaining the purpose, structure, and organization of the proposed West River Water Supply District and, if it is lawful to do so, to promote a favorable vote upon such question. The second question upon which we seek your opinion may then be phrased as follows:

May a city lawfully expend funds realized from the levy authorized by North Dakota Century Code 57-15-10.1 for the purposes of (1) explaining the legislation authorizing the proposed West River Water Supply District and explaining the purpose and organization of the proposed district, or (2) promoting a favorable vote for the creation of the West River Water Supply District, or (3) for both such purposes?

You indicate in your letter that it is your opinion that funds realized from the levy authorized by section 57-15-10.1 may lawfully be used for appropriate advertising for both purposes stated in your second question. Section 57-15-10.1 provides:

57-15-10.1. COUNTIES AND CITIES MAY LEVY FOR CERTAIN ADVERTISING PURPOSES. - The board of county commissioners of any county, or the governing body of any city may annually levy a tax for the purpose of advertising the resources and opportunities in the county or city as the case may be and promoting the industrial development thereof. Such tax shall not exceed the amount produced by the levy of one-half mill on a dollar of the net taxable valuation of the county or city as the case may be.

When any county or city makes the levy provided for by this section, the expenditure of the fund shall be under the direction of the governing boards of such county or city. The levy of such one-half mill authorized by this section shall not be subject to other mill limitations prescribed by law. (Emphasis added).

Under this provision the governing body of the city or county is vested with the discretion to expend the funds and the determination of the governing body would be subject to reversal by the courts only if they have violated the statutory provisions or abused their discretion. The above underlined language sets out the statutory limits within which funds raised by the authorized one-half mill levy can be expended. First, such funds may be expended for "advertising the resources and opportunities in the county or city as the case may be" and/or such funds may be used for the purpose of "promoting the industrial development thereof".

By letter dated June 10, 1975, the Attorney General responded to a

letter which queried whether section 57-15-10.1 funds could be expended by either the City of Minot or Ward County to promote a flood control project on the Souris River. The Attorney General's letter states, in part:

Whether the purpose for which the advertising funds are to be spent in this instance would come within the statutory provisions is essentially a question of fact rather than a question of law and this office does not, as noted above, have the authority to adjudicate the facts, that being a prerogative of the courts. However, this office on May 28, 1969, in response to a request from Clinton R. Ottmar, Stutsman County States Attorney as to whether or not the County Commissioners could make expenditures to influence Congress to expedite the Pipestem Dam Project concluded:

"Political subdivisions have only such authority as the Legislature may grant or as may be necessarily implied from the grant. The grant in this instance is limited to advertising resources and opportunities and to promote industrial development thereof. The Pipestem Dam Project, depending upon the location and its potentials, might qualify under the loose construction of the term 'promoting the industrial development thereof.' If, however, the Pipestem Dam Project does not have an immediate industrial development potential, it would not appear that the aforesaid section would constitute authority for expending tax revenues to expedite same."

The opinion then concluded there was serious doubt that the proposal would constitute subject matter upon which tax moneys could be expended.

We believe the same rationale must be applied in this instance, and thus moneys from the advertising fund could not be expended if the dam project did not have an immediate industrial development potential. . . .

As in previous cases, whether the purpose for which the advertising funds are to be spent would come within the statutory provisions is essentially a question of fact rather than a question of law and this office does not have the authority to adjudicate the facts, that being a prerogative of the courts. In our previously quoted opinion and letter, we expressed serious doubts that the proposal in question would constitute subject matter upon which tax moneys could be expended. The serious doubt was based on the fact that there did not appear to be an immediate industrial development potential resulting from the subject matter. We did not offer an opinion to determine a factual question. In this case, we are not dealing with the question of industrial development. However, again we must express reservations about whether your proposal for expenditure of section 57-15-10.1 funds would constitute subject matter upon which such tax funds could properly be expended. Advertising to educate, persuade, or otherwise influence the electorate as to how they should vote on any kind of an election would not seem to fall within the meaning of either "advertising the resources and opportunities" or "promoting the industrial development thereof".

Hopefully the foregoing comments will be helpful to you.

Sincerely,

ALLEN I. OLSON

Attorney General