LETTER OPINION
93-L-147

April 23, 1993

Dr. Wayne G. Sanstead
State Superintendent
Department of Public Instruction
600 East Boulevard Avenue
Bismarck, ND 58505-0440

Dear Dr. Sanstead:

Thank you for your March 24, 1993, letter inquiring as to the constitutionality of N.D.C.C. ? 57-15-14.

N.D.C.C. ? 57-15-14 sets forth the tax levy limitations for school districts. Under subsection 1 of section 57-15-14, school districts with more than 4,000 in population according to the last federal decennial census, may levy any specified number of mills or remove the mill levy upon resolution of the school board and approval of a majority of the qualified electors voting on the matter at any regular or special school district election. Under subsection 2 of section 57-15-14, school districts having a total population of less than 4,000 may levy any specified number of mills upon resolution of the school board and the approval of 55 percent of the qualified electors voting on the matter at any regular or special school election. The question is presented whether this disparate treatment is unconstitutional insomuch as it requires 55 percent voter approval in school districts with populations of less than 4,000 while only requiring a simple majority in school districts with populations in excess of 4,000.

The relevant constitutional provisions are the Equal Protection Clause of the Fourteenth Amendment of the United States constitution and Article I, Sections 21 and 22 of the North Dakota Constitution. "Because the methods of analysis for resolving challenges to legislative classifications under these constitutional

provisions are essentially the same [a court will generally address them] together under an equal protection analysis" Gange v. Clerk of Burleigh County Dist. Court, 429 N.W.2d 429, 432-33 (N.D. 1988) (citations omitted).

The North Dakota Supreme Court has summarized its review under equal protections challenges as follows:

> There are three separate standards of review for equal protection claims. The standard used in a particular case depends upon the challenged statutory classification and the right allegedly infringed. If the case involves an inherently suspect classification or an infringement of a fundamental right the statute is subject to strict judicial scrutiny and will be held invalid unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the classification are necessary to further its purpose. An intermediate standard of review is utilized in those cases where "an important substantive right" is involved. When using the intermediate standard of review we seek to determine whether or not there is a close correspondence between the statutory classification and the legislative goals the statute was designed to achieve. In all other cases we employ the rational basis standard of review, whereby a legislative classification will be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest.

Kadrmas v. Dickinson Public Schools, 402 N.W.2d 897, 902 (N.D. 1987) (citations omitted). See also State v. Nording, 485 N.W.2d 781 (N.D. 1992).

Although there is no fundamental right, either federal or state, to vote on matters such as mill levies for school districts, Damus v. County of Clark, 569 P.2d 933, 936 (Nev. 1977), such a right of franchise if granted, must comport with principles of equal protection. See, City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (holding a requirement that only real property tax payers be allowed to vote on general obligation bonds invalid as violative of equal protection); Kramer v. Union Free School Dist. No. 15,

395 U.S. 621 (1969) (holding the exclusion of non-owners or lessees of real property or parents or custodians of children from voting in school district elections invalid as violative of equal protection); Avery v. Midland County, Texas, 390 U.S. 476 (1968) (local government apportionment subject to principles of one man, one vote under equal protection); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (holding Virginia's poll taxes as inconsistent with equal protection); Carrington v. Rash, 380 U.S. 89 (1965) (holding that the exclusion of members of armed services from voting was inconsistent with equal protection); Reynolds v. Sims, 377 U.S. 533 (1964) (state legislative districts must be apportioned in relation to population to comport with equal protection); Wesberry v. Sanders, 376 U.S. 1 (1964) (congressional districting plans must be in relation to representative population). However the principle of one man, one vote embodied in equal protection is generally limited to "the geographic confines of the governmental entity concerned." Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 at 68 (1978).

In Holt the Supreme Court said:

> No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.

439 U.S. at 68.

In this case, the constitutionally relevant boundaries of the governmental entity concerned, must remain with each individual school district. Id.; see also Fullerton Joint U. High School v. State Board, 654 P.2d 168 (Cal. 1982). A mill levy vote in one school district has no direct effect anywhere but within its own geographic confines. Compare Hawn v. County of Ventura, 141 Cal. Rptr. 111 (Cal. 2d Dist. Ct. App. 1977). Thus, equal protection principles of one man, one vote are simply not relevant here where each qualified elector within the confines of the pertinent school district stands on an equal footing. See Damus v. County of Clark, 569 P.2d 933, 937 (Nev. 1977).

It should further be noted that voter approval provisions which require more than a simple majority do not violate principles of equal protection. Gordon v. Lance, 403 U.S. 1, 6 (1971) ("certainly any departure of strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the constitution, or history, or cases that requires that a majority always prevail on every issue."). Compare Hunter v. Erickson, 393 U.S. 385 (1969). "[S]o long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause." Gordon v. Lance, 403 U.S. at 7.

"Thus stripped of its voting rights attire", Holt, 439 U.S. at 70, and the fact that no other fundamental or important substantive right is directly at stake, Kadrmas, 402 N.W.2d 897, the issue becomes whether the North Dakota Legislature's disparate delegation of authority between separate localities bears some rational relationship to a legitimate state purpose. There is no equal protection requirement that laws be uniform in operation. State v. Gamble Scogmo, Inc., 144 N.W.2d 749, 759 (N.D. 1966); Holt, 439 U.S. at 70-71; 16A Am. Jur.2d Constitutional Law, ? 764. "The Fourteenth Amendment does not prohibit legislation merely because it is . . . limited in its application to a particular geographical or political subdivision of the state." Holt, 439 U.S. at 70-71 quoting Fort Smith Light Co. v. Paving Dist., 274 U.S. 387, 391 (1927). See also Salsburg v. Maryland, 346 U.S. 545 (1954) (holding that it was permissible for the state of Maryland to have different rules of evidence regulating the admissibility of illegally seized evidence from county to county); Missouri v. Lewis, 101 U.S. 22 (1879) (upholding the constitutionality of a statute which allowed directed appeals to the state supreme court from some counties while directing appeals to an intermediate appellate court from other counties). Rather, the classification must simply bear some rational relationship to the state's objective.

In Smith v. Town of St. Johnsbury, 554 A.2d 233 (Vt. 1988), the Vermont Supreme Court rejected an equal protection challenge to a statute similar to N.D.C.C. ? 57-15-14. The Vermont statute set the percentage necessary for voter approval of zoning changes at

different rates for urban and rural communities. In upholding the statutory classification, the Vermont court noted that distinctions based upon population generally serve a rational enough basis to support geographical differences and treatment. Id. at 239. See also Damus v. County of Clark, 569 P.2d 933 (Nev. 1977). Lindauer v. Oklahoma City Urban Renewal Authority, 469 P.2d 1174 (Okla. 1972); Lindauer v. Oklahoma City Urban Renewal Authority, 320 F.Supp. 332 (1969) affirmed 452 F.2d 117 (10th Cir. 1971).

Finally given that neither the United States Supreme Court nor the North Dakota Supreme Court has apparently ever rendered a decision on the specific question presented in this case, it should be stressed that Legislative enactments generally are cloaked with a presumption of validity. See Snortland v. Crawford, 306 N.W.2d 614 (N.D. 1981). Also, under Article VI, Section 4 of the North Dakota Constitution it takes four of the five justices to declare a legislative enactment unconstitutional.

It is my opinion that, if challenged, N.D.C.C. ? 57-15-14 would be declared constitutional even though it requires a super majority vote in school districts of under 4,000 in population while only requiring a simple majority in school districts in excess of 4,000.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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