

**OPINION
61-135**

January 30, 1961 (OPINION)

LEGISLATURE

RE: Elections - Legislative Districts

The office of the Attorney General acknowledges receipt of your letter of January 26, 1961, in which you state that action was taken by the House of Representatives on Wednesday, January 25, instructing you as its presiding officer to request an official opinion from this office interpreting section 54-03-01 of the North Dakota Century Code, as said section affects the boundaries of the ninth and tenth Legislative Districts of the State of North Dakota.

You further state that since the year 1931 annexations of territory have been made by the City of Fargo, which annexations have included a part of two townships in the Tenth Legislative District. Thus, there is a question raised as to whether or not the Ninth Legislative District includes this territory annexed by the City of Fargo or whether the said territory so annexed since 1931 is still a part of the Tenth Legislative District.

Section 26 of the North Dakota Constitution provides that the senate shall be composed of forty-nine members. Section 29 provides that: "Each existing senatorial district as provided by law at the effective date of this amendment shall permanently constitute a senatorial district. Each senatorial district shall be represented by one senator and no more."

The amendment was voted on at the June 28, 1960 election and became effective thirty days thereafter.

Section 35 of the North Dakota Constitution provides in part:

Each senatorial district shall be represented in the House of Representatives by at least one representative except that any senatorial district comprised of more than one county shall be represented in the House of Representatives by at least as many representatives as there are counties in such senatorial district. In addition the Legislative Assembly shall, at the first regular session after each federal decennial census, proceed to apportion the balance of the members of the House of Representatives to be elected from the several senatorial districts, within the limits prescribed by this Constitution, according to the population of the several senatorial district. . . ."

The senatorial districts were last defined by the Legislature in section 1 of chapter 7 of the 1931 Session Laws. This section is now found in section 54-03-01 of the North Dakota Century Code and provides in part:

The senatorial districts of the state shall be formed, and the senators and representatives shall be apportioned as follows:

9. The ninth legislative district shall consist of the township of Fargo, and the city of Fargo, in the county of Cass, and shall be entitled to one senator and five representatives;
10. The tenth legislative district shall consist of the townships of Noble, Wisner, Harwood, Reed, Barnes, Stanley, Pleasant, Kinyon, Gardner, Berlin, Raymond, Mapleton, Warren, Normanna, Bell, Harmony, Durbin, Addison, Davenport, Casselton, and the fractional township number one hundred thirty-nine, range forty-eight, in the county of Cass, including the villages of Mapleton, Argusville, Gardner, Horace, West Fargo, Grandin, Kindred, Southwest Fargo, Davenport, and the city of Casselton, and shall be entitled to one senator and two representatives;"

The senatorial districts, as set forth in section 54-03-01 of the North Dakota Century Code, have not been changed by law since 1931. A change, if any has taken place, is only the incidental result of growth expansion, etc., resulting in annexation to the city.

We believe the question in point is whether the annexation by the city of Fargo of tracts of land in Reed and Barnes townships has the effect of changing the boundary lines of the legislative districts by transferring such land to the ninth district from the tenth district.

There is serious question whether a senatorial district can be modified, decreased or increased as the result of growth or expansion resulting in annexation or by any other method other than specific legislative action. We have been unable to find a case of a similar nature in this state. Therefore, we must rely upon statutory construction and case law of other states in reaching a conclusion.

At first glance it would appear that since additional territory was annexed to a city it would become a portion of that city for all purposes and thus become a part of the same senatorial district to which the city belongs. However, we note that this does, in effect, raise a problem of construction of our statute since subsection 10 of section 54-03-01 states that the tenth district shall consist of the townships of "Reed, Barnes," Since no exception is made we presume this to mean the entire township. A township has definite boundaries and has a definite area. If a portion of that township is subsequently included within another legislative district, the district in which the township was originally located cannot be said to contain the entire township.

We also note that Section 35 of the North Dakota Constitution provides for reapportionment after each federal decennial census. There is no authority vested in the Legislature to reapportion at other times. Thus if the annexation by the city of Fargo of the territory in question was deemed to be an attempt to alter the boundaries of the senatorial districts there would, in fact, be an attempt to reapportion at a time not permitted by the State Constitution. Such attempted reapportionment would be void. It is presumed that the Legislature would not attempt to adopt a void Act. If two constructions of a statute are possible, the one which will render the Act constitutional must be adopted.

Thus, we are impressed by the holding in the case of *Dowell v. McLees*, 248 Pac. 511 (Calif. Sp. Ct. 1926) in which the court held, on a factual situation almost identical to the one at hand, that the annexation proceedings did not have the effect of changing the boundaries of the legislative assembly districts. The case involved annexation and consolidation statutes.

In that case the court said that in fixing and readjusting the boundaries of assembly districts, the Legislature acts pursuant to the provisions of the constitution. Under the section of the constitution pertaining to legislative reapportionment, which they held to be mandatory and prohibitory, the court said that the power to form legislative districts can be exercised but once during the period between one United States census and the succeeding one. The court noted that in the annexation statutes the Legislature had provided that "nothing in this act contained shall alter or affect the boundaries of any senatorial or assembly district." Our North Dakota statutes apparently contain no such provision. However, the court pointed out that their Consolidation Act contained no similar provisions but that such would be the law, even in the absence of a legislative declaration to that effect. See *Dowell v. Mclees*, *supra*, at page 512.

The court relied to great measure upon the case of *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353, in which the court said, at page 358 of the Pacific Report, "We think the true rule deductible from reason and authority is that the legislative districts are not changed by the change in county lines, but that they will remain, as fixed by the general apportionment Act of 1901, until they are again fixed by the succeeding Act in 1911," For other case holding that the changing of the boundary lines of counties does not alter the boundaries of existing legislative districts, see *County of Bay v. Bullock*, 51 Mich. 544, 16 N.W. 896.

We also note that Section 29 of the North Dakota Constitution provided prior to its amendment in 1960 as follows:

The legislative assembly shall fix the number of senators, and divide the state into as many senatorial districts as there are senators, which districts, as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation. Each district shall be entitled to one senator and no more, and shall be composed of compact and contiguous territory; and no portion of any county shall be attached to any

other county, or part thereof, so as to form a district. The districts as thus ascertained and determined shall continue until changed by law."
(Emphasis supplied)

The law referred to was that provided by Section 35 of the North Dakota Constitution prior to its amendment in 1960. This section reads as follows:

The members of the house of representatives shall be apportioned to and elected at large from each senatorial district. The legislative assembly shall, in the year 1895, and every tenth year cause an enumeration to be made of all the inhabitants of this state, and shall at its first regular session after each such enumeration, and also after each federal census, proceed to fix by law the number of senators, which shall constitute the senate of North Dakota, and the number of representatives which shall constitute the house of representatives of North Dakota, within the limits prescribed by this constitution, and at the same session shall proceed to reapportion the state into senatorial districts as prescribed by this constitution, and to fix the number of members of the house of representatives to be elected from the several senatorial districts; provided, that the legislative assembly may, at any regular session, redistrict the state into senatorial districts, and apportion the senators and representatives respectively."

This was the law in effect at the time that the 1931 Legislative Assembly enacted what is now section 54-03-01 of the North Dakota Century Code. This was also the law in effect at the time the annexations to the city of Fargo were made. Since Section 29 of the Constitution provided that the senatorial districts as established by the Legislature were to remain in effect until changed by law, and the law provided that the senatorial districts could be changed in 1895, every tenth year thereafter, after federal census and at any regular session, we believe that no change could have been attempted at any other time. It would render void a reapportionment attempted to be made effective as the boundaries of the city of Fargo were enlarged through annexation. As noted above no "changed by law" have been made since 1931.

Therefore, it is the opinion of this office that the intent of the 1931 Legislature in enacting what is now section 54-03-01(9) and (10) of the North Dakota Century Code was to adopt the then existing boundaries of the city of Fargo and the township of Fargo as the permanent boundaries of the ninth legislative district and to adopt the then existing boundaries of the tenth legislative district as set out in the 1931 Act as the permanent boundaries of the tenth legislative district. We believe that the descriptions used in that section were merely convenient methods of setting forth the boundaries of these two districts and that there was no intent upon the part of the Legislature to delegate their power of reapportionment to the city of Fargo through means of annexation.

Further, it is our opinion that the Act of the city of Fargo in annexing tracts of land from Reed and Barnes townships does not have the effect of changing the boundary lines of legislative districts by transferring such land to the ninth district from the tenth district.

LESLIE R. BURGUM
Attorney General