

**OPINION
70-40**

October 29, 1970(OPINION)

Mr. Glenn Dill
City Attorney
Kenmare, ND

RE: Cities - Elections - Polling Places in Precincts

This is in reply to your letter of October 26, 1970, in which you state the following facts and questions:

"I have been requested by the city council of the City of Kenmare to request an official opinion regarding whether Chapters 4021 and/or 1609 of the North Dakota Century Code require that a polling place for a specific precinct be within that district.

"The ordinary polling place for the third ward for the city of Kenmare has been abandoned by the Kenmare Public School system. The city council would like to move the place to the municipal building which is within the second ward and at which the second ward polling place and the Kenmare township polling place will also be located.

"Section 16-09-04.1 of the North Dakota Century Code indicates only that the city council shall designate the polling place, not that it be in any specific place."

Section 16-09-04.1 of the North Dakota Century Code provides:

"DESIGNATION OF POLLING PLACES FOR MUNICIPAL ELECTIONS. The governing body of any municipality at the time of calling any general or special municipal election, or prior to the time of registration for said election, if such registration is required by law, where officers of said municipality are not to be elected by wards or districts, may by resolution, designate such voting precinct and polling places for said election as it may deem necessary for the conduct of the same, and shall in giving notice of said election designate such voting precincts and polling places."

We note that this statute applies only to municipal elections in which officers of the municipality are not to be elected by wards or districts. We cannot determine from your letter whether you are concerned with municipal elections or state elections such as the general election on November 3, 1970.

We do note that section 16-09-01 of the North Dakota Century Code, as amended, provides in part:

"The board of county commissioners may divide the county into precincts and establish the boundaries of the same except that within the boundaries of incorporated cities the governing body of such cities shall divide the cities into precincts and establish their boundaries pursuant to the provisions of Title 40.

* * *"

Section 40-21-09 of the North Dakota Century Code provides:

"ELECTION DISTRICTS IN COUNCIL CITIES - DIVISION AND CONSOLIDATION BY ORDINANCE - BALLOTS TO BE KEPT SEPARATE BY WARDS. Each city operating under the council form of government in which aldermen are elected at large shall constitute an election district or voting precinct, and in all other cities each ward shall constitute an election district or voting precinct. Whenever the number of electors in any two or more

contiguous wards does not exceed one hundred as determined by the number of votes cast at the last city election, the council, by ordinance, may consolidate such two or more wards into one precinct for voting purposes. In any city containing less than four hundred electors are determined by the number of votes cast at the last city election, the council, by ordinance, may consolidate all the wards of such city into one precinct for voting purposes. An ordinance dividing or consolidating wards shall be passed and shall take effect before the time of giving notice of the election. Wards and precincts established under the provisions of this section shall constitute election districts for all state, county, city, and school elections. In city election, separate ballot boxes and pollbooks shall be provided and kept for each precinct. The terms 'wards,' 'precincts,' and 'election districts' shall have the same meaning except in the case where two or more wards are consolidated into the precinct for voting purposes or where one ward is divided into more than one precinct for voting purposes. . ."

While the statute does not specifically require that the voting place be within the ward or precinct, this is implied and the North Dakota Supreme Court in Kerlin v. City of Devils Lake, 25 N.D. 207, 141 N.W. 756 (1913) stated, page 757 of the NW Reporter: "There can be no question but what under the plain statute it was the duty of the city authorities to provide for and have conducted a polling place at some place within each ward to comply with the statute quoted.* * *."

Thus we also note that in those instances in which a polling place is situated outside of the precinct the Legislature has specifically authorized same. See, e.g., sections 16-09-05 and 16-09-06 of the North Dakota Century Code, as amended, authorizing the county commissioners to establish a voting place in an adjacent county and section 16-09-06 authorizing the county commissioners, when necessity and convenience demands it, to designate a precinct voting place outside of the boundaries of a precinct. These statutes do not, by their own terms, apply to voting places within the city. The statutes do, however, indicate the intent of the Legislature that the voting places be within the precinct unless by specific provision they may be located outside of the precinct. Thus the fact the statute does not specifically require the voting place to be within the precinct would appear immaterial since we believe the statutes assume the voting place will be within the precinct unless the contrary is specifically expressed in the statute. We are not aware of any statute which would authorize the city to establish a voting place outside of the precinct unless the wards are combined for voting purposes as provided by section 40-21-09.

The assumption that the voting place will be within the ward or precinct is not unusual since the voting place should be located for the convenience of the voters and ordinarily a voting place within the precinct would be nearer to the voters and supposedly more convenient.

We cannot determine from your letter whether the city intended there be three separate election boards within the same building or whether they contemplated that one election board would serve all precincts, two election boards would serve the three precincts, etc. Should the city contemplate more than one election board for the three precincts it would not be unusual if considerable confusion could result if the polling places were all located in one building. However, unless the city intends to consolidate wards for voting purposes as provided by section 40-21-09, it is our opinion the polling place should be within the precinct.

We also note the Court in the Kerlin case, supra, held that where the election is held as called for by the lawful municipal authority, and is regularly conducted and a fair and regular canvass and return made of all votes cast, with no fraud charged, in the absence of a statute expressly invalidating the election it will be upheld. It thus appears that if the election were to be held in a polling place outside of the precinct, the votes would be valid, assuming the election was otherwise regularly conducted. It also appears, however, that any person residing within such ward would, prior to the election, have cause to institute legal action requiring the election to be held in a voting place within the precinct unless the wards were consolidated pursuant to section 40-21-09.

HELGI JOHANNESON
Attorney General