

1999 HOUSE POLITICAL SUBDIVISIONS

HB 1446

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1446

House Political Subdivisions Committee

Conference Committee

Hearing Date 1-29-99

Tape Number	Side A	Side B	Meter #
1	x		16.3-48.0
Committee Clerk Signature <i>Pam Devere</i>			

Minutes: BILL SUMMARY: Relating to the appointment of district overseer of highways for unorganized territory. Chairman Froseth opened the hearing with all members present.

Rep. Haas, Dist. 36 : 16.3 introduced the bill on behalf of county commissioners and is in support of the bill. This bill makes it easier for county commissioners to do their job. The unorganized townships need some supervision on road and highway matter, etc. They have already been doing these jobs, but the attorney general ruled they were not legal in doing this. This bill will address the legal issue.

Rep. Delmore : 18.5 Do you see a conflict of interest? What if the commissioner is to oversee his own interests?

Rep. Haas: I don't think it would be. I have enough trust in my county commissioners, so that I don't think the other commissioners would assign a commissioner to oversee his own interests.

Rep. Koppelman : 21.1 Is this similar to portfolios being assigned, or is this a different kind

Rep. Haas : A different kind.

Rep. Glassheim :21.9 What is the general magnitude of pay per year for that position?

Rep. Haas : Can't answer that for you.

Rep. Koppelman : 22.5 Does this additional pay violate the bill we heard earlier, which stated a maximum pay for county commissioners.

Rep. Haas : I don't think it would.

Rep. Wikenheiser : In our county, it's expected the commissioners will do whatever is need and not be compensated. It's assumed it's part of the job and goes with the territory.

Rep. M.Boucher, Dist 9 : 24.3 testified in support of the bill. This bill is a matter of hindsight and after thought. What we have been doing is not legal, according to the attorney general. (See attached testimony) I don't think this bill would be abused.

Rep. Koppelman : Is it better to use "may" instead of "shall" in the bill. Shall seems to imply a mandate.

Rep. Boucher : It's O.K. by me. Whatever your committee wants.

Rep. Glassheim : 30.1 Are organized townships now being supervised by county commissioners or just the unorganized one?

Rep. Boucher : Some townships have dissolved and have no more boards. The county commission assumes responsibility of unorganized boards.

Rep. Glassheim : Will the \$5.00 per day be taken times 52 weeks or just pay per day worked?

Rep. Boucher : I believe the intent is per day for the days actually worked supervising.

Page 3

House Political Subdivisions Committee

Bill/Resolution Number 1446hb1446

Hearing Date 1-29-99

Mark Johnson, N.D. Assoc. of Counties : 32.7 testified in support of the bill. (See attached testimony) This is a very simple bill. We need this to support the unorganized townships, because they don't get the 1% gas tax.

Rep. Koppelman : Will this extra compensation put commissioner over maximum pay?

Mark : That is possible. They will need to watch or they will cause problems if over the top.

Eldon Moors, Rollette County Commissioner : 41.2 We want to keep taxes down, but still do a good job; this bill will help us.

Chairman Froseth hearing no opposing testimony, closed the hearing. What is committee wish.

Rep. Severson made a motion DO PASS and Rep. Wikenheiser seconded the motion .

ROLL CALL: 15 YES and 0 NO and 0 ABSENT. Rep. Ekstrom will carry.

FISCAL NOTE STATEMENT

House _____ Bill or Resolution No. 1446

This bill or resolution appears to affect revenues, expenditures, or fiscal liability of counties, cities, or school districts. However, no state agency has primary responsibility for compiling and maintaining the information necessary for the proper preparation of a fiscal note regarding this bill or resolution. Pursuant to Joint Rule 502, this statement meets the fiscal note requirement.

Signature _____


John Walstad
Code Revisor

Please type or use black pen to complete

Date 1-29-99

Roll call vote # 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1446

House POLITICAL SUBDIVISIONS Committee

Subcommittee on _____

Conference Committee

} Identify or check where appropriate

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Rep. Severson Seconded By Rep. Wikenheiser

Representatives	Yes	No	Representatives	Yes	No
Chairman Froseth	/		Rep. Wikenheiser	/	
Vice Chair Maragos	/				
Rep. Delmore	/				
Rep. Disrud	/				
Rep. Eckre	/				
Rep. Ekstrom	/				
Rep. Glassheim	/				
Rep. Gunter	/				
Rep. Johnson, N	/				
Rep. Koppelman	/				
Rep. Niemeier	/				
Rep. Rose	/				
Rep. Severson	/				
Rep. Thoreson, B	/				

Total 15 -0-
(Yes) (No)

Absent 0-

Floor Assignment Rep. Ekstrom

If the vote is on an amendment, briefly indicate intent:

DO NOT USE HIGHLIGHTER ON ANY FORMS

REPORT OF STANDING COMMITTEE (410)
February 1, 1999 9:33 a.m.

Module No: HR-20-1566
Carrier: Ekstrom
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1446: Political Subdivisions Committee (Rep. Froseth, Chairman) recommends **DO PASS** (15 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1446 was placed on the Eleventh order on the calendar.

1999 SENATE TRANSPORTATION

HB 1446

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1446

Senate Transportation Committee

Conference Committee

Hearing Date February 25, 1999

Tape Number	Side A	Side B	Meter #
1	x		3,228-End
1		x	1-2037
March 11, 1999		x	2,636-3090
Committee Clerk Signature <i>Blair A. Schaeffer</i>			

Minutes:

SENATOR B. STENEHJEM opened the hearing on HB 1446. Committee members present included: Sens. Bob Stenehjem, R. Schobinger, D. Mutch, D. Cook, D. O'Connell, V. Thompson, and D. Bercier.

MARK JOHNSON, ASSOCIATION OF COUNTIES testified in support of HB 1446 (see testimony).

REPRESENTATIVE C.B. HAAS, DISTRICT 36 testified in support of HB 1446. This bill came to us from some county commissioners in some areas where some problems were occurring based on an Attorney General's opinion (he passed out a letter). The practice of county commissioners appointing themselves as road supervisors is something that has been done. The Attorney General didn't think that was proper to do that in an unorganized township. The general rule regarding self appointment says that "it is void on it's face, it cannot be done and

therefore illegal.” It further states that statutes may provide that officers having appointed power may appoint one of their members to an officer. It’s illegal unless a certain statute permits it.

This bill allows that.

SENATOR O'CONNELL We're making it legal for what they've been doing anyway?

REPRESENTATIVE HAAS Yes. There have been questions asked if this is self serving with regard to compensation. The current statute says they shall receive a compensation of \$5.00 a day plus their mileage so that is controlled in statute also.

SENATOR B. STENEHJEM Are you familiar with what townships do now?

REPRESENTATIVE HAAS Organized townships generally appoint their own supervisor. I can't answer that specifically but I am assuming that there are various ways of doing it and this specific legislation makes it permissible for the county commissioners to appoint one of their own group as a road supervisor in a particular township.

REPRESENTATIVE BOUCHER, DISTRICT 9 spoke in support of HB 1446 (see testimony).

SENATOR O'CONNELL How much per mile does a township get for gas tax?

REPRESENTATIVE BOUCHER I don't know.

SENATOR COOK When a county commissioner appoints one of their own or themselves, do they also proscribe another salary for the commissioner who will do it?

REPRESENTATIVE BOUCHER Rolette County assumes that as part of their duties and they don't get any additional salary except for the mileage. The existing language says they can pay themselves for \$5.00 a day on lines 14 and 15.

SENATOR B. STENEHJEM How do you get by not paying them when it says they “shall” receive this compensation?

REPRESENTATIVE BOUCHER Maybe we should change that to "may".

MARK JOHNSON, ASSOCIATION OF COUNTIES

SENATOR O'CONNELL Do you have the numbers on the gas tax per mile?

MARK JOHNSON I do not have the actual numbers. The 1 cent gas tax accrues to the township based on the number of miles of road they have. In every county and township there are different miles of road so each township receives different allocations and for the unorganized townships the county receives the money for the number of unorganized roads for the unorganized township. Generally, the miles are less in unorganized townships.

SENATOR COOK How would they handle salaries for this?

MARK JOHNSON County commissioners do receive a salary for performing county functions but you need to separate the organized townships and unorganized townships where the county commissioners are responsible for doing the county's business and the unorganized township areas relative to township roads. The \$5.00 a day is a shell because the townships wanted that in terms of having a road boss appointed. If a county commissioner was authorized to appoint themselves then justification would be to be spending extra time on more localized roads. It does add additional responsibility. It was discussed on the House side and if there is any additional responsibility that does accrue from being a road boss in that unorganized township then so be it.

SENATOR COOK As this is written, does it provide a limit that it would be no more than \$5.00.

MARK JOHNSON I believe this would limit it to \$5.00 a day because of the shell.

SENATOR B. STENEHJEM \$5.00 they are acting or \$5.00 that they are the county commissioner including holidays and weekends.

MARK JOHNSON I don't know. I think there would be residents that would point out if someone wasn't doing their duty even at \$5.00 a day.

SENATOR O'CONNELL I think it is \$5.00 that one is actually performing the duties.

SENATOR B. STENEHJEM Are there unorganized townships that handle it differently then having somebody on the county commissions being the road boss?

MARK JOHNSON We have not tried to gather any information on that. In Burleigh County there are some unorganized townships and they have chosen to appoint John Mill as their road boss, he is the county engineer.

SENATOR B. STENEHJEM By passing this bill, would it stop those unorganized townships by doing just that.

MARK JOHNSON No, it wouldn't stop them. It would just allow county commissioners to appoint themselves in unorganized townships where they couldn't choose someone. I'd like to address Senator Krebsbach's proposed amendment. It's becoming more common for townships not to manage their own situation and they are looking to disillusion-they have two options, they can dissolve or they can combine. Four years ago, the Legislature granted the townships the authority to combine, disillusion statutes have been in existence for a long time. We fear we may see more disillusion in the future. A county that has a township that is levying the max and has been levying the maximum number of mills which is capped at 18 mills and if that township took the growth percentages since 1981 they could be near 25 mills. I'll give an example. The township is going to dissolve, when they dissolve it becomes a county responsibility. They have been levying the max and taking the percentages because they do have a number of roads that need to be maintained within that township. If they dissolve and the county takes it over, it is a

new levy and it becomes an unorganized township levy which is again capped at 18 mills. Their mills would drop from 25 to 18 in that township and the county would pick up the responsibility to maintain the roads. It would not be able to maintain the levy at 25 mills; it would have to revert to 18 mills and the county is concerned if a number of townships do this they will be picking up additional costs that are already being levied for in that area that they have not anticipated. If this happens to a number of townships, the county will end up with expenditures and no ability to levy that back as it was previously levied. We're asking that the county will be able to levy the same amount not more but keep the levy of that particular township area in place and allow that money to be used for the maintenance of that area. The purpose of the amendment is that the county would be able to keep that levy and not revert back to the 18 mill cap and the growth factors incorporated since 1981 would still be in place. They would lose that margin if this doesn't pass.

SENATOR SCHOBINGER What are some of the reasons townships dissolve?

MARK JOHNSON The lack of having enough people to put on the township board, there are townships that are organized that do not have four people living in the townships. The financial burden and the feeling that they can no longer operate and maintain is also a reason. One other reason would be the recognition that the county highway department might be driving right by their township using special equipment that would be more efficient and more effective if they combine and allowed the county highway department to manage those organized areas. If they are organized, it is not really the county's responsibility to do anything in that township but by unorganizing is becomes their responsibility.

SENATOR SCHOBINGER What percentage of total costs when they levy these mills is the maintenance of road? If they dissolve they'll be able to levy the same amount of dollars. Would the county to do better if the townships dissolved because other costs would go away at the same time the county would have to pick up the maintenance of the roads.

MARK JOHNSON Theoretically, if they're levying 25 mills in this township, they have a maintenance budget of 25 mills and or construction. Most township roads are already built and the maintenance factor is what they are dealing with. I would guess over 80% of the cost of township road work would center around maintenance. Maybe, in the long run, with the deficiencies, it may benefit the counties but the fear is that if a number of townships realize this that they can dissolve, lower their taxes and still get their roads taken care of, the county is not in the position to take that on.

SENATOR COOK In a county the mill levy that is taxed throughout the county could vary by township.

MARK JOHNSON Absolutely.

SENATOR MUTCH Can an unorganized township that is developed that is only levying 18 mills jack it up to 25 mills?

MARK JOHNSON No, they can only levy what was being levied in dollars. If 25 mills in that township generated \$10,000 they can only levy \$10,000 in that area to continue to take over the responsibilities. This would not let them go to 25.

SENATOR COOK If I owned a township and if was only me and my wife, I could not organize and the county could levy 18 mills to take care of my roads. But if I had two kids of age and there is four of us I could qualify as a township and organize and then remove the 18 mills.

MARK JOHNSON Yes, but once you organize you would be responsible for taking care of your roads.

SENATOR B. STENEHJEM Let's say I was at 18 mills all of these years and I never took the provisions of 57-15.0101. I read it that they could go up to the 25 mills cause that is where they could have been if they would have done it.

MARK JOHNSON On the surface it looks like that but there are provisions that when you are granted the ability to take those percentages given to us over those 15 years, if you do not take it in that year it is available you are not entitled to it thereafter. If they did not take the last percentage granted in 1996 then they are not entitled to it. No, it would not be possible. It is a use it or lose it provision. Burke County is a good example.

JOHN WALSTAD came to answer questions on HB 1446.

SENATOR B. STENEHJEM Let's say we have an unorganized township and the county has been levying 18 mills which is the maximum allowable. Would this amendment allow up until 1998 they never levied more than 18 mill would they automatically be able to get up to that 25 mills?

JOHN WALSTAD If that township was organized and had the authority to levy more than 18 mills then this would allow that expansion but if that township has been disorganized, they would no longer have the authority to levy more than 18 mill. You can only look at your previous three tax years under that levying dollars authority. There would be a cut off there for three years. If the county has become unorganized within the last three years, that township if it had remained an organized township, would have been able to levy whatever it was at in dollars

with no increase under current law. That authority would carry over to the county under this provision.

SENATOR B. STENEHJEM Would this amendment allow them to be higher than 18 mills based upon the way this amendment is written?

JOHN WALSTAD In one taxable year, a township would not be able to take all of the percentage increases it was allowed since 1981 and say we're taking all of them right now. The optional percentage increase year is taken one year at a time and the focus of it is the most recent three tax years. You can levy the highest amount in those three years in dollars and right now it is at a 0% increase.

SENATOR B. STENEHJEM It says they would have been entitled to do it but chose not to do it. If you feel comfortable with this that is fine.

JOHN WALSTAD They would have been entitled to do it if they had stayed organized but we are only looking at an unorganized township and for that tax year they could only levy the highest number in the last three years in dollars. I don't think there is a danger that they could go back ten years and say we could have taken the cumulative percentage increase. They couldn't do it if they were organized or unorganized.

SENATOR COOK I move to adopt amendment 90786.0101.

SENATOR SCHOBINGER I second it.

SENATOR O'CONNELL I have a problem with it because right now the counties do township work and the townships pay the counties to do the work and you are eliminating the board which takes care of the expense. It would encourage the townships to join the counties.

SENATOR COOK How would it lower the mills?

SENATOR O'CONNELL It wouldn't lower the mills but there is no use for it because the county would be entitled to 18 mills anyway.

SENATOR B. STENEHJEM If some organized counties were above the 18 mills levying and they decided to become unorganized the county could still levy whatever they were at.

SENATOR COOK It removes a strong motive to disorganize.

SENATOR B. STENEHJEM Why would one township join another one if they knew they would lose some mills?

The amendment passes (5 Yeas, 1 Nay, and 1 Absent and Not Voting).

March 11, 1999 - Tape 2

SENATOR COOK Page 1, line 14, is there a reason we considered changing the "shall" to "may"?

SENATOR O'CONNELL Most of them weren't doing it anyway.

SENATOR SCHOBINGER Under this, they don't have to take the \$5.00.

SENATOR COOK On page 1, line 14, I motion we change "shall" to a "may".

The amendment was adopted by a voice vote. It passed unanimously.

SENATOR COOK I motion for a Do Pass as Amended.

SENATOR BERCIER I second.

The roll call vote was taken (7 Yeas, 0 Nays and 0 Absent and Not Voting).

Senator Mutch will carry HB 1446.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1446

Page 1, line 1, replace the second "and" with a comma and after "24-06-14" insert ", and 57-15-22"

Page 1, line 3, after "territory" insert "and the levy for roads and bridges in unorganized territory; and to provide an effective date"

Page 1, after line 24, insert:

"SECTION 3. AMENDMENT. Section 57-15-22 of the North Dakota Century Code is amended and reenacted as follows:

57-15-22. Tax levy limitations in unorganized townships. The total tax levied by the board of county commissioners in any unorganized township for the construction, maintenance, and improvement of any roads and bridges may not exceed eighteen mills on the dollar of the taxable valuation of the township or the amount in dollars that the township would have been entitled to levy under section 57-15-01.1 if the township had remained organized, but this does not prohibit the levy of general county road and bridge taxes in such unorganized township.

SECTION 4. EFFECTIVE DATE. Section 3 of this Act is effective for taxable years beginning after December 31, 1998."

Renumber accordingly

90786.0102
Title. 0200

Adopted by the ~~Senate~~ *Senate Transportation Committee*
Prepared by the Legislative Council staff for
Senator Krebsbach
February 12, 1999
March 11, 1997

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1446

Page 1, line 1, replace the second "and" with a comma and after "24-06-14" insert ", and 57-15-22"

Page 1, line 3, after "territory" insert "and the levy for roads and bridges in unorganized territory; and to provide an effective date"

Page 1, line 14, ^{overstrike} replace "shall" with "may" and insert immediately thereafter "is entitled to receive"

Page 1, after line 24, insert:

SECTION 3. AMENDMENT. Section 57-15-22 of the North Dakota Century Code is amended and reenacted as follows:

57-15-22. Tax levy limitations in unorganized townships. The total tax levied by the board of county commissioners in any unorganized township for the construction, maintenance, and improvement of any roads and bridges may not exceed eighteen mills on the dollar of the taxable valuation of the township or the amount in dollars that the township would have been entitled to levy under section 57-15-01.1 if the township had remained organized, but this does not prohibit the levy of general county road and bridge taxes in such unorganized township.

SECTION 4. EFFECTIVE DATE. Section 3 of this Act is effective for taxable years beginning after December 31, 1998."

Re-number accordingly

Date: 3-11-99

Roll Call Vote #:)

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1446

Senate Transportation Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as amended

Motion Made By Sen. Cook Seconded By Sen. Bercier

Senators	Yes	No	Senators	Yes	No
Sen. B. Stenehjem-Chairman	X				
Sen. R. Schobinger-V. Chair	X				
Sen. Duane Mutch	X				
Sen. Dwight Cook	X				
Sen. David O'Connell	X				
Sen. Vern Thompson	X				
Sen. Dennis Bercier	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Mutch

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1446: Transportation Committee (Sen. B. Stenehjem, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1446 was placed on the Sixth order on the calendar.

Page 1, line 1, replace the second "and" with a comma and after "24-06-14" insert ", and 57-15-22"

Page 1, line 3, after "territory" insert "and the levy for roads and bridges in unorganized territory; and to provide an effective date"

Page 1, line 14, overstrike "shall" and insert immediately thereafter "is entitled to"

Page 1, after line 24, insert:

"SECTION 3. AMENDMENT. Section 57-15-22 of the North Dakota Century Code is amended and reenacted as follows:

57-15-22. Tax levy limitations in unorganized townships. The total tax levied by the board of county commissioners in any unorganized township for the construction, maintenance, and improvement of any roads and bridges may not exceed eighteen mills on the dollar of the taxable valuation of the township or the amount in dollars that the township would have been entitled to levy under section 57-15-01.1 if the township had remained organized, but this does not prohibit the levy of general county road and bridge taxes in such unorganized township.

SECTION 4. EFFECTIVE DATE. Section 3 of this Act is effective for taxable years beginning after December 31, 1998."

Renumber accordingly

1999 TESTIMONY

HB 1446

TESTIMONY HOUSE BILL 1446
Prepared by Representative Merle Boucher
Friday - January 29, 1999

Chairman Froseth and members of the House Political Subdivisions Committee. For the record I am Representative Merle Boucher representing District 9, which is Rolette County.

One could describe HB 1446 as a matter of hindsight, or legislation coming as an afterthought. The bill would allow a board of county commissioners, by resolution, to appoint one or more of its members as a district overseer of highways -- duties in unorganized territory. As defined in current law; Section 24-06-14; it allows the board of commissioners to appoint an overseer of highway duties. This current law is interpreted to mean someone who is independent from the commission. The proposed new language would allow the commission to appoint one or more of its own member(s) to serve as (an) overseer(s) of highways.

Reality is that there are a number of situations around the state where this is all ready being done. An Attorney General's opinion stated that this was not legal. House Bill 1446 would correct the current situation. This is a very necessary, and an appropriate piece of legislation. A Due Pass recommendation is the right thing to do.

**TESTIMONY TO THE
HOUSE POLITICAL SUBDIVISIONS COMMITTEE
Prepared January 29, 1999 by the
North Dakota Association of Counties
Mark Johnson, NDA Co Executive Director**

Concerning House Bill No. 1446

Thank you Chairman Froseth and members of the Committee for the opportunity to explain why we believe it is necessary for the Legislature to pass House Bill 1446. To begin however, I must explain the role of “district overseers of highways in unorganized townships”.

Each township, whether organized or unorganized, has numerous miles of roads. To fund the repair and maintenance of these roads, the organized townships have a state revenue source from gas tax refunds, as well as property tax levy authority. The township supervisors direct the appropriate expenditure of these funds.

The unorganized townships however, have no gas tax refund revenue and no township supervisors. They do however have a levy specific to the land within the township, generating revenue specifically dedicated to the roads of that township. The Board of County Commissioners is mandated by law to appoint an “overseer” for each unorganized township, to ensure the appropriate expenditure of these funds for the roads of that township. In the larger counties, those that can afford to hire a professional road engineer or road supervisor, this individual is usually appointed, since they have already been appointed consistent with the statutory requirement (11-11-17) as overseer of county roads.

The more rural counties, particularly those in which the commissioners are elected by district, a common practice is to appoint each commissioner the overseer of county roads in their own district. Historically, at least since statehood it seems,

the practice has always been to appoint the commissioner of a particular district as the overseer of unorganized township roads as well.

In the fall of last year however, the Attorney General pointed out in the attached opinion, that we may have a lack of statutory authority for the appointments that have been made for the last one hundred years or so. On page 3 of the opinion, in the indented section, we see that the “general rule regarding self-appointment” would suggest the commissioners must have specific statutory authority to appoint one of themselves to this post, similar to 11-11-17 “permitting the board of county commissioners to designate one or more of its members to oversee county roads.”

House Bill 1446 will simply place in statute the permission that seems to be lacking, and would therefore allow the counties that have handled this responsibility in this manner to continue. County Commissioners urge a “Do Pass” recommendation on this bill.



Heidi Heitkamp
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
600 E BOULEVARD AVE
BISMARCK ND 58505-0040
(701) 328-2210 FAX (701) 328-2226

AUG 27 1998

COPY

August 24, 1998

Ms. Cynthia M. Feland
Grant County State's Attorney
PO Box 104
Carson, ND 58529-0104

Dear Ms. Feland:

Thank you for your letter concerning the authority of county commissioners to supervise elected county officers and to appoint its own members as district overseers of highways in unorganized townships.

N.D.C.C. § 11-11-11(2) provides that the board of county commissioners "[s]hall supervise the conduct of the respective county officers." Each county, subject to certain exceptions depending upon options adopted by the county, has the following officers: an auditor, register of deeds, clerk of district court, state's attorney, sheriff, treasurer, coroner, and county commissioners. N.D.C.C. § 11-10-02. I will assume, for the purposes of this letter, that the county has not adopted a home rule charter and implementing ordinance or other form of county government under which the powers and duties otherwise assigned to these officials lawfully could be altered.

The Grant County Board of Commissioners questions the extent of their role in supervising county officers. It would be impossible to list all of the authority a county commission has under N.D.C.C. § 11-11-11(2). I previously advised Representative Bill Oban that N.D.C.C. § 11-11-11(2) makes it a "duty of the board of county commissioners to direct or oversee the behavior or management of the respective elected county officers." 1996 N.D. Op. Att'y Gen. 1, 2. But, "the board of county commissioners may not usurp the duties and powers given to the respective elected county officers pursuant to other statutes." Id. I also advised Representative Oban that the duty to supervise is to be interpreted in light of the statutes that specify the powers and duties of the respective elected county officers. Id. See generally N.D.C.C. chs. 11-13 (auditor); 11-14 (treasurer); 11-15 (sheriff); 11-16 (state's attorney); 11-17 (clerk of district court); 11-18 (register of deeds); and 11-19 and 11-19.1 (coroner).

While opinions of this office have recognized the responsibility of a board of county commissioners to supervise county officers, they have also recognized that this responsibility is significantly limited.

Ms. Cynthia M. Feland
August 24, 1998
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1996 N.D. Op. Att'y Gen. 1, 2-3. The responsibility might best be characterized as advisory. For example, the North Dakota Supreme Court observed that under N.D.C.C. § 11-11-11(2), the "board of county commissioners is charged with the supervision of the conduct of the county officials, but it has no right to perform their duties or to exercise their prerogatives" Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924). "If [the board of county commissioners] or its members individually have notice of the fact that property has escaped taxation, then the obligation may rest upon it or them to advise the county auditor to the end that that officer properly charged with the duty may place such property upon the assessment role." Id. Thus, the Board may advise a county officer of facts that are relevant to the duties of a particular county officer so that the officer may accomplish those duties. 1996 N.D. Op. Att'y Gen. 1, 3. See also 1997 N.D. Op. Att'y Gen. L-32 (concluding that the board of county commissioners' supervisory authority may not unduly restrict a county officer's authority to hire or fire employees). A board of county commissioners may ensure that employees are discharged by county officers in accordance with county personnel policies, but those policies may not usurp or significantly interfere with an elected officer's authority to manage the officer's office. Id. at L-33. The restrictive nature of the supervisory authority is emphasized by the absence of any authority "to sanction elected county officials for poor job performance, improper behavior, or failure to properly perform their jobs. Consequently, the duty of the board of county commissioners to supervise the conduct of elected county officials must be interpreted in light of the absence of any specific enforcement powers." 1996 N.D. Op. Att'y Gen. 1, 2.

You also ask whether an elected county officer or the board of county commissioners has the authority to determine when and how much vacation time the elected county officer may take. As I advised in 1996 N.D. Op. Att'y Gen. 1, 2, "the duties and powers necessarily implied from those expressly granted to the respective elected county officers . . . are not the duties and powers of the board of county commissioners." Instead, those powers belong to the respective county officers. Id. I emphasized that the board of county commissioners' supervisory function does not give it authority to "usurp the duties and powers given to the respective elected county officers." Id. See also Murphy v. Swanson, 198 N.W. at 119 (board has no right to perform county officers' duties or to exercise their prerogatives). Thus, a board of county commissioners may not determine whether an employee is hired or fired by an elected county officer, but only that such decisions conform with reasonable county personnel policies which do not interfere with the management of an elected officer's office. 1997 N.D. Op. Att'y Gen. L-32, L-33. For the same reasons, it is my opinion that elected county officers have implied authority to determine when and how much vacation time they take. I am aware of an earlier opinion of this office suggesting that a board of county commissioners may determine the length of time of vacations for county

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officers, and to that extent, it is overruled. See 1957 N.D. Op. Att'y Gen. 72.

You also ask whether a board of county commissioners can appoint its own members as district overseers of highways in the territory consisting of unorganized townships and compensate themselves for performing these duties.

The board of county commissioners is required to appoint a district overseer of highways to perform the same services in territory in the county that is not organized into civil townships as a township overseer of highways performs in an organized township. N.D.C.C. § 24-06-14. The compensation of the district overseer of highways is fixed by the board of county commissioners. Id. The district overseer of highways is paid out of moneys derived from road taxes from the territory in the county that is not organized into civil townships. N.D.C.C. § 24-06-15. On or before the first Monday in January in each year, the district overseer of highways reports to the board of county commissioners the amount and days of labor performed during the preceding year, and the board of county commissioners pays the district overseer of highways for such services. N.D.C.C. § 24-06-16. The district overseer of highways has direct charge of the construction and maintenance of all highways and bridges in the unorganized territory and must execute all lawful orders of the board of county commissioners. See N.D.C.C. § 58-12-03.

The general rule regarding self-appointment is as follows:

Officers who have appointing power are usually disqualified for appointment to office to which they may appoint. Such exercise of the appointive power is against public policy, and is void on its face Statutes may provide, however, that officers having appointive power may appoint one of their number to an office

3 Eugene McQuillin, The Law of Municipal Corporations, § 12.75 (3rd ed. 1990) (footnotes omitted).

State law does not authorize the board of county commissioners to appoint its members as district overseers of highways in unorganized townships. Compare N.D.C.C. § 11-11-17 (permitting the board of county commissioners to designate one or more of its members to oversee county roads). It must be presumed the Legislature says what it means. Little v. Tracy 497 N.W.2d 700, 705 (N.D. 1993). The law is what the Legislature says, not what is unsaid. Id. It is improper to construe a statute "so as to legislate that which the words of the statute do not themselves provide." Peterson v. Heitkamp, 442 N.W.2d 219, 221 (N.D. 1989). Therefore, it is my opinion that the board of county commissioners cannot appoint its members as district overseers

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of highways in unorganized townships. Accord 1963 N.D. Op. Att'y Gen. 81 (a board of county commissioners may not select its members to make spot checks of real and personal property assessments); see also 1950 N.D. Op. Att'y Gen. 195 (township supervisors may not compensate themselves as township overseers of highways).

It is not necessary to address your additional questions regarding the compensation of the board of county commissioners for performing the duties of a district overseer of highways.

Sincerely,


Heidi Heitkamp
ATTORNEY GENERAL

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TESTIMONY IN REGARDS TO HB 1446

Chairman and Members of the Committee:

For the record, my name is Eldon Moors and I serve as Chairman of the Rolette County Board of Commissioners.

Rolette County is comprised of 25 townships. Of the 25 townships only 4 are organized. The remaining 21 are under supervision of the Board of County Commissioners.

The Attorney General's opinion dated August 24, 1998, states that the Board of County Commissioners cannot appoint its members as district overseers of highways in unorganized townships.

We are 1 of approximately 18 counties that do not employ a road foreman or a county engineer. We have been supervisor of our roads in the unorganized townships until the opinion was issued.

The cost of a road foreman would mean an additional cost of \$25,000 to \$35,000 more per years, which would reduce the amount of money that could be spent on the roads.

We urge your support of this legislation of HB 1446. If you have any questions, I will be happy to answer them.

**TESTIMONY TO THE
SENATE TRANSPORTATION COMMITTEE
Prepared February 25, 1999 by the
North Dakota Association of Counties
Mark Johnson, NDACo Executive Director**

Concerning House Bill No. 1446

Thank you Chairman Stenehjem and members of the Committee for the opportunity to explain why we believe it is necessary for the Legislature to pass House Bill 1446. To begin however, I would like to briefly describe the role of a "district overseer of highways in unorganized townships".

Each township, whether organized or unorganized, has numerous miles of roads. To fund the repair and maintenance of these roads, the organized townships have a state revenue source from gas tax refunds, as well as an 18-mill property tax levy. The township supervisors direct the appropriate expenditure of these funds.

The unorganized townships have these same dedicated funds, but no township supervisors. The Board of County Commissioners is mandated by law to appoint an "overseer" for each unorganized township, to ensure the appropriate expenditure of these funds, specifically for the roads of that township. In the larger counties, those that can afford to hire a professional road engineer or road supervisor, that individual is most often appointed, since they have already been appointed consistent with the statutory requirement (11-11-17) as overseer of county roads.

The more rural counties, particularly those in which the commissioners are elected by district, a common practice is to appoint each commissioner the overseer of county roads in their own district. Historically, the practice has also been to appoint the commissioner of a particular district as the overseer of unorganized township roads.

In the fall of last year however, the Attorney General pointed out in the attached opinion, that we may have a lack of statutory authority for the appointments that have been made

for the last one hundred years or so. On page 3 of the opinion, in the indented section, we see that the “general rule regarding self-appointment” would suggest the commissioners must have specific statutory authority to appoint one of themselves to this post, similar to 11-11-17 “permitting the board of county commissioners to designate one or more of its members to oversee county roads.”

House Bill 1446 will simply place in statute the permission that seems to be lacking, and would therefore allow the counties that have handled this responsibility in this manner to continue. At this point I concluded my testimony on the House side, however I wish also to support the amendments proposed by Senator Krebsbach regarding an emerging issue regarding the dissolution of organized townships.

As I noted, both organized and unorganized townships have a levy available for their road responsibilities. This 18-mill authority was, like all other levies, allowed to grow beyond the 18-mill limit in some townships. As organized townships reach a point that they no longer can manage, some consider the option of dissolution. In Ward County, a township has called a meeting to vote on the issue, however the levy limit has become an important topic. This township currently levies slightly in excess of 25 mills. It seems that if they dissolve, the county can levy for the specific road needs of the township, only 18 mills, because they are actually imposing a “different unorganized township levy”.

The amendment suggested would simply cap the unorganized township levy at 18 mills, or the dollar amount that was actually levied at the time of disorganization. Without this provision, the tendency may be for counties to consider disorganization in order to shift costs onto countywide levies to the benefit of the township taxpayers.

County Commissioners urge your support of the proposed amendment and a “Do Pass” recommendation on this bill.