LETTER OPINION
2001-L-07

March 8, 2001

Honorable Aaron Krauter
State Senator
Senate Chambers
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Dear Senator Krauter:

Thank you for your letter inquiring about the constitutionality of SB 2388.

SB 2388 amends subsection 2 of N.D.C.C. § 47-05-02.1 by creating an exception to the 99-year limitation on easements, for organizations that meet the following criteria:

a. The directorate of the organization consists of agricultural producers;

b. The organization was incorporated in this state before January 1, 2001; and

c. The organization is exempt from taxation under section 501(c)(5) of the Internal Revenue Code [26 U.S.C. 501(c)(5)].

N.D.C.C. § 47-05-02.1(2) limits real property easements to 99 years in duration. In North Dakota v. United States, 460 U.S. 300, 320 (1983), the Court ruled that this limitation, as applied to wetlands easements granted under the Migratory Bird Hunting Stamp Act, "is hostile to federal interests and may not be applied." Id. at 320. The Court reserved judgment on whether the 99-year limit could apply to easements acquired in the future. Id. at 320 n.24. Accordingly, wetlands easements acquired by the U.S. Fish and Wildlife Service may be perpetual, while easements acquired by other, private organizations are limited to 99 years. I understand that the purpose of SB 2388 is to allow certain farm organizations to acquire perpetual easements, to provide another option for landowners seeking to sell perpetual easements on their property.

You have inquired whether this exception would violate either the United States or the North Dakota Constitutions. Your letter did not indicate any specific constitutional provisions or

issues with which you are concerned. It is difficult to speculate what constitutional challenges may be raised with regard to a particular statute. Also, as will be discussed below, the constitutionality of a statute depends largely on its legislative history. Because the legislative history of SB 2388 is not yet complete, it may be premature to determine the constitutionality of the proposed statute. This opinion will generally address constitutional issues that have been raised with other, or similar statutes, and might be raised by SB 2388, and explain the analyses that a court may undertake in considering these issues.

Any discussion of a statute's constitutionality is guided by a handful of principles. All statutes are presumed constitutional. N.D.C.C. § 1-02-38; Stokka v. Cass County Elec. Coop., 373 N.W.2d 911, 914 (N.D. 1985). The unconstitutionality of a statute must be proven beyond a reasonable doubt. MCI Telecommunications Corp. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994). All doubts about constitutionality are resolved in favor of constitutionality. Id. At least four justices of the North Dakota Supreme Court must agree that a statute is unconstitutional. Id.; N.D. Const. Art. VI, § 4. Finally, proving that a statute is unconstitutional on its face is especially difficult. The challenger must establish that no set of circumstances exists under which the law would be valid. Rust v. Sullivan, 500 U.S. 173, 183 (1991). See also Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1988) (facial invalidation of a statute is "'strong medicine'" employed "'sparingly and only as a last resort'" (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973))). In sum, the analysis of SB 2388 starts with the strong presumption that it, if passed, will likely be constitutional.

However, there are at least three constitutional questions that could be raised with SB 2388. Challengers could argue that SB 2388 violates the equal protection requirement of the United States Constitution and the privileges and immunities clause of the North Dakota Constitution by unfairly discriminating between private organizations that may acquire conservation easements. SB 2388 could also be challenged as a special law prohibited by the North Dakota Constitution.

Section 1 of the Fourteenth Amendment to the federal Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis added.)

Article I, Section 21 of the North Dakota Constitution provides:

> No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

This provision is generally considered the equal protection clause of the North Dakota Constitution. Bouchard v. Johnson, 555 N.W.2d 81, 87 (N.D. 1996). "Equal protection analysis should generally be considered when a statute creates a classification of individuals and grants something to one group but not the other." Id. It could be argued that by allowing only a limited group of qualifying farming organizations to acquire perpetual easements, and not allowing other private organizations the same opportunity, SB 2388 creates an unconstitutional classification that denies other organizations equal protection and grants privileges to only a limited group of organizations.

The standard of review that a court uses to review an equal protection question depends on the type of classification. Id. (citing Hanson v. Williams County, 389 N.W.2d 319, 323 (N.D. 1986)). Because the classification between organizations in SB 2388 is not a suspect classification, and does not involve a fundamental right or an important substantive right, it would likely be reviewed under a rational basis standard. Under this standard legislation will be upheld unless it is "patently arbitrary and bears no rational relationship to a legitimate government interest." Id.

The North Dakota Supreme Court has long held that a statute may create reasonable classifications. Bouchard v. Johnson, 555 N.W.2d at 88, citing Bellemare v. Gateway Builders, Inc., 420 N.W.2d 733, 739 (N.D. 1988). In Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973), the North Dakota Supreme Court stated:

> "Merely because a statute distinguishes between citizens or classes of citizens does not make it unconstitutional. If a classification is reasonably necessary to effect the purposes of a law which is otherwise within the province of the Legislature to enact, the classification will not render the law repugnant to the Constitution."

Id. at 553, quoting State v. Miller, 129 N.W.2d 356, 364 (N.D. 1964). Further,

> "[t]he classification must be one based upon some reasonable grounds, some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

Id. at 555, quoting Northwestern Improvement Co. v. State, 220 N.W. 436, 439 (N.D. 1928) (citations omitted).

In other words, if the distinction between the farming organizations granted perpetual easement rights and those not included in SB 2388 is reasonably necessary to effect the purpose of the statute, and is not arbitrary, the law is likely to be upheld. At this point, the stated legislative purpose is limited to the testimony before the Senate Natural Resources Committee during the hearing on SB 2388, conducted on February 15-16, 2001. The bill appears to be based on the assumption that the U.S. Fish and Wildlife Service is currently the only entity permitted to acquire perpetual easements. Senator Gary Nelson, co-sponsor of SB 2388, testified that the bill would "widen the options available and will allow agricultural organizations to become involved in the process allowing them to hold easements." Hearing on S.B. 2388 Before the Senate Natural Resources Comm., 2001 N.D. Leg. (Feb. 15). Representative Dennis Johnson testified that the bill would "allow a very finely defined group of organizations the ability to hold all types of conservation easements, including perpetual easements[,]" and further that the bill "would expand the options available to landowners," by granting agricultural organizations the ability to hold easements. Id. Based on these and other statements during the hearing, the current legislative purpose of SB 2388 appears to be to give landowners other options for selling perpetual easements on their property.

It is somewhat unclear precisely which organizations will qualify for the exemption outlined in SB 2388. The bill states that the "directorate" of the organization must "consist" of agricultural producers, that the organization must be incorporated in North Dakota before January 1, 2001, and must be exempt from taxation under 26 U.S.C. 501(c)(5). Whether the "directorate" refers specifically to a "board of directors" or other governing body, and whether "consisting" of agricultural producers means that the organization must be governed exclusively by agricultural producers may be factors in interpreting these requirements. Of equal concern, it may be questioned whether the limitation to certain tax-exempt organizations but not others is arbitrary or whether the limitation to organizations incorporated in this state before the beginning of the present year serves a rational purpose. However, if the distinction between qualifying organizations under SB 2388 and other, non-qualifying organizations is rationally related to the legislative purpose of expanding perpetual easements options for landowners, and is not arbitrary, the classification is likely to be upheld.

The classification in SB 2388 could be compared to the classification in North Dakota's corporate farming law. This law prohibits corporations, except for cooperative corporations, seventy-five percent of whose members or stockholders are farmers residing on farms or depending principally on farming for their livelihood, from farming or owning farm or ranchland. In considering the constitutionality of this distinction under an equal

protection analysis, the North Dakota Supreme Court held that the distinction was not arbitrary or unreasonable under the equal protection clause, and that there was a reasonable basis for the classification. Asbury Hospital v. Cass County, 7 N.W.2d 438, 455-456 (N.D. 1943).

Considering the same case on appeal, the United States Supreme Court held:

> The legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made. . . . The North Dakota Legislature may have thought that its policy with reference to corporate-owned agricultural lands would be advanced by permitting corporations engaged in the business of dealing in farm lands to acquire and sell without restriction lands forced upon the market by the statute. It could have thought that its policy would be in part defeated by withholding authority from farm cooperatives to acquire and use farm lands for agricultural purposes. . . . Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it.

Asbury Hospital v. Cass County, N.D., 326 U.S. 207, 214-215 (1945). (Citations omitted.)

The legislative history is not yet complete for SB 2388, and whether the classification is reasonably necessary for the legislative purpose will depend on the purpose or purposes as ultimately established through the remaining legislative process. However, the above discussion explains the type of analysis that a court may undergo when considering an equal protection challenge to SB 2388.

It is also possible that SB 2388 could face a constitutional challenge as a "special law." Article IV, Section 13 of the North Dakota Constitution provides in part:

> The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution. Except as otherwise provided in this constitution, no local or special laws may be enacted, nor may the legislative assembly indirectly enact special or local laws by the partial repeal of a general law but laws repealing local or special laws may be enacted.

(Emphasis added.)

"'A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special.'" MCI Telecommunications Corp. v. Heitkamp, 523 N.W.2d at 552 (citations omitted). Special laws are made for individual cases of less than a class, due to peculiar conditions and circumstances. Id. The special laws language of the North Dakota Constitution constrains laws relating "only to particular persons or things of a class, as distinguished from a 'general law' which applies to all things or persons of a class." Id. (Citations omitted.) Arguably, because SB 2388 relates to a particular group of organizations, farming organizations, within the larger more general group of all farm organizations and organizations that acquire easements, it is a special law.

The North Dakota Supreme Court has held that when it examines a statute to determine if the classification is special, rather than general, it will examine the reasonableness of the classification. Id. at 553 (citing Best Products Co., Inc. v. Spaeth, 461 N.W.2d 91, 99 (N.D. 1990)). The North Dakota Supreme Court has held that a classification challenged under the special laws provision will be upheld if it is "'natural, not arbitrary, and standing upon some reason having regard to the character of the legislation of which it is a feature.'" Id. (Citations omitted.)

The reasonableness of the distinction between the farming organizations exempted from the 99-year limitation in SB 2388 and those other organizations or individuals not included in the bill will be upheld if it is natural, not arbitrary, and has some reason relating to the legislation's purpose. Again, this will be a function of the documented purpose of the legislation, based on the still-evolving legislative history.

Sincerely,

Wayne Stenehjem
Attorney General

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