

**LETTER OPINION
2003-L-40**

September 25, 2003

Mr. S. Lee Vinje
Portland City Attorney
PO Box 547
Mayville, ND 58257-0547

Dear Mr. Vinje:

Thank you for your letter asking whether a city may approve an application for a property tax exemption under N.D.C.C. ch. 40-57.1 if the application is made after building construction has begun.

Chapter 40-57.1, N.D.C.C., authorizes a city to grant property tax and income tax exemptions for businesses meeting certain prescribed qualifications. Section 40-57.1-03, N.D.C.C., authorizes a municipality to grant, subject to certain limitations:

... a partial or complete exemption from ad valorem taxation on all buildings, structures, fixtures, and improvements used in or necessary to the operation of a project for a period not exceeding five years from the date of commencement of project operations. A municipality may also grant a partial or complete exemption from ad valorem taxation on buildings, structures, fixtures, and improvements used in or necessary to the operation of a project that produces or manufactures a product from agricultural commodities for all or part of the sixth year through the tenth year from the date of commencement of project operations.

You indicate that the city of Portland received an application for a property tax exemption from a project operator who intends to process beans in a plant located within the city. At the time the application was filed, construction had begun on the building that is the subject of the application.¹ While the city council expressed support for the application, it is concerned that its authority is restricted by N.D.C.C. § 40-57.1-07(1) which provides:

¹ According to your letter, at the time the application for the property tax exemption was made the walls of the building had already been erected.

No property tax exemption shall be granted under this chapter unless the application for it is granted as provided in this chapter prior to the commencement of construction of the project as that term is defined in section 40-57.1-02 or prior to occupancy by the project operator if the project is an existing building.

In a July 7, 2003, letter to you, counsel for the applicant suggests that the application could be approved either under the provisions of N.D.C.C. § 40-57.1-07(1) as an “existing building” or upon reapplication under N.D.C.C. § 40-57.1-05.²

The primary objective in construing a statute is to ascertain the Legislature’s intent by looking at the statutory language itself and giving it its plain, ordinary, and commonly understood meaning. State of North Dakota v. Norman, 660 N.W.2d 549, 554 (N.D. 2003). In determining the Legislature’s intent, statutes must be construed as a whole. Matter of Estate of Opatz, 554 N.W.2d 813, 815 (N.D. 1996). Each provision must be harmonized with the others to give force and effect to each if possible; and each word, phrase, clause, and sentence must be given meaning. Id. Statutory words may not generally be considered useless rhetoric or surplusage. State v. Nordquist, 309 N.W.2d 109, 115 (N.D. 1981). Although courts may resort to extrinsic aids, such as the legislative history, to interpret a statute if it is ambiguous, if the language is clear and unambiguous, the legislative intent is presumed clear from the face of the statute. Norman, 660 N.W.2d at 554. Under a plain reading of the statute, a “newly constructed building” is not the same as “an existing building.” The Legislature’s use of different terms evidences its intent that there is a distinction. To interpret the statute to mean that once construction is complete a newly constructed building becomes an existing building would render the language in the first part of N.D.C.C. § 40-57.1-07(1) mere surplusage since its prohibition could easily be avoided by waiting until construction is complete to apply for an exemption. The interpretation that the exemption must be requested before construction commences seems the most reasonable from a plain reading of the statute.

Generally, resort to the legislative history is not permissible when the statute is clear and unambiguous. In my opinion, the language in N.D.C.C. § 40-57.1-07(1) is clear and unambiguous. Even if N.D.C.C. §40-57.1-07(1) were determined to be ambiguous, thus allowing extrinsic aids to be used, a review of the legislative history supports the interpretation that the exemption must be requested prior to beginning construction.

Section 40-57.1-07(1), N.D.C.C., was originally enacted by the 1973 Legislative Assembly. 1973 N.D. Sess. Laws ch. 341, § 1. As originally enacted, it did not include

² See note 3 below.

the language “or prior to occupancy by the project operator if the project is an existing building.” This language was added in 1991. 1991 N.D. Sess. Laws ch. 447, § 9.

A review of the 1973 legislative history reveals that one of the sponsors of this legislation was Senator Butler. During a committee hearing, Senator Butler said:

. . . the problem which will be corrected is that now people build a building and then ask for an exemption, this bill will correct that in that one will have to ask to build first. This got out of hand.

Hearing on S.B. 2380 Before the Senate Finance and Taxation Comm., 1973 N.D. Leg. (Feb. 5).

The following are excerpts from a February 26, 1973, committee hearing:

SEN. BUTLER, sponsor, said that the bill allows that application for exemption will be made prior to construction and also approved before construction. Intent of original legislation was to exempt new industry. There have been a great many exemption (sic) made over the past years, it has gotten out of hand. This bill is to try to put it back on track to conform to original intention of legislature.

. . . .

REP. DORNACKER said that this bill puts on a deadline of July 1, and after that it requires an application and approval for exemption before construction starts.

REP. POYZER said the requirements for approval of exemption were too loose. This is just clarifying the law.

Hearing on S.B. 2380 Before the House Finance and Taxation Comm., 1973 N.D. Leg. (Feb. 26).

When the 1991 Legislative Assembly considered House Bill No. 1534, which contained, among other things, the above-quoted addition to N.D.C.C. § 40-57.1-07(1), one of its sponsors, Representative John Schneider, presented extensive written testimony to the House Finance and Taxation Committee. With respect to this language, he stated:

Section 9 retains the requirement that the property tax exemption must be approved prior to commencement of construction for a new building, adds the requirement that application for the property tax exemption must be made before occupying an existing building, and adds the requirement

that an application for an income tax exemption must be made within one year after the commencement of project operations.

Hearing on H.B. 1534 Before the House Finance and Taxation Comm., 1991 N.D. Leg. (Feb. 6).

Not only does the plain meaning of the statute require an applicant to apply for an exemption prior to commencing construction, but by requesting the tax exemption after construction of the building has begun, the applicant is attempting to do exactly what the drafters of N.D.C.C. § 40-57.1-07(1) intended to foreclose. Therefore, it is my opinion that the application cannot be approved under the provisions of N.D.C.C. § 40-57.1-07(1) as an “existing building,” as suggested by counsel for the applicant.³

It may be of interest to the city council that N.D.C.C. § 40-57.1-03 was amended by the Legislative Assembly during a 1994 Special Session. 1994 N.D. Sp. Sess. Laws ch. 784, §1. The amendment added language that now provides, in pertinent part, as follows:

In addition to, or in lieu of, a property tax exemption granted under this section, a municipality may establish an amount due as payments in lieu of ad valorem taxes on buildings, structures, fixtures, and improvements used in the operation of a project. The governing body of the municipality shall designate the amount of the payments for each year and the beginning year and the concluding year for payments in lieu of taxes, but the option to make payments in lieu of taxes under this section may not extend beyond the twentieth year from the date of commencement of project operations. To establish the amount of payments in lieu of taxes, the governing body of the municipality may use actual or estimated levels

³ Further, I do not believe it is likely that the application can be approved as a reapplication under N.D.C.C. § 40-57.1-05 also suggested by counsel for the applicant but not specifically asked in your letter. That statute permits a project operator to reapply for a tax exemption “upon the presentation of additional facts and circumstances which were not presented or discovered at the time of the original application.” N.D.C.C. § 40-57.1-05. No additional facts or circumstances have been proffered, nor would additional facts and circumstances alter the fact that the application was made after project construction had commenced. While the reapplication process authorized by N.D.C.C. § 40-57.1-02 would involve factual determinations, the city in so doing cannot ignore the provisions of N.D.C.C. § 40-57.1-07(1) which require that an application for a property tax exemption for a newly constructed building be granted prior to the onset of project construction.

of assessment and taxation or may establish payment amounts based on other factors.

N.D.C.C. § 40-57.1-03.

In N.D.A.G. 96-F-23 it was noted that “[b]ecause there is a clear difference between an exemption and an in lieu tax, the in lieu tax payments authorized by N.D.C.C. § 40-57.1-03 are not affected by the language of N.D.C.C. § 40-57.1-07(1) which requires that a property tax exemption authorized under these provisions be granted before the commencement of construction of the project. . . . It is apparent that the Legislative Assembly considered the in lieu of tax payments as an alternative option for a municipality that is separate from a tax exemption.” N.D.A.G. 96-F-23.

There is no requirement that payments in lieu of taxes be granted prior to beginning construction or prior to occupancy of an existing structure. Thus, payments in lieu of taxes in this case may be a way for the city to provide a form of assistance to the applicant free of some of the restrictions that accompany property tax exemptions.

Sincerely,

Wayne Stenehjem
Attorney General

rww/pg