

**LETTER OPINION
2004-L-03**

January 13, 2004

Ms. Nici Meyer Clarkson
Bowman County State's Attorney
PO Box 180
Bowman, ND 58623-0180

Dear Ms. Clarkson:

Thank you for your letter asking whether an assisted living unit project constructed by a nursing home could qualify as a public facility or public service under N.D.C.C. § 15.1-27-25(4). Section 15.1-27-25, N.D.C.C., provides for the county-level distribution of monies received by the state from the federal government as royalties for minerals produced in certain counties. Section 15.1-27-25(4), N.D.C.C., provides that "counties may use any money received under this section only for the planning, construction, and maintenance of public facilities and the provision of public services." The terms "public facilities" and "public services" are not defined in N.D.C.C. ch. 15.1-27.¹

The "primary goal in construing a statute is to discover the intent of the Legislature." Northern X-Ray Company, Inc. v. Hanson, 542 N.W.2d 733, 735 (N.D. 1996). In seeking to determine legislative intent, courts will look first to the language of the statute. Id. "If a statute's language is clear and unambiguous, the legislative intent is presumed clear on the face of the statute." Id. "Unless words in a statute are defined in the code, they are to be given their plain, ordinary, and commonly understood meaning." Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). On the other hand, "[i]f the language of a statute is ambiguous or of doubtful meaning, extrinsic aids may be used to interpret the statute." Id. "[L]egislative history may be used to determine legislative intent if the meaning of the statute is ambiguous or unclear." N.D.A.G. 95-L-53; see also N.D.C.C. § 1-02-39.

The term "public" means "[c]onnected with or acting on behalf of the people, community, or government rather than private matters or interests." The American Heritage Dictionary

¹ Section 15.1-27-25, N.D.C.C., was passed as a result of a federal statute, 30 U.S.C. § 191, the Federal Mineral Lands Leasing Act, which also uses but does not define the terms "public facilities" or "public services."

1001 (2d coll. ed. 1991). “Facility” means “[s]omething created to serve a particular function.” Id. at 484. “So long as [a] facility is owned and operated by [a] public entity, is devoted to [a] public purpose, and is beneficial to [a] substantial segment of public, it is [a] ‘public facility’ or hospital” 35 Words and Phrases 148 (2003 cum. supp.) (citing Farina v. City and County of Denver, 940 P.2d 1004 (Colo. Ct. App. 1996)). Cf. Minnesota Ass’n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare, 742 F.2d 442, 446 (8th Cir. 1984), cert. denied, 469 U.S. 1215 (1985) (“nursing homes, unlike public utilities, have freedom to decide whether to remain in business and thus subject themselves voluntarily to the limits imposed by [a state] on the return they obtain from investment of their assets in nursing home operation”).

The term “public service” has been defined as a “service provided or facilitated by the government for the general public’s convenience and benefit.” Black’s Law Dictionary 1246 (7th ed. 1999). It has also been defined as a “service performed for the benefit of the public.” The American Heritage Dictionary 1001 (2d coll. ed. 1991).

You indicate in your letter that the nursing home creating the assisted living units is not a governmental facility but rather is a private nonprofit 501(c)(3) corporation. Thus, the assisted living units would not be owned or operated by a public entity, nor would they appear to provide or facilitate a service by or for the government for the general public’s convenience and benefit.² Consequently, it is my opinion that such a privately owned and operated assisted living facility would not qualify as a public facility or public service within the meaning of N.D.C.C. § 15.1-27-25(4).³

Alternatively, you ask whether the county could transfer money received under N.D.C.C. § 15.1-27-25(4) to the “Bowman County Economic Development Corporation,” which in turn would use the funds to benefit the nursing home in creating the assisted living units. According to the records on file with the Secretary of State’s office, the Bowman County

² I would also note that there is no apparent nexus here between the facility or service and apparent purpose of the statute to compensate local units of government for the adverse effects of mineral production on public facilities and services within the producing counties. Your letter contains no information linking the assisted living unit project to remedying any impacts of mineral development in the county.

³ This construction is consistent with the somewhat lengthy legislative history for former N.D.C.C. § 15-40.1-13, the predecessor statute to current N.D.C.C. § 15.1-27-25. It was concerned with the type of public services impacted by mineral development and resultant traffic increases, such as schools, hospitals, ambulances, and police patrols. See infra.

Development Corporation⁴ is a North Dakota nonprofit corporation. This organization is apparently not a jobs development authority created under N.D.C.C. ch. 11-11.1 (which would be a public entity) but may be an “active industrial development organization” within the meaning of N.D.C.C. § 11-11.1-06. A county may contract with an industrial development organization “for performance of the functions of a job development authority.” Id.

In fact, a county may levy a tax to fund such an industrial development organization for performing the functions of a job development authority. Id. The main function of a job development authority is to “use its financial and other resources to encourage and assist in the development of employment within the county.” N.D.C.C. § 11-11.1-03. In doing so, a job development authority has the authority under state law:

. . . .

10. To loan, grant, or convey any funds or other property held by the authority for any purpose necessary or convenient to carry into effect the objective of the authority established by this chapter.
11. To use existing uncommitted funds held by the authority to guarantee loans or make other financial commitments to enhance economic development.

N.D.C.C. § 11-11.1-03(10) and (11). A job development authority also has the power to acquire and dispose of property. N.D.C.C. § 11-11.1-03(5). As a public entity, a job development authority provides a public service. A county may contract with an industrial development organization to provide the public service.

To the extent an active industrial development organization is properly authorized by the county and does act in lieu of a job development authority in developing employment and enhancing economic development in the county, it would be acting as a public entity and may be performing a recognized public service of economic development⁵ by assisting the construction and operation of an assisted living project. However, it is unclear whether the term “public service” as used in N.D.C.C. § 15.1-27-25(4) was intended to cover any and all public services or only those impacted by mineral exploration and development. Resort to legislative history is therefore appropriate. See N.D.A.G. 95-L-53. An economic

⁴ The word “economic” does not appear in the name of this entity as on file with the Secretary of State.

⁵ “Economic development is generally recognized as a valid public use or purpose.” City of Jamestown v. Leever's Supermarket, Inc., 552 N.W.2d 365, 369 (N.D. 1996).

development project such as this is not the kind of public service the Legislature was contemplating when it passed the predecessor statute to N.D.C.C. § 15.1-27-25. Section 15-40.1-13, N.D.C.C., is the predecessor to current N.D.C.C. § 15.1-27-25. There were numerous references in the legislative history for N.D.C.C. § 15-40.1-13 indicating that the money was intended to be used primarily for repair and reconstruction of infrastructure impacted by mineral exploration and development activities, particularly deterioration of roads and bridges and similar infrastructure, as well as to assist public services such as schools, police, hospitals, and ambulance services that are impacted by such activities. See, e.g., Hearing on S.B. 2202 Before the House Appropriations Comm., 1999 N.D. Leg. (Feb. 25) (Testimony of Sen. Bowman); Hearing on S.B. 2202 Before the House Appropriations Comm., 1999 N.D. Leg. (Mar. 24) (Statement of Rep. Byerly); Hearing on S.B. 2202 Before the Conference Comm., 1999 N.D. Leg. (Apr. 6) (Statements of Sen. Bowman). There does not appear to be any nexus between this assisted living facility type of an economic development project and ameliorating mineral development impacts. See note 2 above. Consequently, it is my opinion that a county may not provide an industrial development organization acting as a jobs development authority under N.D.C.C. ch. 11-11.1 with funds under N.D.C.C. § 15.1-27-25(4) to assist a nursing home in constructing assisted living units.

Sincerely,

Wayne Stenehjem
Attorney General

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