

**LETTER OPINION  
2004-L-51**

July 29, 2004

Mr. Kenneth L. Dalsted  
Jamestown City Attorney  
PO Box 1727  
Jamestown, ND 58402-1727

Dear Mr. Dalsted:

Thank you for your letter raising several questions about the authority of a district health unit under N.D.C.C. § 23-35-10 to purchase a building via a contract for deed and remodel it to house its authorized operations. For the reasons stated below, it is my opinion that a district board of health may finance the purchase and remodeling of a building to house its authorized operations through a contract for deed arrangement pursuant to N.D.C.C. § 23-35-10.

**ANALYSIS**

You indicate in your letter that the district board of health is interested in financing the purchase and remodeling of a building under N.D.C.C. § 23-35-10(1)(b). That provision states, in part, as follows:

The district board of health may finance the purchase, construction, or equipping of a building on owned or leased property for the use and purpose for which the health district is formed and carry out the functions of the health district in either of the following ways:

....

- b. The district board of health may mortgage or otherwise encumber the building constructed in an amount not exceeding two times the authorized tax revenue of the district for the year in which the construction is to be commenced.

You first ask whether a contract for deed purchase is included within the meaning of N.D.C.C. § 23-35-10(1)(b), which allows a district board of health to “mortgage or

otherwise encumber the building constructed . . . .” An encumbrance is defined generally as a “claim, lien, charge, or liability attached to and binding real property; e.g. a mortgage; judgment lien; mechanics’ lien; lease; security interest; easement or right of way; accrued and unpaid taxes.” Black’s Law Dictionary 527 (6th ed. 1990). A contract for deed means an “agreement by a seller to deliver the deed to the property when certain conditions have been met, such as completion of payments by purchaser.” Id. at 325.

Unlike conventional financing with a note and mortgage, a contract for deed financing does not typically involve recording a mortgage or entering into some other formal security arrangement. Nevertheless, under N.D.C.C. § 35-20-01, “[o]ne who sells real property has a special or vendor’s lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.” Thus, a lien or encumbrance is created by operation of law when real property is sold under a contract for deed for the unpaid and unsecured amount. Consequently, it is my opinion that a district board of health may finance the purchase, construction, or equipping of a building under N.D.C.C. § 23-35-10(1)(b) through a contract for deed since a lien or encumbrance would be created by operation of law for the amount of the purchase price remaining unpaid and unsecured.

You next ask whether N.D.C.C. § 23-35-10(1)(b) would permit the financing of the costs of purchasing the existing building and remodeling or whether that provision is limited to financing new construction. The question arises because the express terms of N.D.C.C. § 23-35-10(1)(b) refer to mortgaging or otherwise encumbering “the building constructed,” whereas the lead-in sentence to that provision permits financing the “purchase, construction, or equipping of a building.” N.D.C.C. § 23-35-10(1).

As I noted in a recent opinion:

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 is 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).

To limit the financing option in N.D.C.C. § 23-35-10(1)(b) to only new building construction could render the words “purchase” and “equipping” of a building in the lead-in sentence in N.D.C.C. § 23-35-10(1) to mere rhetoric or surplusage -- at least as to an existing building. Moreover, in applying a statute it is generally recognized that the greater contains the lesser. See N.D.C.C. § 31-11-05(27). Thus, if a district board of health is authorized to finance the construction of a building, it follows that it should be able to finance something less than the new construction, i.e., the remodeling or reconstruction of a building. Consequently, it is my further opinion that N.D.C.C. § 23-35-10(1)(b) authorizes the financing of the purchase and remodeling of a building for a district board of health.

Finally, you ask whether N.D.C.C. § 23-35-10(2) creates a general state tax exemption for interest income received by a holder of a note and mortgage or a seller under a contract for deed. That provision states, in part, that “[b]onds issued under this section and income under this section are exempt from any taxes except inheritance, estate, and transfer taxes.” Your question relates to whether the phrase “and income under this section” relates only to bonds issued or to other types of obligations that may arise in financing the purchase of a building by a district board of health.

The statute permits a district board of health to issue and sell bonds. N.D.C.C. § 23-35-10(1)(a). However, as noted above, it also permits a mortgage or other encumbrance. N.D.C.C. § 23-35-10(1)(b). Had the Legislature intended the reference to exempt income in N.D.C.C. § 23-35-10 to be limited to income from bonds issued, it could have easily so stated as it did in a number of other similar statutes in which it made clear that it was exempting income from bonds.<sup>1</sup>

Moreover, in N.D.C.C. § 23-35-10, the Legislature used the language “income under this section.” Since this section of law permits the financing of a building through a mortgage loan or other lien or encumbrance (such as a contract for deed), it is my opinion that interest income received by a holder of a mortgage loan and to a seller under a contract for deed would constitute “income under this section” which would be exempt from state taxes except for inheritance, estate, and transfer taxes. This interpretation is also

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<sup>1</sup> See N.D.C.C. § 40-35-12 (“Bonds issued under the provisions of this chapter and the income therefrom shall be exempt from any taxes, except inheritance, estate, . . . .”) (emphasis added); N.D.C.C. § 40-36-07 (“Refunding bonds issued under the provisions of this chapter and the income therefrom shall be exempt from any taxes, except inheritance, estate, . . . .”) (emphasis added); N.D.C.C. § 40-57-13 (“Bonds issued under the provisions of this chapter, and the income therefrom, shall be exempt from any taxes, except inheritance, estate, . . . .”) (emphasis added); N.D.C.C. § 55-08-08 (“The bonds must have all of the qualities and incidents of negotiable paper, and the bonds and the income from the bonds . . . .”) (emphasis added).

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consistent with the general exemptions from state income taxation for interest on obligations<sup>2</sup> of any political subdivision<sup>3</sup> of the state. See N.D.C.C. §§ 57-38-01.2(1)(g) and 57-38-01.3(1)(d).

Sincerely,

Wayne Stenehjem  
Attorney General

jff/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

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<sup>2</sup> “‘Obligation’ means an agreement of a public entity to pay principal and any interest thereon.” N.D.C.C. § 21-03.1-01(6).

<sup>3</sup> A health district is a separate political subdivision. See N.D.A.G. 2004-L-05.