

**LETTER OPINION**  
**2004-L-72**

December 6, 2004

Mr. Kent A. Reiersen  
Williston City Attorney  
PO Box 1366  
Williston, ND 58802-1366

Dear Mr. Reiersen:

Thank you for asking whether N.D.C.C. § 40-13-05 prohibits a city commissioner from purchasing real property the city obtained because of unpaid taxes and assessments. It is my opinion that N.D.C.C. § 40-13-05 prohibits a city commissioner from purchasing the real property from the city unless the rest of the city commissioners unanimously approve the purchase by finding that the purchase is necessary because the services or property obtained are not otherwise available at equal cost.

**ANALYSIS**

The following information is the basis for my analysis. When selling its real property, the city of Williston (hereafter City) has either advertised for bids or has designated certain lots and provided the description of the property to realtors via an open listing agreement. See N.D.C.C. §§ 40-11-04, 40-11-04.1, and 40-11-04.2. Some lots are pre-priced. If a party makes an offer meeting the price, it is sold to the party if approved by the Williston City Commission (hereafter Commission). Other lots are not pre-priced, and the Commission considers an offer made through a realtor on the property. One of the city commissioners is interested in purchasing several lots. The property at issue has been openly listed for a period of time, and the offer made by the commissioner meets the pre-priced amount set by the Commission.

Section 40-13-05, N.D.C.C., states:

Except as otherwise provided by law, no municipal officer, in a municipality having a population of ten thousand or more according to the last federal decennial census, shall be directly or indirectly interested in:

1. Any contract, work, or business of the municipality;
2. The sale of any article the expense, price, or consideration of which is paid from the municipal treasury or by any assessment levied by any act or ordinance; or

3. The purchase of any real estate or other property belonging to the municipality or which shall be sold for taxes or assessments or by virtue of any process issued in any suit brought by the municipality.

Provided, however, that the foregoing shall not be applicable if unanimously approved by the other members of the governing body of the political subdivision by a finding unanimously adopted by such other members and entered in the official minutes of the governing body, to be necessary for the reason that the services or property obtained are not otherwise available at equal cost.

(Emphasis added.)

Williston has a population of 10,000 or more; therefore, N.D.C.C. § 40-13-05 applies to this situation. The prohibitions of that section, however, may be overcome if the provisions in the last sentence of N.D.C.C. § 40-13-05 are met. The last sentence would authorize the contract or purchase by the city commissioner if the other Commission members unanimously approve the contract or purchase by finding that the contract or purchase is “necessary for the reason that the services or property obtained are not otherwise available at equal cost.” N.D.C.C. § 40-13-05. This office has previously issued an Attorney General’s opinion, which indicates that the last sentence in N.D.C.C. § 40-13-05 could apply in this situation.

The Attorney General’s opinion concluded a city commission could enter into a PACE (Partnership in Assisting Community Expansion) loan agreement in which the city, in cooperation with the Bank of North Dakota, buys down the interest on a loan to a business located in the city and owned solely by the president of the board of city commissioners, if the other members of the city commission unanimously approve the agreement and unanimously adopt the finding required by the last sentence in N.D.C.C. § 40-13-05. See N.D.A.G. 94-F-32. The opinion also concluded that the city commission could grant a five-year tax exemption to the business solely owned by the president of the board of city commissioners if the other city commission members unanimously approved the exemption and unanimously adopted the finding required by the last sentence in N.D.C.C. § 40-13-05. Id. The city was seeking economic development through the PACE loan agreement. When discussing whether the interest buy-down was “necessary for the reason that the services or property obtained are not otherwise available at equal cost,” part I of the Attorney General’s opinion stated:

Whether the economic development services or property are otherwise available at equal cost is a question of fact for the city commission to determine. For example, the city commission could reasonably determine that it is necessary for the city to utilize the PACE program to obtain the PACE program’s economic development services which if not utilized would

otherwise not be available at equal cost to the city. Once this commitment is made, it becomes necessary for the city to evaluate the funding of economic development projects in the same manner it would evaluate the purchase of more conventional services or property. After going through this evaluation, the fact that the city commission chooses to fund an economic development project in which the president of the board is involved would not, because of this conflict, preclude the city from selecting that project if it is in the best interests of the city to do so.

N.D.A.G. 94-F-32 (emphasis added). The opinion also stated:

In the case of a tax exemption, the service or property which the city is gaining is again economic development or the increased tax revenue anticipated as a result of the short-term tax exemption. Whether the services or property obtained are otherwise available at an equal cost is a factual determination to be made by the city commission. The analysis the city commission would use is similar to that discussed under part I. For example, many economic development projects use a variety of different incentives to make that project feasible. For instance, if the economic development project included the coupling of a PACE loan and the necessity of providing a short-term tax exemption, then the city commission should not be precluded from providing that exemption pursuant to the exception in N.D.C.C. § 40-13-05.

Id. (emphasis added). The opinion concluded the services or property obtained by the city in the situation were economic development and anticipated increased tax revenue. The opinion also stated it is a question of fact whether the services or property obtained are otherwise available at equal cost. Thus, in determining whether to make the necessary finding, the Commission may consider, among other things, economic development and anticipated increased tax revenue<sup>1</sup> as those “services or property” which may be obtained by the City if the City were to approve the sale of real property to the city commissioner.

In addition, the last sentence of N.D.C.C. § 40-13-05 could be analyzed more directly for the actual transaction involved in this instance, i.e., a sale of real property to a city commissioner. The last sentence in the statute refers to “property obtained.” The property obtained by the City in a sale of lots would be the funds or money it obtained in the sale. “Property” includes “funds” or “money.” See West’s Legal Thesaurus/Dictionary 500, 611 (1985); cf. The American Heritage Dictionary 809 (2d coll. ed. 1991) (“money” includes “[a]ssets and property considered in terms of monetary value”).

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<sup>1</sup> For example, the Commission could take into account the economic development that may occur if improvements are constructed on the lots and the increased property tax revenues that would flow from increases in property values of the improved lots.

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In this instance, you indicate the lots in question were pre-priced by the Commission, the property was openly listed for a period of time, and the commissioner met the pre-priced amount. You did not indicate there were any other qualifying or higher offers made for the lots. Given these factors, the Commission could reasonably determine that the funds or moneys (the property) received or to be received in the sale "are not otherwise available at equal cost" if no other qualifying or higher offer was bid for the property during a reasonable listing period. See N.D.C.C. § 40-13-05.

In conclusion, it is my opinion that N.D.C.C. § 40-13-05 prohibits a city commissioner from purchasing the real property from the city unless the rest of the city commissioners unanimously approve the purchase by finding that the purchase is necessary because the services or property obtained are not otherwise available at equal cost.

Sincerely,

Wayne Stenehjem  
Attorney General

las/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).