

Opinion modified by subsequent amendment to N.D.C.C. § 40-63-01(2)(g).

**LETTER OPINION
2017-L-01**

February 3, 2017

Mr. Richard J. Riha
Burleigh County State's Attorney
514 East Thayer Avenue
Bismarck, ND 58501

Dear Mr. Riha:

Thank you for your letter requesting my opinion whether the Department of Commerce's program guidelines for the Renaissance Zone Program have the force and effect of law. For the following reasons, it is my opinion that the Renaissance Zone program guidelines issued by the Department of Commerce do not have the force and effect of law, and that the Department of Commerce must manage the Renaissance Zone Program according to the statutes which govern that program.

ANALYSIS

The Renaissance Zone Program was established to assist cities in rehabilitating, preserving, or renovating designated portions of the city by providing certain incentives to private owners and investors.¹ Cities may apply to the Division of Community Services of the North Dakota Department of Commerce in order to designate a portion of that city as a Renaissance Zone.² To qualify for tax incentives, properties within the Renaissance Zone must be approved as Zone projects; once approved, owners or investors may obtain certain exceptions from income taxes and also may obtain property tax relief.³ The property tax exemption for Zone projects includes partial or complete exemptions from property taxes for a period of up to five years for residential, business, or investment purposes.⁴

A city's grant of property tax exemptions for approved Zone projects within its Renaissance Zone will reduce the tax revenues available to other political subdivisions

¹ See generally N.D.C.C. ch. 40-63.

² N.D.C.C. § 40-63-03.

³ N.D.C.C. § 40-63-03(4); see also N.D.C.C. §§ 40-63-04 through 40-63-07.

⁴ N.D.C.C. § 40-63-06.

which are authorized to levy taxes against that property, such as counties⁵ and school districts.⁶ Thus, property taxing districts, such as Burleigh County, have a practical interest in the creation or continuation of a Renaissance Zone in a city within the county, such as Bismarck. However, the laws governing Renaissance Zones do not provide a direct role for property taxing districts other than the city.⁷

The Division of Community Services has, however, sought the opinion of school districts and counties which are affected by a Renaissance Zone. A city's application for a Renaissance Zone must include a development plan⁸ and the statute describing the development plan requires the plan to include evidence of community support.⁹ While there is no specific definition of what is meant by community support in the statute, the Division of Community Services has provided some interpretation of its meaning. The application form for a Renaissance Zone includes a section addressing local commitment, requiring the city to "[p]rovide letters of support from the community. A letter of support from the school district and county must be included."¹⁰ Further, the Division of Community Services has published Renaissance Zone Program guidelines that note when a city seeks to extend the duration of a Renaissance Zone, "[i]n order to be considered for an extension, Commerce will need the following: . . . [l]etters of support from the school district and county."¹¹

As noted in your letter, the city of Bismarck recently applied to the Department of Commerce for a five-year extension of its existing Renaissance Zone Program and the Burleigh County Commission voted not to issue a letter of support for the extension. The Department of Commerce responded to this situation by granting an extension through August 1, 2017, "in order to provide the legislature with an opportunity to clarify the definition of 'evidence of community support.'"¹² Your question, thus, is whether the Department of Commerce can change the requirements of their guidelines for the Renaissance Zone Program.

The statutes governing the Renaissance Zone Program require the Department of Commerce to assess community support for a proposed Renaissance Zone or a proposed

⁵ See N.D.C.C. § 57-15-06.

⁶ See N.D.C.C. § 57-15-13.

⁷ See N.D.C.C. ch. 40-63.

⁸ N.D.C.C. § 40-63-03(1)(b).

⁹ N.D.C.C. § 40-63-01(2)(g).

¹⁰ N.D. Renaissance Zone Application, SFN 55205 (8/11), Section VI(2). (On file with ND Department of Commerce.)

¹¹ N.D. Renaissance Zone Program Guidelines, Section X(3)(b)(3), p. 12.

¹² Letter from Alan R. Anderson, Commerce Comm'r, to Carl D. Hokenstad, Dir. of Cmty. Dev., City of Bismarck (May 5, 2016).

extension of an existing Renaissance Zone, but do not define what is meant by community support.¹³ Further, the statutes governing Renaissance Zones do not specifically require any input from other local taxing entities which may be affected by a Renaissance Zone's grant of a property tax exemption, and do not contain any requirement of approval from, nor any grant of veto authority to, any such entity.¹⁴ The only place where the approval of another local taxing entity is required is found in the application form and program guidelines developed by the Division of Community Services, a division within the Department of Commerce, which oversees the Renaissance Zone Program on behalf of the Department.

In order to have the force and effect of law, a provision must be contained in statute or, for those agencies subject to the Administrative Agencies Practice Act, the provision must be found in a properly adopted rule.¹⁵ A rule is an agency statement of general applicability which implements or prescribes law or policy.¹⁶

The Division of Community Services is subject to the Administrative Agencies Practice Act but the Renaissance Zone application form and guidelines adopted by the Department of Commerce were not promulgated as rules.¹⁷ The application form and guidelines are exempt from the Administrative Agencies Practice Act to the extent they concern only the internal management of an agency that does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public¹⁸ and that they are merely a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, which is explanatory and not intended to have the force and effect of law.¹⁹

The Renaissance Zone law requires the development plan to include "evidence of community support and commitment from residential and business interests."²⁰ It does not require letters of support from the school district or the county government.²¹ Therefore, the suggestion by the Department of Commerce to have letters of support is not legally binding as a statute or administrative rule. Further, the Department of Commerce may not rely upon the lack of a letter of support as a basis to deny the city of Bismarck's application to extend its Renaissance Zone Program.²² It is settled law that an administrative agency

¹³ N.D.C.C. § 40-63-01(2)(g).

¹⁴ See id.

¹⁵ Mullins v. Dep't of Human Servs., 454 N.W.2d 732, 735 (N.D. 1990).

¹⁶ N.D.C.C. § 28-32-01(11).

¹⁷ See N.D.C.C. ch. 28-32.

¹⁸ N.D.C.C. § 28-32-01(11)(a).

¹⁹ N.D.C.C. § 28-32-01(11)(k).

²⁰ N.D.C.C. § 40-63-01(2)(g).

²¹ See N.D.C.C. ch. 40-63.

²² Mullins, 454 N.W.2d at 735.

is generally not required to promulgate rules interpreting every statutory provision that may be relevant to its actions, but instead an administrative agency may announce new principles through adjudicative proceedings on a case-by-case basis.²³

Therefore, it is my opinion that the statements in the Renaissance Zone program guidelines and the Renaissance Zone application form which require a letter of approval from the county and the school district affected by a Renaissance Zone do not have the force and effect of law because this requirement is not found in statute nor in a properly promulgated administrative rule. It is my further opinion that the Department of Commerce may alter its interpretation of what is meant by community support from that stated in its Renaissance Zone application and Renaissance Zone guidelines in accordance with statutory laws governing the Renaissance Zone Program.²⁴

Sincerely,

Wayne Stenehjem
Attorney General

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.²⁵

²³ Amerada Hess Corp. v. Conrad, 410 N.W.2d 124, 133 (N.D. 1987).

²⁴ Cass Cnty. Elec. Co-op, Inc. v. Northern States Power Co., 518 N.W.2d 216, 220 (N.D. 1994) (“We normally defer to a reasonable interpretation of a statute by the agency responsible for enforcing it, ‘especially when that interpretation does not contradict the statutory language.’” (Internal citation omitted.)).

²⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).