

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-23

Date issued: December 27, 1996

Requested by: Stuart A. Larson, Traill County State's Attorney

- QUESTION PRESENTED -

Whether a county may consider an application for payments in lieu of property taxes under North Dakota Century Code (N.D.C.C.) § 40-57.1-03 if the application is filed after the commencement of construction of the project.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a county may consider an application for payments in lieu of property taxes under N.D.C.C. § 40-57.1-03 if the application is filed after the commencement of construction of the project.

- ANALYSIS -

"In North Dakota, counties are creatures of the constitution and may speak and act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to constitutional authority." County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 329 (N.D. 1985).

N.D.C.C. ch. 40-57.1 grants a municipality discretionary authority to grant property tax exemptions or payments in lieu of taxes to new and expanding businesses with certain limitations. For the purposes of this chapter, "municipality" includes counties as well as all organized cities. N.D.C.C. § 40-57.1-02(2).

N.D.C.C. § 40-57.1-03 historically granted a municipality the authority to grant exemptions from ad valorem taxation with certain limitations. The 1994 Special Session of the Legislative Assembly amended this section to authorize, among other things, a municipality to grant payments in lieu of taxes. 1993 N.D. Sess. Laws, 1994 Special Supp., ch. 784, § 1. N.D.C.C. § 40-57.1-03 currently provides in part:

After negotiation with a potential project operator, a municipality may grant 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.

In addition to, or in lieu of, a property tax exemption 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 upon which initial construction is begun after June 30, 1994. 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 of assessment and taxation or may establish payment amounts based on other factors. The governing body of the municipality may designate different amounts of payments in lieu of taxes in different years to recognize future project expansion plans or other considerations.

N.D.C.C. § 40-57.1-07(1) provides that an application for a property tax exemption must be granted "prior to the commencement of construction of the project . . . or prior to occupancy by the project operator if the project is an existing building."

In Northern X-Ray Co. v. State, 542 N.W.2d 733, 735 (N.D. 1996), the North Dakota Supreme Court recently set forth the standard for statutory interpretation:

Our primary goal in construing a statute is to discover the intent of the legislature. We look first to the language of the statute in seeking to find legislative intent. If a statute's language is clear and unambiguous, the legislative intent is presumed clear on the face of the statute. If a statute's language is ambiguous, however, we may look to "extrinsic aids" in interpreting the statute.

(Citations omitted.) A reading of the above-quoted language of N.D.C.C. § 40-57.1-03 clearly and unambiguously shows that a municipality may: (1) grant a five-year property tax exemption for a new industry; (2) extend the exemption as a phased-out exemption through the tenth year of operation if the new industry manufactures a product from agricultural commodities; and (3) negotiate an amount due as payments in lieu of property taxes on improvements used in the operation of a project upon which initial construction is begun after June 30, 1994, but the option to make payments in lieu of taxes may not extend beyond the twentieth year from the date of commencement of project operations.

In William Clairmont, Inc. v. State, 261 N.W.2d 780, 783-84 (N.D. 1977), the North Dakota Supreme Court considered the word "exempt" as applied to taxation:

The word "exempt" has a plain and common meaning. As applied to taxation, it means "freedom from the burden of enforced contributions to the expenses and maintenance of government, or an immunity from a general tax." It is a special freedom from taxation imposed upon others, a dispensation.

This is the sense in which the word "exempt" is customarily used in the statutes of this State.

(Citations omitted.) "Lieu tax" means instead of or as a substitute. Sioux Valley Hosp. Ass'n v. State, 519 N.W.2d 334, 336 (S.D. 1994).

Because 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.

However, assuming for the sake of argument that there is some ambiguity in the relevant statutory language, the legislative history may be considered in determining the intention of the Legislature. N.D.C.C. § 1-02-39(3). The Legislative Council prepared a written summary of House Bill No. 1520, which contained the in lieu provisions, for the 1994 Special Legislative Session. Under the heading of "PROPERTY TAXES" the following language is found:

House Bill No. 1520 creates a "payments in lieu of taxes" option that could be used in combination with, or in place

of, property tax exemptions for a project that begins construction after June 30, 1994. Payments in lieu of taxes could apply to any kind of facility and do not apply only to agricultural processing facilities.

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.

Therefore, it is my opinion that a county may consider an application for payments in lieu of property taxes under N.D.C.C. § 40-57.1-03 if the application is filed after the commencement of construction of the project.

- EFFECT -

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 questions presented are decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

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