

LETTER OPINION
98-L-122

August 25, 1998

Mr. Douglas D. Sletten
Garrison City Attorney
PO Box 459
Garrison, ND 58540-0459

Dear Mr. Sletten:

Thank you for your letter requesting my opinion on whether the city of Garrison may form a housing authority pursuant to N.D.C.C. ch. 23-11, either by itself or in conjunction with an agreement with a county housing authority. N.D.C.C. § 23-11-02 provides, in part:

In each city and in each county of the state, there is created a public body corporate and politic to be known as the "housing authority" of the city or county, as the case may be. Such authority may not transact any business nor exercise any powers granted by this chapter until the governing body of the city or of the county, as the case may be, by proper resolution, declares that there is need for an authority to function in such city or county.

A city is defined in N.D.C.C. § 23-11-01(5) as:

[a]ny city having a population of more than five thousand inhabitants according to the last federal census and "the city" means the particular city for which a particular housing authority is created, except that it does not mean a city which has agreed to or will so elect to participate in a county housing authority pursuant to section 54-40-08,¹ provided that any city with less than five

¹ N.D.C.C. § 54-40-08 was amended in 1993 to remove the joint powers provision referred to in N.D.C.C. § 23-11-01(5). See 1993 N.D. Sess. Laws ch. 401, § 50. The deleted provision allowed for political subdivisions to enter into agreements with one another for joint or cooperative action. That joint powers provision had been interpreted by both the North Dakota Supreme Court and this office to only allow two or more governmental units to enter into joint powers agreements if each had the power which they were contracting to share. See City of Hazelton v. Daugherty, 275 N.W.2d 624, 629, n.1 (N.D. 1979); 1973 N.D. Op. Att'y Gen. 150. A similar, although greatly expanded, joint powers provision was also enacted in 1993 as part of the so-called

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thousand population which has an activated city housing authority prior to July 1, 1971, must be included within this definition.

You indicate in your letter that the city of Garrison has a population of less than 5,000 inhabitants and that the city council "approved a housing authority in calendar year 1998 with the idea it would work cooperatively with McLean County since no housing authority exists now."

You first ask whether the city had the authority to form a housing authority under N.D.C.C. ch. 23-11. The primary purpose of statutory construction is to determine the intent of the Legislature, which must initially be sought from the language of the statute. Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990); County of Stutsman v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985). "It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say." City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940). Words in a statute are to be understood in their ordinary sense unless a contrary intention plainly appears, but any words explained in the North Dakota Century Code are to be understood as explained. N.D.C.C. § 1-02-02. Kinney Shoe Corp. v. State, 552 N.W.2d 788, 790 (N.D. 1996).

N.D.C.C. § 23-11-02 creates a housing authority for each "city" and county of the state which is dormant until the "city" or county activates its housing authority by proper resolution. The requirements for the resolution are set out in N.D.C.C. § 23-11-03. The term "city" is defined in N.D.C.C. § 23-11-01(5). A plain reading of the definition of "city" contained in N.D.C.C. § 23-11-01(5) indicates that unless grand-fathered in, a municipality must have a population of at least 5,000 inhabitants to be considered a "city" for purposes of that chapter. See also Letter from Chief Deputy Attorney General Gerald VandeWalle to Mark Hinthorne (November 14, 1975) ("[f]or the purpose of Chapter 23-11, any city which does not have a population in excess of five thousand persons is not a city even though it is a city for other purposes. . . . A city with

Tool Chest bill and now appears as N.D.C.C. § 54-40.3-01. See 1993 N.D. Sess. Laws ch. 401, § 49. This new joint powers provision, which is not mentioned in N.D.C.C. § 23-11-01, has been construed by this office to allow governmental entities to contract to do those things which only one entity had the authority to do. See 1993 N.D. Op. Att'y Gen. L-190, L-194.

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less than five thousand population may not create its own municipal housing authority under Chapter 23-11, since only cities with a population of more than five thousand may establish a housing authority pursuant to Chapter 23-11 of the North Dakota Century Code.").

Based on the foregoing, it is my opinion that unless a municipality with less than 5,000 population had an activated housing authority prior to July 1, 1971, such a municipality is not a "city" within the meaning of N.D.C.C. ch. 23-11 and consequently may not now form a housing authority.

The question then arises regarding what role or function a city with less than 5,000 people may have under the housing authority law. In Fradet v. City of Southwest Fargo, 59 N.W.2d 871, 876 (N.D. 1953), the court noted that "the legislature . . . had no intention of omitting from the operation of the Housing Authorities Law cities having a population of five thousand or less."

In your letter you state that Garrison is located in McLean County but that McLean County has not yet formed a county housing authority. Even though the county may not yet have formed or activated a housing authority, by virtue of N.D.C.C. § 23-11-02, there is a dormant county housing authority existing in McLean County. At such time as the county would pass the appropriate resolution required by N.D.C.C. §§ 23-11-02 and 23-11-03, the county housing authority would then be activated and could then transact business. The area of operation of the county housing authority would include "all of the county except that portion which lies within the territorial boundaries of any city." N.D.C.C. § 23-11-01(1)(c).

Since Garrison has a population of less than 5,000, it would not be a "city" within the meaning of the area of operation definition contained in N.D.C.C. § 23-11-01(1). Thus, the area of operation of the McLean County Housing Authority would include the land within the territorial boundaries of the city of Garrison. "[W]ith the exception of cities which had a housing authority prior to July 1, 1971, any city with a population of less than five thousand would automatically be included in the area of operation of the county housing authority. . . ." Letter to Hinthorne, supra. See also Fradet v. City of Southwest Fargo, 59 N.W.2d at 876 ("[w]e conclude that the legislature intended that all areas of population other than cities of more than five thousand inhabitants were to be included within the area of operation of the county housing authority."). Because the area of a city with less than 5,000 population would be

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included within a county housing authority's area of operation, no formal agreement between a county housing authority and a municipality with a population of less than 5,000 would be necessary for the municipality to be served by the county housing authority. Letter to Hinthorne, supra.

You also ask whether a city with a population of less than 5,000 could form a housing authority and enter into a cooperative or joint powers agreement with a county housing authority. As I have previously determined, such a city could not lawfully form a city housing authority. However, assuming that the county housing authority was properly activated pursuant to N.D.C.C. ch. 23-11, and notwithstanding the 1993 amendment to N.D.C.C. § 54-40-08 discussed in footnote 1 above, there is sufficient authority for a city with a population of less than 5,000 to enter into cooperative or joint powers agreements with another political subdivision such as a county housing authority. See N.D.C.C. § 23-11-33; Ferch v. Housing Authority of Cass County, 59 N.W.2d 849 (N.D. 1953); N.D.C.C. § 54-40.3-01; 1993 N.D. Op. Att'y Gen. L-190. N.D.C.C. §§ 40-58-07(8), 40-58-13(1)(f),(3), and 40-58-15 (regarding urban renewal). See also Fradet v. City of Southwest Fargo, 59 N.W.2d at 882 ("[a] city having a population of five thousand or less may enter into an agreement to cooperate with the county housing authority in the performance of functions arising from the powers so granted. The State Housing Authorities Law grants to the city no new and independent powers and in entering into a cooperation agreement with the county housing authority the obligations of the city must be limited to the performance of functions falling within the framework of the powers possessed by the municipality under other statutes.").

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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