**N.D.A.G. Letter to Furuseth (March 6, 1985)**

March 6, 1985

Peter H. Furuseth
Assistant City Attorney
City of Williston
P. O. Box 1306
Williston, ND 58801

Dear Mr. Furuseth:

Thank you for your letter of February 26, 1985 concerning the State Plumbing Code and its requirements of a minimum of 20,000 square feet prior to the installation of a private disposal sanitation sewage system.

Pursuant to the authority granted it by N.D.C.C. § 43-18-09, the State Plumbing Board has adopted administrative rules constituting the State Plumbing Code. This code is found in N.D.A.C. Art. 62-03. One of the rules constituting the State Plumbing Code is N.D.A.C. § 62-03-16-04(1) which states as follows:

The minimum lot size in which a private disposal system may be installed is 20,000 square feet [1850.06 square meters].

In speaking with Mr. E. F. Welch, Executive Director of the State Plumbing Board, I have confirmed the information contained in your letter that this provision of the State Plumbing Code was adopted in March of 1973. Mr. Welch is aware of the problem in the city of Williston involving pre-1973 platted lots which have less than 20,000 square feet. Apparently, this information was presented to him several years ago although he is unaware of any resolution of the problem. To Mr. Welch's knowledge, this is the only instance where a city has platted lots of less than 20,000 square feet prior to 1973.

In searching the State Plumbing Code as found in the North Dakota Administrative Code I have been unable to locate any "grandfather" provision pertaining to lots platted prior to 1973. Indeed, N.D.A.C. § 62-03-02-01 provides for general application of the plumbing code to all plumbing materials, systems, or parts thereof installed as of the date of effectiveness of these administrative rules. That particular section of the administrative code states as follows:

> 62-03-02-01. CONFORMANCE WITH CODE. All plumbing materials, and plumbing systems or parts thereof installed hereafter shall meet or exceed the minimum provisions of this article.

It should be noted that N.D.A.C. § 62-03-02-01 makes no mention of retroactive application of the plumbing code. Instead, the plumbing is given prospective application by use of the term "hereafter".

The North Dakota Supreme Court has on several occasions issued general rules of statutory construction indicating that statutes shall be presumed to be constitutional and shall be construed so as to harmonize their provisions with the constitution where ever it is possible to do so. Grace Lutheran Church vs. North Dakota employment Sec Bureau, 294 N.W. 2d 767 (N.D. 1980). Where a statute is susceptible of two constructions, one of which will be compatible with constitutional provisions or one which will render the statute unconstitutional, the courts must adopt that construction which will make the statute valid. Paluck vs. Board of County Commissioners, Stark County, 307 N.W. 2d 852 (N.D. 1981).

Another line of court decisions have held that statutes are presumed to be prospective unless the enacting body has manifested a contrary intention. It is only where legislative intent is clearly expressed that a statute will be construed to operate retrospectively. Monson vs. Nelson, 145 N.W. 2d 892 (N.D. 1966); Lindberg vs. Benson, 70 N.W. 2d 42 (N.D. 1955).

Although these court decisions apply to statutes as opposed to administrative rules, it is my opinion that this same rationale should be applied when construing the administrative rules. The administrative rules should be construed, where possible, so as to be in harmony with constitutional provisions rather than in disharmony. Furthermore, unless the rules indicate a clear intention to be applied retrospectively, they shall be presumed to apply prospectively only.

In a case where retroactive application of N.D.A.C. § 62-03-16-04(1) may result in the possible taking of property without due process, I see no reason why the administrative rule cannot be construed or interpreted so as to be in compliance with the constitutional provisions.

This may be accomplished by concluding that the administrative rule's application is prospective only as of March of 1973 (the date of its effectiveness as an administrative rule). This conclusion would be in compliance with rules of statutory construction and in harmony with the apparent prospective application of the State Plumbing Code as provided for in N.D.A.C. § 62-03-02-01.

Naturally, such interpretations must be made on a case by case basis depending upon the facts of each case. An Attorney General's opinion is inappropriate in such cases as we cannot anticipate the various facts which may be present in individual cases which would have an impact upon the manner in which this administrative rule should be interpreted or construed. It is sufficient, however, to conclude that such an interpretation is indeed available to those called upon to assist city officials in implementing the State Plumbing Code.

Sincerely,

Nicholas J. Spaeth

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cc:  E. F. Welch