OPINION
69-2

June 2, 1969 (OPINION)

Mr. Arne Dahl
Commissioner of Agriculture

RE: Agriculture - Beekeepers - Nonresidents

This is in reply to your letter with regard to Senate Bill No. 462 adopted as an emergency measure by the 1969 Legislative Session and enclosed various correspondence with regard to a particular corporate entity.

The problem here appears to relate to the application of that part of Section 3 of the Bill amending section 4-12-04 of the North Dakota Century Code and more particularly to that part of such amendment stating: "Nonresident beekeepers shall, in addition to the above fees, pay an additional fee of ten cents per colony."

Correspondence enclosed indicates that the corporate entity is not a migrant beekeeping operation, that they have been a fully North Dakota domesticated foreign corporation for many years, and that the corporation has complied with the provisions of Chapter 10-22 of the North Dakota Century Code. The correspondence further indicates that the corporate entity involved has acquired considerable personal and real property on the strength of its admission to do business in the State of North Dakota.

As a result of legal citation in the correspondence we have checked 36 Am. Jur.2d., pages 51 through 54, including Section 36, Commercial Domicile, Section 37, Residence as a result of doing business in state, and Section 38, Location of principal office or place of business as residence. Section 37 thereof states:

> "RESIDENCE AS RESULT OF DOING BUSINESS IN STATE. According to the strict rule expressed in a number of cases that a corporation is a resident or inhabitant of the state in which it is incorporated and of no other, it is held that a corporation created in one state does not become a resident of another by engaging in business there, even though licensed by the latter state and in terms given all the rights and privileges of a domestic corporation. However, many decisions, including a number from courts which approve the foregoing rule as technically correct and frequently controlling, support the view that for certain purposes at least, a practical residence within the jurisdiction may be considered apart from the legal residency or domicil of the corporation, and that 'foreign corporation' and 'nonresident corporation' are not necessarily always synonymous terms. According to this view, a foreign corporation may so establish its business within the state in conformity with the local laws as to justify treatment as a resident for certain purposes, or it may, like a natural person, acquire a special or constructive residence so as to be

> charged with taxes and duties or be subjected to a special jurisdiction. Or, for certain purposes, it may be deemed an inhabitant in a state wherein it is transacting business. Conversely, even a domestic corporation may be classified as a nonresident when its business, agents, and property are all located in another state, although there is some authority to the contrary.
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> "Irrespective of the question whether a foreign corporation can itself change its residence, it is competent for the state in which business is done, according to some courts, to assign to it a residence therein for local purposes, subject to the rule that this must not have the effect of depriving the corporation of constitutional rights to which it is entitled by virtue of the fact that it was incorporated in another jurisdiction and has its legal domicile there."

The correspondence enclosed also mentions possible constitutional criteria with regard to the application of this statutory provision to foreign corporations. If we may quote in part, it states:

> "There seems to be considerable authority on the general principle that the equal protection clause prohibits arbitrary discrimination upon foreign corporations previously admitted to do business in the state if they have acquired substantial property on the strength of the admission to do business."

We would certainly feel that if there is both a constitutional and unconstitutional interpretation of the statute, possible under its terms, the constitutional interpretation should be applied.

It would appear that there may be a serious problem in regard to the constitutionality of this statutory provision.

We note in 33 Am. Jur., pages 360 through 362, Licenses, Section 35, the following statement:

> "NONRESIDENTS. As a general rule, license statutes or ordinances which discriminate against nonresidents of the state, or nonresidents of a political subdivision of the state, either by refusing to grant licenses to such nonresidents or by granting them on different terms, such as by charging nonresidents a higher fee or adding other burdens, where not required under the police power of the state for the protection of the local citizens, are unconstitutional and void as violating article 4 Section 2 of the Federal Constitution, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,' or Section 1 of the Fourteenth Amendment, which provides that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws,' or because they violate some provision of the state Constitution. This rule has been applied, for example, in respect of the following: dealers in bakery products; distributors of handbills; lightning rod salesmen; livestock owners pasturing animals; manufacturers or other persons selling automobiles within the state; nursery-stock salesmen; solicitors, canvassers, and sellers by sample; and other businesses and occupations. In a few cases, however, license laws imposing different or heavier burdens on nonresidents have been upheld. This has been the result, for example, in a few cases involving dealers in bakery products, and photographers soliciting work. It has also been ruled that a statute requiring the payment of a larger license fee in case of nonresidents, for the privilege of purchasing certain kinds of products in a certain county, to be shipped out of it, does not violate article 4 Section 2 of the United States Constitution, since the discrimination is not against citizens of other states more than citizens of the enacting state.

* * * *

"It is also to be observed that the statement of the general rule prohibiting discrimination against nonresidents contains a qualification of the case of licenses required by virtue of the police power. Accordingly, the general rule is subject to two well-recognized exceptions: (1) licenses to sell intoxicating liquors, which exception is justified as an exercise of the police power; and (2) licenses to hunt, fish, or trap, sometimes justified as an exercise of the police power but oftener on the ground that game, fish, and furbearing animals when not reduced to possession belong to the state; as a part of its natural resources, which it can protect and save for its own citizens.

* * * *."

In this regard we note in 16 Am. Jur.2d., pages 828 through 839, Constitutional Law, Section 474, the following:

"RESIDENTS AND NONRESIDENTS OF A STATE. A citizen of a state may acquire and claim rights under the laws of another state without actually going into it. He may enter into contracts to be executed in another state and may acquire and own property, personal and real, situated therein, by purchase, bequest, or inheritance. After a citizen has moved into any state he undoubtedly has the right, as a privilege and immunity of citizenship, to become a citizen of that state by a bona fide residence therein with the same rights as other citizens therein. As long as he remains a citizen of a particular state, however, he may within certain limits owe allegiance to its sovereignty.

> "A citizenship and residence in a state are not necessarily synonymous, for although the Fourteenth Amendment specifically says that United States citizens are citizens of the state in which they reside, there may be a temporary residence in one state, with intent to return to another, which will not create citizenship in the former. Merely because a statute is couched in terms of residence it is not ipso facto outside the scope of the privileges and immunities clause, which speaks of citizens. It has been held in some instances that a statute which makes discriminations and distinctions against nonresidents by permitting only residents to engage in certain occupations or by granting certain privileges only to residents does not violate the privileges and immunities of citizens of other states of Unites States citizens, provided the statute has been construed to include within the class of residents, not only citizens of the state, but also such citizens of other states who happen to be residents of the state. If a state chooses to prefer residents and to deny such preference to nonresidents, whether its own citizens or those of other states, the choice is one within the state's own control. The United States Supreme Court has stated quite broadly that a statute conferring privileges may validly discriminate between residents and nonresidents where the distinction is based on rational considerations. Residents of s state are generally, however, citizens of that state, and citizens of a state are usually residents of that state. Unless the distinction is made clear by enactment or by judicial interpretation, as a usual rule residents include only citizens, and nonresidents are noncitizens. Hense, any law of a state which broadly discriminates against all nonresidents without being construed to include nonresident citizens of such state and which generally seeks to create an alienage which, although based upon residence in form, is based upon citizenship in meaning and effect, discriminates against Unites States citizens who are not citizens of the state and unconstitutionally violates their privileges and immunities."

In the context of these constitutional provisions and theories of their application there may well be serious problems as to the constitutional validity of the statutory provision heretofore mentioned. It is our understanding that at the time of the enactment of the provision there were several corporate beekeepers doing business in the state. While we do feel that in this factual context, and particularly noting the theories and authorities cited in the correspondence forwarded with your request for opinion, they are a part of the problem, nonresident corporate beekeepers, and the fees to be paid by them are not the entire problem. There is probably an equal problem with regard to nonresident individual beekeepers.

We do note a very interesting comment of the Supreme Court of the State of North Dakota in Austinson vs. Kilpatrick, 82 N.W.2d. 388, at page 392 of the Northwestern Reporter that:

> "The first question raised is whether the statute authorizes service upon a corporation. Considering the purpose of the statute there is no doubt that

> the intention of the legislature was to have the word 'nonresident' include every nonresident whether a corporation or an individual. Otherwise the purpose of the statute would be very much restricted. Jones vs. Pebler, supra."

We do feel a similar viewpoint is appropriate to the instant situation.

We do not find further authority with regard to the actual definition of the term "nonresident" as used in the statutory definition. We, of course, are familiar with the statutory rules for determining "residence" contained in section 54-01-25 of the North Dakota Century Code as amended to date, as follows:

> "RESIDENCE - RULES FOR DETERMINING. Every person has in law a residence. In determining the place of residence the following rules shall be observed:
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> 1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose;
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> 2. There can be only one residence;
>
> 3. A residence cannot be lost until another is gained;
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> 4. The residence of the father during his life, and after his death, the residence of the mother, while she remains unmarried, is the residence of the unmarried minor children;
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> 5. The residence of the husband is presumptively the residence of the wife except in the case of establishing residencefor voting purposes;
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> 6. The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian; and
>
> 7. The residence can be changed only the union of act and intent."

We note the comments of the North Dakota Supreme Court in Northwestern Mortgage & Security Co. vs. Noel Construction Company, 71 N.D. 256, 300 N.W. 28, at page 261 of the North Dakota Reports that:

> "The term 'residence' as employed by the Legislature in this statute is synonymous with 'domicil.' * * * (citing authority) * * * This statute did not create any new rule or principle, it merely adopted and embodied into a statute, rules that had been adopted, recognized and applied quite generally throughout this country. * * * (citing authorities) * * *."

In this context, we do recognize that the statute was not designed to state a rule for "corporate domicil." Obviously, a corporation has neither father nor mother, husband or wife, children or minority, nor does a corporation vote. Nevertheless, this statute is the only general statutory definition of the term "resident", and on such basis we presume at least of interest in determining what the meaning of the term "nonresident" or "resident" is, when used in legislative terminology.

We are, of course, familiar with the concept of "Delaware corporations", created on paper in that state, though exercising all corporate functions elsewhere. We do not feel that, in the application of the current statute to such a "Delaware corporation" it would be proper to adhere to a strict rule that a corporation is a resident or inhabitant of the state in which it is incorporated and not other. On the other hand, in view of the positive definition of resident applicable through section 54-01-26 quoted above to individual beekeepers, it would be actually discriminatory to recognize in the case of corporate beekeepers, such a broad definition of the term, as to recognize a "corporate residence" based only on the fact that a part of the corporate business was done in the state and property was owned therein.

In the total context with which we are here concerned a more appropriate definition of "residence" applicable to a corporate entity would be that outlined in 36 Am. Jur.2d., pages 51-52, Foreign Corporations, Section 36, as follows:

> "'Commercial Domicil.' As to a corporation chartered under the liberal laws existing in some states, it would make a legal fiction dominate realities to deny that its 'principal place of business' within the incorporating state is only technical, where the business operations of the corporation are in fact conducted outside the state, its chief place of business is actually situated in another state, and the actual seat of its corporate government is established in the latter. It is not surprising, therefore, that courts have sometimes spoken of the corporation as 'domiciled' in the state from which its operations are actually conducted. Perhaps the best solution to the confusion in terminology in these cases is the recent authoritative recognition of a distinction between the domicil of a corporation in the legal sense and what is aptly termed its 'commercial domicil,' which a corporation may be deemed to acquire by making its actual, as distinguished from its technical or legal, home in a state other than that of its incorporation. This extends to corporations the rule, long recognized in the law of nations, that a person may acquire a commercial domicil by residence in a country for the purpose of trading."

This concept would, of course, be subject to such modification as appropriate under the applicable provisions of section 54-01-26, such as for example: "There can be only one residence."

We recognize that there may still be problems as to the constitutional application of the statutory provision in question. Perhaps the soundest argument in favor of

constitutionality is the fact that same has not been declared unconstitutional by a court of competent jurisdiction. Also, however, we think the nature of property in bees, and the fact that the police power of the state is very much involved in control of colony disease in bees may well have a bearing on the question. While we would certainly not assert that bees as such are equivalent to game or fish we do note in 4 Am. Jur.2d. 252, Animals, Section 4, the following:

> "Bees. Although bees were classified as ferae naturae by Blackstone and other early authorities, and although it may be proper still to so classify them, they nevertheless must be regarded as coming very near the dividing line between animals ferae naturae and those domitae naturae."

Without going into great detail as to the law of pursuit and capture with regard to swarms of bees it would seem that the sovereign does have a great deal more of a property interest related to bees, than for example cattle or other items of agriculture or industry. Factually, also, this office in recent years has been involved in more litigation with regard to disease control in nonresident beekeeper's colonies than in other phases of this industry.

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