

Office of the Attorney General
State of North Dakota

Opinion No. 84-30

Date Issued: August 17, 1984

Requested by: Representative Earl R. Pomeroy

--QUESTIONS PRESENTED--

I.

Whether a leasehold interest may constitute sufficient ownership to comply with licensing requirements for the operation of a treatment or care center for developmentally disabled persons under Chapter 25-16 of the North Dakota Century Code.

II.

Whether the operator of a treatment or care center for developmentally disabled persons, which conducts its operation in a facility financed in part through the Developmentally Disabled Facility Loan Program, may convey a leasehold in that facility without affecting the loan.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that a leasehold interest may constitute sufficient ownership to comply with licensing requirements for the operation of a treatment or care center for developmentally disabled persons under Chapter 25-16, N.D.C.C.

II.

It is my further opinion that the operator of a treatment or care center for developmentally disabled persons, which conducts its operation in a facility financed in part through the Developmentally Disabled Facility Loan Program, may not convey a leasehold in that facility without affecting the loan.

--ANALYSES--

I.

Treatment or care centers for developmentally disabled persons must be licensed in accordance with the provisions of Chapter 25-16, N.D.C.C., Section 25-16-01(1), N.D.C.C., defines treatment or care center as follows:

25-16-01. DEFINITIONS. In this chapter unless the context or subject matter otherwise requires:

1. Treatment or care center' means any hospital, home, or other premises, owned and operated by a charitable nonprofit corporation or association, especially to provide relief, care, custody, treatment, day activity, work activity, or extended employment services to developmentally disabled persons. . . . (Emphasis supplied).

This provision clearly requires that the premises be one in which the operator has an ownership interest.

The word 'owned' and the phrase 'owned by' ordinarily connote that collection of rights to use and enjoy property to the exclusion of others. If not in some way modified by the terms of a statute, 'ownership' refers to absolute ownership. See, generally, 1 Thompson, Real Property, Section 1 (1980 Replacement Vol.) However, '[t]he term 'owner', as applied to land, has no fixed meaning applicable under all circumstances and as to any and every enactment.' People v. Chicago Title and Trust Co., 389 N.E.2d 540, 544 (Ill. 1979), citing Keesling, 'Conflicting Conceptions of Ownership in Taxation,' 44 Cal.L.Rev. 866 (1956). '[O]wnership . . . does not merely involve the title interest to property.' Ex Parte Davis, 542 S.W.2d 192, 195 (Tx. Cr. App. 1976).

When a statute includes the term 'own,' the nature and purpose of the statute may control the meaning of the term. While 'owner' has been interpreted to mean 'one who has the legal or rightful title, whether or not in possession . . . ; the word may depend for its significance upon the connection in which it is used and at times may include one not holding legal title.' Loving Savior Church v. United States, 556 F.Supp. 688, 690 (D.Ct. SD 1983), citing Lien v. Rowe, 92 N.W.2d 922 (SD 1958).

Chapter 47-02, N.D.C.C., distinguishes between absolute and qualified ownership. Section 47-02-03, N.D.C.C., identifies the circumstances of qualified ownership:

47-02-03. 'QUALIFIED OWNERSHIP' DEFINED.--The ownership of property is qualified:

1. When it is shared with one or more persons;

2. When the time of enjoyment is deferred or limited; or
3. When the use is restricted.

The Court of Appeals of Kansas has observed that once the property rights in land 'have been split, we do not think that the answer to the question of who is the 'owner' can be simply answered by pinpointing who has legal title.' *Roberts v. Osborn*, 589 P.2d 985, 990 (Ks. App. 1979).

It is necessary, in determining whether the ownership requirement imposed by the legislature is absolute or qualified, to examine the context in which the term is used. In Chapter 25-16, N.D.C.C., the definition of a licensed entity collectively refers to the terms 'owned' and 'operated' suggesting that the operator and owner must be the same. However, two sections of the substantive provisions of Chapter 25-16, N.D.C.C., (Sections 25-16-03.1 and 25-16-08, N.D.C.C.), one of which was enacted contemporaneously with the definition (Section 25-16-08, N.D.C.C.) refer to the 'owner or operator' of a treatment or care center. The statutory language at least suggest the possibility that some ownership interest might not be in the hands of the operator. If that be the case, the legislature could only have meant that a qualified ownership may satisfy the requirements of the phrase 'owned and operated.'

One must address substantive provisions of Chapter 25-16, N.D.C.C., to determine whether the ownership interest of the operator of a treatment or care center is sufficient to comply with the law. That ownership interest must be sufficiently extensive to allow the operation of the facility in a manner consistent with Chapter 25-16, N.D.C.C., and rules which may have been promulgated thereunder. A leasehold is an ownership interest consistent with that required by Section 25-16-01(1), N.D.C.C., if it affords the lessee sufficient control over the property to conform its operation to the requirements of law.

Therefore, it is my opinion that a leasehold interest may constitute sufficient ownership to comply with licensing requirements under Chapter 25-16, N.D.C.C.

II.

The Developmentally Disabled Facility Loan Program is administered under Chapter 6-09.6, N.D.C.C. Section 6-09.6-03, N.D.C.C., sets forth certain terms and conditions for the granting of a loan under that program. As a consideration for the granting of a loan, the loan recipient is required to 'execute a contract with the state to operate the facility in accordance with standards prescribed for the licensing of the facility . . .' (Emphasis supplied).

A decision by the borrower to convey a leasehold in the facility would preclude operation by the borrower. The breach of the contract to operate would constitute a violation of a covenant of the mortgage executed by all borrowers from the fund established

under Chapter 609.6, N.D.C.C. The loan is, of course, affected by a violation of the mortgage covenants. If the covenant violation is not waived by the lender, the mortgage may be foreclosed.

Therefore, it is my opinion that the operator of a treatment or care center for developmentally disabled persons, which conducts its operation in a facility financed in part through the Developmentally Disabled Facility Loan Program, may not convey a leasehold in that facility without affecting the loan.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the questions presented are decided by the courts.

Robert O. Wefald
Attorney General

Prepared by: Blaine L. Nordwall
Assistant Attorney General