

LETTER OPINION
95-L-213

September 15, 1995

Mr. J. Bruce Gibbens
Cando City Attorney
P.O. Box 708
Cando, ND 58324-0708

Dear Mr. Gibbens:

Thank you for your letter concerning in lieu of ad valorem tax payments made under N.D.C.C. § 40-57.1-03. Your question is "whether or not NDCC 40-57.1-03 allows a municipality to establish payments in lieu of taxes for years six through twenty on [a] project upon which initial construction has begun after June 30, 1994, if that project does not produce or manufacture an agricultural commodity." Your question arose from facts which you set forth in your letter as follows:

Towner County MedCenter approached the City of Cando and had several discussions with the City Council concerning property tax exemption (ad valorem exemption) for a congregate care housing project they were planning to construct. Towner County MedCenter met with the City Council on several occasions to discuss various financing alternatives for the congregate care housing, and the final presentation said that the only feasible means that the project could be completed was by the granting of a tax exemption for years one through five, and establishing a payment in lieu of taxes for years six through twenty. The City Council reviewed the cash flow analysis from Towner County MedCenter and determined this was the only method available if the congregate care facilities were to be constructed. Tax payments based on actual or estimated levels of assessment and taxation would not allow the facility to be built because it would not cash flow.

The Towner County MedCenter published two notices to competitors and at the meeting with the City of Cando there was a protest to the granting of the tax exemption and payment in lieu of taxes. The City determined that it was in the best interest of the municipality to approve the application for the five year exemption and payment in lieu of taxes for years six through twenty. The City reviewed the definitions for project contained in Chapter

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40-57.1, and determined that the Towner County MedCenter congregate housing project should qualify for the five year exemption and for the payment in lieu of taxes for the years six through twenty.

For the following reasons, it is my opinion that N.D.C.C. § 40-57.1-03 allows a municipality to establish payments in lieu of taxes for years six through twenty on a project upon which initial construction has begun after June 30, 1994, even if that project does not produce or manufacture an agricultural commodity.

The 1994 Special Session of the Legislative Assembly enacted House Bill No. 1520, which, among other things, amended N.D.C.C. § 40-57.1-03 to authorize payments in lieu of taxes. 1993 N.D. Sess. Laws, 1994 Special Supp., ch. 784, § 1. This amendment, in pertinent part, provides as follows:

In addition to, or in lieu of, a property tax exemption granted 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.

(Emphasis supplied.) "Project" is defined by N.D.C.C. § 40-57.1-02(4), in pertinent part, as follows:

"Project" means any revenue-producing enterprise, or any combination of two or more of these enterprises.

The North Dakota Supreme Court in Western Gas Resources, Inc. v. Heitkamp, 489 N.W.2d 869, 872 (N.D. 1992), set forth the following criteria for statutory interpretation:

In construing statutes, our primary objective is to ascertain the intent of the Legislature. Id. The Legislature's intent must be sought initially from the language of the statute. Peterson v. Heitkamp, 442 N.W.2d 219 (N.D. 1989). If the language of a statute is clear and unambiguous, we cannot ignore that language under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute. County of Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985); Section 1-02-05, N.D.C.C. However, if the language of a statute is ambiguous, the court may resort to extrinsic aids to interpret the statute. County of Stutsman, supra. A statute is ambiguous if it is susceptible to differing but rational meanings. Rott v. Connecticut General Life Ins. Co., 478 N.W.2d 570 (N.D. 1991).

The language authorizing the in lieu of tax payments under N.D.C.C. ch. 40-57.1 and providing that any revenue-producing enterprise may qualify if construction is begun after June 30, 1994, is not ambiguous. However, assuming for the sake of argument that there is some ambiguity, the legislative history may be considered in determining the intention of the legislation. N.D.C.C. § 1-02-39(3).

On June 29, 1994, John Walstad of the Legislative Council reviewed the entire bill before the House Finance & Taxation Committee. The minutes reflect his statements regarding the in lieu of tax payments provision, as follows:

The next change is the option for the local government to grant the option to make payments in lieu of ad valorem taxes on all businesses, this does not apply only to agricultural commodity processing facilities, this applies to any revenue producing enterprise that would qualify under this chapter.

. . . .

The first provision on page 2 cites the ten year exemption, is only for ag process. The language below there relating to payments in lieu of property taxes are for any qualifying business, which is any revenue producing enterprise. Anybody can qualify for payments in lieu of taxes.

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Payments in lieu of taxes portion of the first segment of the bill applies to everybody, any revenue producing enterprise again. The only thing in the property tax provision that applies only to ag processors is years six through ten exemption.

Minutes on H. 1520 Before the House Comm. on Finance and Taxation, 53rd N.D. Leg. (June 29, 1994), pp. 1, 10. The Legislative Council also prepared a written summary of House Bill No. 1520 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.

Therefore, it is my opinion that the in lieu of tax payments provision is not limited to a project which produces or manufactures an agricultural commodity.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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