

**OPINION
71-257**

October 6, 1971 (OPINION)

The Honorable Robert F. Reimers

Representative

Carrington, ND

RE: Municipal Industrial Development Act - Projects -

Location

This is in response to your letter of September 23, 1971, wherein you make inquiry of this office requesting an official opinion regarding Chapter 40-57 of the North Dakota Century Code, relating to the Municipal Industrial Development Act. You submit the following questions in your letter:

1. Would it be possible, under the terms of the North Dakota Municipal Industrial Development Act, for the City of Jamestown and Stutsman County to join in the issuance of MIDA bonds for one project that could be divided into two separate but related functions and to be under the control of the same owner and with a total combined cost of approximately eight million dollars? If this is possible must the project be located partially or entirely in two separate municipalities or the municipality and the county, or could the complete project be entirely within the boundaries of a single city or county?
2. In order for a city or a county to issue MIDA bonds for a project must all or any part of that project be located within the limits of that municipality or borders of that county?
3. Is it necessary for a municipality to be incorporated in order to issue MIDA bonds or in order to construct a municipal water or sewer system?
4. What are the requirements that a community must meet under the laws of North Dakota in order to incorporate itself, and what is the procedure to follow for such incorporation?
5. If the answer to question one is negative, would it be possible for the town of Spiritwood to issue such bonds jointly in two separate issues with Stutsman County or with the City of Jamestown if the total of the two issues exceeded five million dollars and if the total proceeds were to be used to construct one project consisting of two separate but related functions to be held under the same ownership?"

With regard to your first question, we would first note that with regard to the city and county joining in a particular project,

section 40-57-03 of the North Dakota Century Code, outlining the powers of a municipality, provides as follows, in part:

"POWERS OF MUNICIPALITY. Any municipality, in addition to the powers prescribed elsewhere by the laws of this state, shall have the power to:

* * *

7. Enter into and perform such contracts and agreements with other municipalities, political subdivisions, and state agencies, authorities and institutions as the respective governing bodies of the same may deem proper and feasible for or concerning the planning, construction, lease, or other acquisition, and the financing of such facilities, and the maintenance thereof. Any such municipalities so contracting with each other may also provide in their contract or agreement for a board, commission, or such other body as their governing bodies may deem proper for the supervision and general management of the facilities of the project; * * * " (emphasis supplied)

Also, and in connection with the term "municipality," we note the same is defined by section 40-57-02 of the North Dakota Century Code, as amended, which provides in part:

"'PROJECTS' AND 'MUNICIPALITIES' DEFINED. As used in this chapter, unless a different meaning clearly appears from the context, the term 'municipality' shall include counties as well as municipalities of the types listed in section 40-01-01, subsection 1, * * *."

In view of the foregoing definition it becomes clear that both the county and the city mentioned are "municipalities" within the meaning of the act and the context of the statutes which grant and regulate the powers enumerated under the Act. Since section 40-57-03 provides for the contracting between different municipalities for the planning, construction, lease or acquisition of such projects, it would appear that the city and county mentioned in your letter could joint efforts for the purpose of financing a proper project under the provisions of chapter 40-57 of the North Dakota Century Code. With regard to the amount of the project and its estimated costs, we would note that there is no specific dollar amount, cost limitation or limitations as to the number of projects that may be entered into under the provisions of chapter 40-57 of the North Dakota Century Code. Obviously, however, there would be a point of diminishing returns, a point where the city or other municipalities involved would not have enough inhabitants to operate a plant, and a point where the objectives and purposes stated in chapter 40-57 could not be achieved by a new project or an outrageously enormous project; however, the Legislature has not attempted to further specify or qualify such practical limitation.

With regard to that portion of your first question relating to the location of the project and whether the same must be located partially or entirely in two separate municipalities or the municipality and the county, or whether the project could be entirely

within the boundaries of a single city or county, or would note the provisions of section 40-57-03 of the North Dakota Century Code, which provides in part:

"POWERS OF MUNICIPALITY. Any municipality, in addition to the powers prescribed elsewhere by the laws of this state, shall have the power to:

1. Acquire whether by purchase, lease, or gift, from any source whatsoever, any real property, buildings, improvements on real property or buildings, including but not limited to easements, profits, rights in land and water rights deemed necessary in connection therewith, and to construct, reconstruct, improve, better, or extend to real property, buildings, and improvements on real property and buildings of any project which shall be located within this state, whether wholly within or wholly without the municipality, or partially within and partially without the municipality; * * *." (emphasis supplied)

With regard to the location of such project, then, it appears clear that the only requirement be that it be upon property "located within this state." Since specific provision is made that such project may be wholly within this state." Since specific provision is made that such project may be wholly within or or wholly without the municipality itself, it would appear that city limits or county boundaries would not be proper criteria in determining the proper location of a particular project insofar as statutory requirements are concerned. The reference in the statute to "wholly without the municipality" is without further restriction, qualification or limitation, excepting that the project must be within this state.

In direct response to your initial question, it would appear that the same would be answered in the affirmative, assuming that the project is one that is contemplated and authorized by the statute and that the same is not of such unreasonable magnitude in relation to the municipalities involved that its creation would not be an abuse of the powers granted under the Act.

In response to your second question, it would appear that the answer would be in the negative, being restricted only as hereinbefore mentioned in our replay to your first question, to location within this state.

In response to your third question it would appear that the municipality must be incorporated or organized under the laws of this state. We note that in section 40-57-02 of the North Dakota Century Code, as amended, as hereinbefore quoted, states in the definition of "municipality," as "shall include counties as well as municipalities of the types listed in section 40-01-01, subsection 1, * * *." Said section 40-01-01 defines municipality as follows:

1. 'Municipal corporation' or 'municipality' shall include all cities organized under the laws of this state, but shall not include any other political subdivision;"

In this connection, it would appear that a municipality, in order to

obtain the authority granted under chapter 40-57 of the North Dakota Century Code, would need to be incorporated or otherwise organized according to the laws of this state, as enumerated in the statute granting the power. The same would appear to be true with regard to a sewer or water system; however, of course, there would be no prohibition of a group of persons or entities joining in the common cause and construction of such facilities in a separate joint effort, on a personal or contractual basis. The provisions authorizing a municipality to construct same, however, and levy for payment of same, would not appear to be available to an unorganized municipality.

In response to your fourth question, we would note that the requirements of incorporation as a city are set forth in section 40-02-01 of the North Dakota Century Code, and the procedures for such incorporation are set out generally in chapter 40-02 of the North Dakota Century Code. Specifically, section 40-02-01 provides as follows:

1. 'Municipal corporation' or 'municipality' shall include all cities organized under the laws of this state, but shall not include any other political subdivision;"

In this connection, it would appear that a municipality, in order to obtain the authority granted under chapter 40-57 of the North Dakota Century Code, would need to be incorporated or otherwise organized according to the laws of this state, as enumerated in the statute granting the power. The same would appear to be true with regard to a sewer or water system; however, of course, there would be no prohibition of a group of persons or entities joining in the common cause and construction of such facilities in a separate joint effort, on a personal or contractual basis. The provisions authorizing a municipality to construct same, however, and levy for payment of same, would not appear to be available to an organized municipality.

In response to your fourth question, we would note that the requirements of incorporation as a city are set forth in section 40-02-01 of the North Dakota Century Code, and the procedures for such incorporation are set out generally in chapter 40-02 of the North Dakota Century Code. Specifically, section 40-02-01 provides as follows:

"REQUISITES OF INCORPORATION AS CITY. Any contiguous territory in this state, not exceeding four square miles in area, not already included within the corporate limits of any incorporated municipality, may become incorporated as a city whether such territory is located in one or more counties, under the following conditions:

1. If such territory shall have residing therein a population of not less than fifty nor more than five hundred inhabitants, it may become incorporated as a city under the council or modern council form of government.
2. If such territory shall have residing therein a population of not less than five hundred inhabitants, it may become incorporated as a city under the council or modern council

form of government, of as a city under the commission system of government."

With regard to procedure to effect such incorporation, we note that the sets and requirements are generally set forth in chapter 40-02, section 40-02-02 thereof requiring a census; section 40-02-03 requiring a survey; section 40-02-05 requiring a petition, etc.

Since the response to your first question was answered in the affirmative, it appears that your fifth question does not need a reply or response.

We trust that the foregoing general observations, comments and suggestions will be of interest and assistance to you and will adequately state our opinion on matter presented.

HELGI JOHANNESON

Attorney General