

LETTER OPINION
97-L-185

November 19, 1997

Mr. Tom Tudor
Municipal Bond Bank
Suite 246
418 East Broadway
Bismarck, ND 58501

Dear Mr. Tudor:

Thank you for your letter requesting my opinion on whether a city may lawfully issue revenue bonds under N.D.C.C. ch. 40-35 to be sold to the Municipal Bond Bank to finance the purchase of a nursing home. As you know, after your letter was initially reviewed by this office, the transaction in question was restructured using a management contract¹ to accommodate some concerns raised by this office.

Originally it was proposed that the city would purchase the facility, hold nominal legal title to its physical assets, assume no business risk, lease the facility to the nonprofit entity to operate and maintain, and convey its interest to the nonprofit entity for a nominal amount when the bonds were paid, essentially a pure conduit financing on behalf of a private entity. The transaction is no longer structured that way.²

¹ Rev Proc. 97-13 defines a management contract to mean "a management, service, or incentive payment contract between a qualified user [a state or local government] and a service provider under which the service provider provides services involving all, a portion of, or any function of, a facility. For example, a contract for the provision of management services for an entire hospital, a contract for management services for a specific department of a hospital, and an incentive payment contract for physician services to patients of a hospital are each treated as a management contract." Rev. Proc. 97-13, 1997-5 I.R.B.

² Bond counsel for the city has informed a member of my staff that the management contract for this transaction has been structured to meet one of the "safe harbors" for management contracts contained in Rev. Proc. 97-13 so that the management contract would not be considered a private business use of the bond-financed facility under § 141(b) of the Internal Revenue Code of 1986 and the city's bonds would not be considered taxable private activity bonds. Such a management contract may not, inter alia, give a nongovernmental service provider an ownership or leasehold interest in financed property. Rev. Proc. 97-13. The "safe harbors" contained in Rev.

Mr. Tom Tudor
November 19, 1997
Page 2

This office issued two opinions in 1995 dealing with the authority of a city to own and operate a nursing home and with the authority of a city to issue revenue bonds pursuant to N.D.C.C. ch. 40-35 to fund improvements for a nursing home. See 1995 N.D. Op. Att'y Gen. L-99 and 1995 N.D. Op. Att'y Gen. L-251 (copies attached).

The April 24, 1995, opinion concluded that "a municipality's power to 'establish, control, and regulate hospitals' as stated in N.D.C.C. § 40-05-02(10) includes the power to set up and operate nursing homes." The November 7, 1995, opinion concluded that "a city may lawfully issue revenue bonds under N.D.C.C. ch. 40-35 for the purpose of financing improvements to a city-owned and operated nursing home." However, that opinion also noted that "N.D.C.C. ch. 40-35 does not generally authorize a city to issue so-called private activity bonds³ for a nursing home facility owned or operated by a non-governmental entity." (See 1995 N.D. Op. Att'y Gen. L-251, n.1.)

The question you raise turns on the authority of a city under N.D.C.C. §§ 40-05-02(10), 40-35-02(7), and 40-35-03 to issue revenue bonds for the acquisition of a nursing home which is then to be managed for a term of years by a nonprofit entity pursuant to a management agreement.

The primary purpose of statutory construction is to determine the intent of the Legislature, which must initially be sought from the language of the statute. Kim-go v. J.P. Furlong Enter., Inc., 460 N.W.2d 694, 696 (N.D. 1990); County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 325 (N.D. 1985). "It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say." City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940). Words in a statute are to be understood in their ordinary sense unless a contrary intention plainly appears, but any words explained in the North Dakota Century Code are to be understood

Proc. 97-13 also place limitations on the type and amount of compensation to be received by the service provider and the duration of the contract.

³ As discussed in footnotes 1 and 2 above, if a management contract between a political subdivision and a service provider to manage the political subdivision's facility is structured in conformance with Rev. Proc. 97-13, it would not be considered to be a private business use of the facility under federal tax law and the bonds used to finance such a properly structured managed facility would not be considered private activity bonds.

Mr. Tom Tudor
November 19, 1997
Page 3

as explained. N.D.C.C. § 1-02-02. Kinney Shoe Corp. v. State By Hanson, 552 N.W.2d 788, 790 (N.D. 1996).

Thus, under the authority of the opinions referenced above and the law cited therein, the city would have the authority to acquire a nursing home under N.D.C.C. § 40-05-02(10) and to finance the acquisition with revenue bonds issued under N.D.C.C. ch. 40-35.

N.D.C.C. § 40-35-02(7) defines a revenue bond undertaking to include the "purchase, acquisition, construction, maintenance, and operation of a hospital" and N.D.C.C. § 40-35-03(1) and (2) authorize the acquisition of an undertaking and its operation and maintenance by a city "for the use of public and private consumers and users within and without the territorial boundaries of the municipality."

While a city has no express power to contract the operation and maintenance of a nursing home acquisition financed under N.D.C.C. ch. 40-35 to a nongovernmental entity, the question remains whether such contracting out pursuant to a management agreement may be an implied or incidental power in conjunction with the city's express power under N.D.C.C. § 40-35-03(2) to operate and maintain an undertaking for public and private use.

In Eugene McQuillin, Municipal Corporations § 10.12 (3d ed. 1996), it was noted:

In addition to powers conferred on municipal corporations by express enumeration in the constitution, statutes or charter, it is beyond dispute that municipal corporations possess certain implied, sometimes referred to as incidental, powers. . . . The municipal corporation may adopt or employ devices, agencies, instrumentalities, or other means for the purpose of carrying out powers expressly conferred on it, although the particular means adopted is not expressly authorized. The corporation cannot, however, under this rule enlarge or extend the power expressly granted.

Likewise, the North Dakota Supreme Court noted that while in defining municipal powers the rule of strict construction applies, "the manner and means of exercising those powers, unless prescribed by the legislature, are within the discretion of the City." Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991). See also Murphy v. City of Bismarck, 109 N.W.2d at 642. ("But the existence and extent of a municipal corporation's powers having been determined and measured the rule of strict construction no longer applies, and the manner and

Mr. Tom Tudor
November 19, 1997
Page 4

means of exercising those powers where not prescribed by the Legislature are left to the discretion of the municipal authorities.'" Quoting from Lang v. City of Cavalier, 228 N.W. 819 (N.D. 1930).)

Because it is established that a city has the authority to acquire, operate, and maintain a nursing home pursuant to N.D.C.C. § 40-35-03(2) and the 1995 Gregg opinions issued by this office, and because the Legislature has not prescribed the way the city may exercise its power to operate and maintain its nursing home, the city could reasonably enter into an agreement for another entity to manage the operation and maintenance of the facility. It is my opinion that the power to contract out the operation and maintenance is reasonably implied or incidental to the exercise of its express powers. It is my understanding that the city wishes to ensure that the facility remains viable because the facility is a significant employer and service provider in the community; however, the city does not want to get mired down in the day-to-day operations of the facility, but wishes to have professional management operate the facility under the general oversight authority of the city.

Because a municipality may have the implied authority under N.D.C.C. ch. 40-35 to enter into an arrangement with a nongovernmental entity to operate and maintain a nursing home otherwise lawfully acquired under N.D.C.C. chs. 40-05 and 40-35, revenue bonds issued by a municipality under such circumstances would be properly eligible for purchase by the Bond Bank within the meaning of N.D.C.C. § 6-09.4-06, assuming compliance with the other provisions of applicable federal law and with N.D.C.C. ch. 6-09.4 and the Bond Bank's loan agreement and other loan documents. The purpose of the Bond Bank is to "foster and promote the provision of adequate capital markets and facilities for borrowing money by political subdivisions and for the financing of their respective public improvements." N.D.C.C. § 6-09.4-02. The city, in this case, is seeking to borrow for the financing of a public improvement authorized as an undertaking under N.D.C.C. chs. 40-05 and 40-35 which it would own. The city would not merely act as a conduit financier for a private nongovernmental entity, as was contemplated under the lease concept as initially structured.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

Mr. Tom Tudor
November 19, 1997
Page 5

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Enclosures