

**LETTER OPINION**  
**98-L-25**

March 20, 1998

J. Thomas Traynor, Jr.  
Devils Lake City Attorney  
PO Box 838  
Devils Lake, ND 58301-0838

Dear Mr. Traynor:

Thank you for your letter asking for my opinion on whether property owned by a telephone company (telecommunications carrier) that is subject to central assessment by the State Board of Equalization may participate in a tax increment financing district under N.D.C.C. ch. 40-58.

For tax years prior to January 1, 1998, the operative property of public utilities, including a telecommunications company, was assessed annually for ad valorem purposes by the State Board of Equalization under N.D.C.C. ch. 57-06. For tax years after December 31, 1997, the 1997 Legislative Assembly enacted House Bill 1068 which restructured the tax on the telecommunications industry. S.L. 1997, ch. 483. This legislation removed telecommunications companies from the provisions of N.D.C.C. ch. 57-06 and made them subject to a gross receipts tax, which is codified as N.D.C.C. ch. 57-34.

Under this tax, the Tax Commissioner annually computes the tentative total tax to be assessed against each telecommunications carrier at the rate of two and one-half percent of the adjusted gross receipts, and the tax is subsequently assessed by the State Board of Equalization. N.D.C.C. § 57-34-03. The taxes imposed under this chapter "are in lieu of all real and personal property taxes levied by the state or any of its political subdivisions upon real or personal property to the extent the property is directly used by the telecommunications carrier in its telecommunications operations." N.D.C.C. § 57-34-11. These taxes are allocated "among counties in the same proportion that taxes paid by telecommunications carriers in locally assessed property taxes and taxes assessed under chapter 57-06 and this chapter in 1997 and received by taxing districts in the county bears to all taxes paid by telecommunications carriers in locally assessed property taxes and taxes assessed under chapter 57-06 and this chapter in 1997 and received by taxing districts in the state." N.D.C.C. § 57-34-05.

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Tax increment financing is authorized under N.D.C.C. § 40-58-20. Tax increment financing is a method for financing redevelopment projects based on the premise that the portion of increased ad valorem taxes generated as a result of property improvement is available to pay for the redevelopment.<sup>1</sup> The authorized use of tax increment financing is limited to certain public costs set forth under N.D.C.C. § 40-58-20.1.

The North Dakota Supreme Court "has stated that cities are agencies of the state and have only the powers expressly conferred upon them by the legislative branch of government or such as may be necessarily implied from the powers expressly granted." City of Dickinson v. Gresz, 450 N.W.2d 216, 217 (N.D. 1989) (citations omitted).

There is no statutory authority for a city to use in lieu property tax measured by adjusted gross receipts and assessed by the State Board of Equalization as a substitute for ad valorem property taxes that are locally assessed on real estate and which qualify for urban renewal tax increment financing under N.D.C.C. § 40-58-20. Therefore, it is my opinion that the gross receipts tax paid by a telecommunications carrier under N.D.C.C. ch. 57-34 may not be used to participate in a tax increment financing district under N.D.C.C. ch. 40-58.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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Enclosures

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<sup>1</sup> 1994 N.D. Op. Att'y Gen. L-282 (October 17 letter to Bismarck City Attorney Charlie Whitman) citing in footnote 1 State v. City of Daytona Beach, 484 So.2d 1214, 1215 (Fla. 1986). The lengthy duties of the county auditor and the county treasurer in computing the amount of available tax increment financing for each affected parcel of real estate was summarized in a December, 1989 Property Tax Guideline prepared by the Office of State Tax Commissioner. A copy is enclosed for your use.