

LETTER OPINION
2000-L-101

June 13, 2000

Mr. Richard J. Riha
Burleigh County State's Attorney
514 East Thayer Avenue
Bismarck, ND 58501-4413

Dear Mr. Riha:

Thank you for your letter asking about county commission licensing authority over anhydrous ammonia facilities.

Anyone wanting to construct or operate an anhydrous ammonia facility must, among other things, get a license from the county commission. N.D.C.C. § 19-20.2-03. The section goes on to state that the county may deny a license for four reasons.

It may deny a license to an applicant who does not pay the proper fee to the Commissioner of Agriculture, who also has a role in licensing anhydrous ammonia facilities. Id. The county may reject an application if the facility does not comply with the "siting requirements of this chapter." Id. The siting requirements are in N.D.C.C. § 19-20.2-05(1) and (2). This statute sets minimum distances that the facility must be from adjoining property, from any place of public assembly or residence, and from any institutional residence. The county may also deny a license if the facility does not comply with rules adopted pursuant to N.D.C.C. ch. 19-20.2. N.D.C.C. § 19-20.2-03. Rulemaking authority under the chapter is given to the Commissioner of Agriculture. N.D.C.C. § 19-20.2-01. See N.D.A.C. art. 7-12, Anhydrous Ammonia Regulation. Finally, the county may deny a license if the facility does not comply with "local siting requirements." N.D.C.C. § 19-20.2-03.

You ask whether this is the exclusive list of items that the county may consider or whether it is just the minimum criteria. In my opinion, this is the exclusive list of items that a county commission may consider in reviewing a license request for an anhydrous ammonia facility.

Political subdivisions have only those powers expressly given by statute as well as those powers that can be necessarily implied from the express powers. E.g., *Megarry Bros. v. City of St. Thomas*, 66 N.W.2d 704, 709 (N.D. 1954). N.D.C.C. ch. 19-20.2 does not give counties general regulatory authority over anhydrous ammonia facilities. It does not grant counties general discretionary <PAGE NAME="p.L-102">authority to decide whether to allow these facilities and under what conditions. Rather, N.D.C.C. § 19-20.2-03 sets forth

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specific criteria that a county commission is to examine in its licensing review. I do not find in this statute any implication that a county may consider other criteria. Consequently, once an applicant has satisfied the four conditions of N.D.C.C. § 19-20.2-03, the commission must grant the license.

While your question can be answered by just reviewing the scope of authority granted by the statute, I also considered the legislative history.

N.D.C.C. ch. 19-20.2 was enacted in 1985. 1985 N.D. Sess. Laws ch. 269. Prior to 1985, there were no laws specifically regulating anhydrous ammonia facilities. This void led to a number of serious controversies between the industry and people living near the facilities. Hearing on H.B. 1587 Before the House Comm. on Agriculture 1985 N.D. Leg. (Feb. 7) (Statement of Jack Jansen, State Fire Marshal). Recognizing that some regulation was necessary, the industry initiated the move for legislation and helped draft, and supported, the bill that resulted in enactment of N.D.C.C. ch. 19-20.2. Id. (Statements of Gary Walter, N.D. Ag. Ass'n, and Chuck Roemmich, Fertilizer Bd.); Hearing on H.B. 1587 Before the Senate Comm. on Agriculture 1985 N.D. Leg. (Mar. 7) (Statements of Rep. Olson and Rep. Dalrymple).

It is apparent from the legislative history that the bill was a compromise. Some people thought more should be done to protect the public from the potential dangers of anhydrous ammonia. Hearing on H.B. 1587 Before the House Comm. on Agriculture 1985 N.D. Leg. (Feb. 7) (Statement of Jack Jansen, State Fire Marshal). But it was also recognized that anhydrous ammonia is of major importance to agriculture. Id. and Statements of Gary Walter, N.D. Ag. Ass'n, and Chuck Roemmich, Fertilizer Bd.

The 1985 Legislative Assembly would be surprised if its law were now interpreted to give a county commission free reign to consider other criteria to further regulate the industry or even to entirely exclude anhydrous ammonia facilities from a county. As one of the bill sponsors stated, it was to "set some guidelines." Hearing on H.B. 1587 Before the House Comm. on Agriculture 1985 N.D. Leg. (Feb. 7) (Statement of Rep. Olson).

My view that counties have only limited authority here is also supported by statements made by two other persons testifying on the bill. One stated that the bill would provide "a uniform rule." Id. (Statement of Chuck Roemmich, Fertilizer Bd.). There would not be a uniform rule if each county had discretion to set different conditions on licensing anhydrous ammonia facilities.

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In addition, the state fire marshal proposed the setback distances that eventually became law. He favored more restrictive conditions but noted that the bill provides "a small measure of safety." Id. (Statement of Jack Jansen, State Fire Marshal). If he had thought the bill merely set minimum requirements and gave counties authority to impose additional rules, his support for the bill would have been more enthusiastic.

In summary, the 1985 Legislature placed some minimum requirements on a previously unregulated industry. It did not intend, in N.D.C.C. ch. 19-20.2, to give county commissions full discretion to decide whether to allow anhydrous ammonia facilities and, if so, to set whatever conditions they think best. Of course, a county may have other sources of authority that might allow it to further regulate the anhydrous ammonia industry, such as county zoning power.

You also ask whether the definition of "city" in N.D.C.C. § 40-01-01(1) applies to that term as it is used in N.D.C.C. ch. 19-20.2. The introductory sentence to N.D.C.C. § 40-01-01 states that the words it defines are defined only for the purposes of N.D.C.C. title 40. Therefore, by its own terms the definition of "city" in N.D.C.C. § 40-01-01 does not necessarily define "city" where it appears in another title of the Century Code. Based on the foregoing, it is my opinion that N.D.C.C. § 19-20.2-03 only authorizes denial of an anhydrous ammonia facility license for one of the four stated reasons. But cf. N.D.C.C. § 40-01-19 (N.D.C.C. title 40 applies to all cities); *Moses v. Burleigh County*, 438 N.W.2d 186, 193 (N.D. 1989) (definitions are a guide in interpreting words defined in one part of the Code but not another).

Sincerely,

Heidi Heitkamp
Attorney General

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