LETTER OPINION
2001-L-38

September 25, 2001

The Honorable Nancy Johnson
House of Representatives
1308-A Empire Road
Dickinson, ND 58601-3615

Re: Theodore Roosevelt Medora Foundation

Dear Representative Johnson:

Thank you for your letter requesting an Attorney General's opinion concerning the proposed purchase of agricultural land by the Theodore Roosevelt Medora Foundation (TRMF). Under N.D.C.C. chapter 54-01 the Attorney General can only give an opinion on a question of law, not fact. Accordingly, to the extent a question of fact is presented, I generally cannot express an opinion, but can only set forth the various legal issues which a trier of fact ought to consider in arriving at a decision. See N.D.C.C. § 54-12-01(8) (opinions issued to state legislators on "legal questions"). However, in matters involving the corporate or limited liability company farming laws, the Attorney General also serves in a regulatory capacity. As such, this office does conduct factual investigations, and I do assess and decide factual questions. Therefore, I am authorized to express an opinion on a matter that requires an examination of facts.

You ask whether the State of North Dakota may have concerns about the TRMF purchase under the North Dakota Corporate Farming laws, N.D.C.C. ch. 10-06.1. The TRMF is a non-profit corporation, engaged in tourism in southwest North Dakota. The TRMF seeks to acquire a tract of land currently being used for farming and ranching purposes. Once purchased, TRMF says it "intends to develop this property into a Leadership Management Retreat Center and a golf course." Until it is developed, TRMF states that "it is likely" that the land will be leased to private individuals for farming and ranching. The land is presently leased to a third party and TRMF will honor the lease for its term, although the letter does not indicate when the third-party lease expires. Additional facts provided to my staff by TRMF's president indicate the proposed land acquisition may include more acreage than would be necessary for a

retreat center and golf course. Future plans for the site include horseback and mountain bike trails, bird watching, low density housing development, a dude ranch, and other activities. Depending upon finances, construction of the future activities may begin within three years.

Under N.D.C.C. § 10-06.1-02, a corporation such as the TRMF is prohibited from owning or leasing land which is being used for farming or ranching and from engaging in the business of farming or ranching, unless chapter 10-06.1 provides a specific exception. As you correctly point out, a corporation may own or lease farmland under N.D.C.C. § 10-06.1-07. This exception applies, however, only when that land is "necessary" for residential or commercial development, the siting of facilities, or similar industrial or business purposes of the corporation. Id. I am unaware of any North Dakota court decisions or Attorney General's opinions analyzing when land is "necessary" for development under this specific statute.

Generally, words not defined by statute are to be understood in their ordinary sense. See N.D.C.C. § 1-02-02; Northern X-Ray Co., Inc. v. State, 542 N.W.2d 733, 735 (N.D. 1996). When construing a statute, "words are given their plain, ordinary, and commonly understood meaning, with consideration of the ordinary sense of statutory words, the context in which they were enacted, and the purpose which prompted the enactment." Heck v. Reed, 529 N.W.2d 155, 160 (N.D. 1995) (internal citation omitted). The word "necessary," used in its ordinary sense, means "[a]bsolutely essential," "indispensable," or "[n]eeded to achieve a certain result or effect." The American Heritage Dictionary, 834 (2d. coll. ed. 1991). A usage note under the synonyms heading states that "[n]ecessary denotes that which fills an urgent need, but not invariably an all-compelling need," and that "necessary" is not as strong a term as "essential," "vital," or "indispensable." Id. Therefore, whether land is "necessary" is related both to its objective, specific context and to a subjective evaluation of the corporation's plans for development and use.

The North Dakota Supreme Court has interpreted the term "reasonably necessary" for the surface coal mining exception under former section 10-06-03, now codified in section 10-06.1-06. In Slope County v. Consolidation Coal Co., 277 N.W.2d 124 (N.D. 1979), the court concluded "that the term 'reasonably necessary' as used in § 10-06-03, N.D.C.C., refers to that which is useful, convenient, or suitable, and not inconsistent with the legitimate objectives of the corporation." Id. at 126. The court further said that "the necessity for its actual use need not be a present one; it may arise in the future." Id. at 127. The court described the terms "reasonably necessary" as "relaxed" terms. Id. at 128. This is in contrast to "more exacting degrees of necessity such as absolute, strict, or indispensable." Id. at 126.

In the present case, however, the TRMF would not be acquiring land under the "reasonably necessary" exception contained in the surface coal mining law. Section 10-06.1-06 modifies "necessary" by the term "reasonably," while section 10-06.1-07 does not contain any modification of the term "necessary." The North Dakota Supreme Court has determined that where a phrase is used in a like context in a related statute, the Legislature is presumed to intend that the phrase is being used in the same sense and with the same effect. State v. E.W. Wylie Co., 58 N.W.2d 76, 82 (N.D. 1953). This implies that when different phrases are used in similar contexts in related statutes, the Legislature intended different results to occur. Therefore, the Legislature is presumed to have intended two different standards of "necessity" to apply depending on whether a corporate purchaser seeks an exception under section 10-06.1-06 (surface coal mining) or 10-06.1-07 (industrial or business purpose). Section 10-06.1-07 requires a more definite link between ownership of the land and the corporation's plan for its development and use than is required by the "relaxed" term used in section 10-06.1-06.

The manifest purpose of chapter 10-06.1 is to prevent certain corporations from directly or indirectly engaging in the business of farming or ranching by limiting their ownership of farmland.[1] Chapter 10-06.1 does not regulate land use or limit and control commercial and residential development; those purposes are addressed by laws governing local zoning. Interpretations of section 10-06.1-06 should be limited to the purpose of preventing corporate farming, and not expanded to address unrelated issues that are resolved under other statutes.

Therefore, it is my opinion that for a corporation or LLC to invoke the section 10-06.1-07 exception, the land sought to be acquired must be essential, indispensable or needed to achieve its business or industrial purpose. This necessity, however, will be determined on a case-by-case basis in view of the statute's purpose and by requiring a greater showing of necessity than the relaxed standard of section 10-06.1-06. It is my further opinion that for the exception to apply, the proposed acquisition must be used for carrying on a business or activity for which the corporation or LLC was created. See Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438, 447 (1943), Aff'd 326 U.S. 207 (1945).

The TRMF points out in its letter that until the property is developed, "it is likely that it will be leased to private individuals for farming and/or ranching." Section 10-06.1-07

[1] Asbury Hospital v. Cass County, ND, 326 U.S. 207, 214 (1945) (this legislation demonstrates "a state policy against the concentration of farming lands in corporation ownership."). See also N.D.A.G. 46-54 ("it was the intent of the legislative assembly . . . to prevent a tendency towards a monopoly by corporations in owning land and conducting farming operations."); N.D.A.G. 46-50 ("the purpose of the legislature . . . was to encourage individual citizens in acquiring and improving farms.").

requires that the land, while not being immediately used for any corporate purpose, "must be available to be leased" by farmers or ranchers. However, the leasing period should be of short duration. If the corporation does not develop the farm or ranch land within a reasonable time, it risks being unable to show that the acquisition was "necessary", and will lose the exception provided by section 10-06.1-07.[2]

Based on the information provided, it is my opinion that the TRMF may acquire agricultural land that is necessary for a "Leadership Management Retreat Center and a golf course." The corporation may not retain excess acreage that is not "necessary" within the meaning of section 10-06.1-07. Loy v. Kessler, 39 N.W.2d 260, 272 (N.D. 1949). If the corporation acquires farm or ranch land, it may be subject to the reporting requirements under section 10-06.1-18. This opinion is based on the facts presented to me. If these facts are inaccurate or change, the legal conclusions in this opinion may also change.

Sincerely,

Wayne Stenehjem
Attorney General

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[2] TRMF's president predicted a period of approximately three years before development of the entire property could begin. In Slope, the coal company had taken more than twenty years and still had not begun to mine the land, but had been active in exploration and planning during the entire period. 277 N.W.2d at 129. This was deemed sufficient by the Court to show the land was reasonably necessary for mining. Id. A cessation of meaningful activity would indicate the land was being held for other purposes, such as speculation, and was therefore not necessary for development.