

LETTER OPINION
2005-L-29

October 6, 2005

Ms. Kimberly J. Radermacher
Ellendale Assistant City Attorney
PO Box 39
Ellendale, ND 58436-0039

Dear Ms. Radermacher:

Thank you for your letter asking whether state law would prohibit a city housing authority from leasing new or existing housing projects to a local college which in turn would lease individual units to its students. It is my opinion that N.D.C.C. § 23-11-14(5), which prohibits subletting by housing authority tenants, would bar a city housing authority from leasing new or existing housing projects to a local college which in turn would lease individual units to its students.

ANALYSIS

You state that the city of Ellendale may create a housing authority to operate moderate income housing as now permitted under N.D.C.C. ch. 23-11. See 2005 N.D. Sess. Laws ch. 237. You further state that the housing authority may purchase existing housing projects or build new housing projects and ask whether the housing authority may lease the projects to a local religious college which would in turn lease individual units to its students.

State law provides:

In the operation or management of housing projects, an authority at all times shall observe the following duties with respect to rentals and tenant selection:

. . . .

5. The authority shall prohibit subletting by tenants.

N.D.C.C. § 23-11-14(5).¹ Similar provisions appear in federal law dealing with Section 8, Tenant Based Assistance. See 24 C.F.R. § 982.551(h)(6) and (7) (“(6) The family must not sublease or let the unit. (7) The family must not assign the lease or transfer the unit.”).

The apparent purpose for such provisions is to make sure those persons occupying public housing are indeed eligible to do so, i.e., to ensure that the housing authority or program only permits persons of low or moderate income or other eligible tenants to occupy units owned by a public housing authority or financed or supported with public funds. See, e.g., N.D.C.C. § 23-11-14(1) and (2).

A sublease has been described as:

a grant by a tenant of an interest in the rented premises less than his or her own, retaining to himself or herself a reversion, and a subtenant is a person who rents all or a portion of leased premises from the lessee for a term less than the original one, leaving a reversionary interest in the first lessee. Where the sublease is for the whole term, it is in law an assignment as between the original lessor and the sublessee

49 Am. Jur. 2d Landlord and Tenant § 1157 (2d ed. 1995) (footnote omitted).

“It is well settled that in the absence of restrictions thereon by the parties, or of statutory prohibitions, a tenant under a lease for a definite period may sublet the premises in whole or in part.” 49 Am. Jur. 2d Landlord and Tenant § 1158 (2d ed. 1995) (footnote omitted); see also Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964) (“[I]n the absence of statutory or contractual restrictions, a lessee may assign or sublet the term of his lease.”). As noted above, in North Dakota, there is a statutory prohibition against subletting local housing authority housing projects. N.D.C.C. § 23-11-14(5). The statutory prohibition has been in the law since its inception in 1937. See 1937 N.D. Sess. Laws ch. 102, § 10. I have found no North Dakota case or Attorney General opinion which has construed this provision. Nor does the legislative history shed any light on its meaning.

Thus, I am left with analyzing the situation you describe in your letter according to the plain language of N.D.C.C. § 23-11-14(5). As noted above, the proposed housing authority would lease housing projects to a local college which in turn would lease individual units to its students. As you described, the arrangement between the housing authority and the college is a lease. The housing authority would be the landlord (or lessor) and the college would be a tenant (or lessee). The term “tenant” has been defined as follows:

¹ In your letter, you refer to section 4 of Senate Bill 2227 passed by the Fifty-ninth Legislative Assembly. See 2005 N.D. Sess. Laws ch. 237, § 4. This provision amended N.D.C.C. § 23-11-14; however, no substantive changes were made to N.D.C.C. § 23-11-14(5), which is the primary provision you reference.

In the broadest sense, one who holds or possesses lands or tenements by any kind of right or title, whether in fee, for life, for years, at will, or otherwise. In a more restricted sense, one who holds lands of another; one who has the temporary use and occupation of real property owned by another person (called the "landlord"), the duration and terms of his tenancy being usually fixed by an instrument called a "lease."

Black's Law Dictionary 1466 (6th ed. 1990).

The arrangement between the college as tenant (or lessee) and its students as subtenants (or sublessees) would be properly characterized as a sublease. A sublease means:

A lease executed by the lessee of land or premises to a third person, conveying the same interest which the lessee enjoys, but for a shorter term than that for which the lessee holds (as compared to assignment, where the lessee transfers the entire unexpired term of the leasehold to a third party).

Black's Law Dictionary 1425 (6th ed. 1990).

Consequently, it is my opinion that N.D.C.C. § 23-11-14(5) would not permit a city housing authority to lease housing projects to a local college which in turn would lease individual units to its students since this arrangement would constitute subletting by a tenant within the plain meaning of the statute.²

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

² Because I have determined that this proposed arrangement would be in violation of state law, it is unnecessary to determine whether this arrangement between a public agency and a religious college may violate any other statutory or constitutional provisions such as the establishment clause in the First Amendment to the United States Constitution or the anti-gift provision contained in N.D. Const. art. X, § 18.