

**LETTER OPINION
2005-L-45**

December 16, 2005

The Honorable Dwight C. Cook
State Senator
1408 17th Street SE
Mandan, ND 58554-4895

Dear Senator Cook:

Thank you for your letter raising questions about the application of 2005 Senate Bill 2227 passed by the 59th Legislative Assembly on local housing authority jurisdiction. You ask whether county housing authorities may continue to own and operate existing assisted housing projects in cities with less than 5,000 population which elect to form housing authorities. You also ask whether county housing authorities may continue to administer federal Section 8 certificates and vouchers in these small cities under authority granted by prior law.¹ It is my opinion that a county housing authority may continue to own and operate existing assisted housing projects in cities with less than 5,000 population which elect to form housing authorities under Senate Bill 2227. It is my further opinion that county housing authorities that exercised their power to preempt the Industrial Commission under prior law and administer federal Section 8 certificates and vouchers may continue to exercise that authority after the passage of Senate Bill 2227.

ANALYSIS

The 59th Legislative Assembly made some significant changes to N.D.C.C. ch. 23-11 dealing with the authority of local housing authorities.² Prior to the passage of Senate Bill 2227, unless grandfathered in under N.D.C.C. ch. 23-11, cities of less than 5,000 population were not permitted to form local housing authorities.³ Under the new law, a "city with less than five thousand population which has determined a shortage of safe or sanitary dwelling accommodations in the city"⁴ may adopt a resolution declaring a need for a housing authority in that city.⁵ Previously, such small cities were included within the area of operation of the county housing authority.⁶ Under N.D.C.C. § 23-11-01(1)(a), the area

¹ See former N.D.C.C. § 54-17-07.6 (1993).

² See 2005 N.D. Sess. Laws ch. 237.

³ See 2005 N.D. Sess. Laws ch. 237, § 1.

⁴ *Id.*

⁵ *Id.* at § 2.

⁶ See Fradet v. City of Southwest Fargo, 59 N.W.2d 871, 876 (N.D. 1953); N.D.C.C. §§ 23-11-01(1)(c); 23-11-01(5).

of operation of a city with a population of less than 15,000 persons includes the city and the area within five miles of the territorial boundaries of the city, but excludes any area within the territorial boundaries of another city.

You indicate that a number of small cities are taking advantage of the provisions of Senate Bill 2227 and are forming housing authorities in areas that were previously covered under the areas of operation of their respective county housing authorities. You also indicate that a number of existing county housing authorities own projects within cities with less than 5,000 inhabitants and ask whether the county housing authorities may continue to own and operate existing assisted housing projects in these small cities.

Section 1-02-10, N.D.C.C., provides that no statute “is retroactive unless it is expressly declared to be so.”⁷ As noted by the North Dakota Supreme Court: “[a]n amendatory act, like other legislative enactments, does not take effect prior to the time of passage, and the new or changed portions have no application to prior transactions unless an intent to the contrary is expressed in the act or clearly implied from its provisions.”⁸

In N.D.A.G. 95-F-08, it was stated that

N.D.C.C. § 1-02-10 does not “require that a statute or act contain the word ‘retroactive’ in order for it to be applied to facts occurring prior to the effective date of the statute or act.” In Interest of W.M.V., 268 N.W.2d at 783. . . . Instead, both the text of a statute and its legislative history may be reviewed to determine legislative intent. Id.; Gimble v. Montana-Dakota Utilities Co., 44 N.W.2d 198, 204 (N.D. 1950).

There is no express language in Senate Bill 2227 making any of its provisions retroactive, nor is such an intent clearly implied.

In establishing, owning, and operating assisted housing projects, county housing authorities undoubtedly entered into agreements or other arrangements to finance, operate, and maintain the facilities. As noted in a prior opinion of this office:

Both the United States Constitution and the North Dakota Constitution prohibit the enactment of a statute that impairs vested rights in an existing

⁷ See also Reiling v. Bhattacharyya, 276 N.W.2d 237, 240-41 (N.D. 1979) (statutes are not to be given retroactive effect but are to be applied prospectively only).

⁸ In Interest of W.M.V., 268 N.W.2d 781, 783 (N.D. 1978), quoting Monson v. Nelson, 145 N.W.2d 892 (N.D. 1966); accord Smith v. Baumgartner, 665 N.W.2d 12, 14-15 (N.D. 2003).

contract. U.S. Const. art. I, § 10; N.D. Const. art. I, § 18. Thus, generally, a contract will be interpreted under the law that is in effect at the time the contract is entered and a law enacted after the contract was entered will not affect the interpretation of the contract's terms. See Murry v. Mutschelknaus, 291 N.W. 188 (N.D. 1940) (interpreting a statute to apply prospectively only to avoid an unconstitutional impact on an existing contract).⁹

Further, in enacting a statute, it is presumed that compliance with the constitutions of the state and the United States is intended.¹⁰ No provision contained in the statutes may be "construed as to impair any vested right or valid obligation existing when it takes effect."¹¹ An ownership interest, such as an ownership interest in real property by a county housing authority, is one clear example of a vested right.¹² Thus, the Legislative Assembly, in passing Senate Bill 2227, did not appear to intend that any portion of that bill be retroactive and it must be presumed that it did not intend to impair any contract or vested right of the county housing authorities. Consequently, it is my opinion that county housing authorities may continue to own and operate existing assisted housing projects even within areas of operation of newly formed city housing authorities in cities of under 5,000 population. This is not to suggest that a county housing authority could not assign or otherwise transfer its interest in such existing housing projects to a newly formed city housing authority or to enter into a joint powers agreement, if the parties so desired.

You also raise the issue of county housing authorities continuing to administer federal Section 8 certificates and vouchers in areas of newly formed city housing authorities. Prior to the passage of House Bill 1240 by the 53rd Legislative Assembly in 1993, the Section 8 certificate and voucher program was administered by the Industrial Commission acting as the Housing Finance Agency, a state entity, under agreements with the federal Department of Housing and Urban Development ("HUD").¹³ The purpose of House Bill 1240 was to "eliminate state involvement in the provision of the HUD Section 8 certificate and voucher service."¹⁴ House Bill 1240 provided a two-year transition period for transferring Section 8 certificate and voucher programs to local

⁹ N.D.A.G. Letter to Keller (July 6, 2000).

¹⁰ N.D.C.C. § 1-02-38(1).

¹¹ N.D.C.C. § 1-02-30.

¹² See West's Legal Thesaurus/Dictionary 788 (1985), defining vested right as "[a]n immediate or fixed right to present or future enjoyment, which is not dependent on an uncertain event."

¹³ See 1993 N.D. Sess. Laws ch. 258, § 2.

¹⁴ N.D.A.G. 93-L-190.

housing authorities and the transfer process has been completed.¹⁵ In order for a local housing authority to administer Section 8 certificates and vouchers, it must meet the definition of a public housing agency under federal law.¹⁶ In North Dakota, a local housing authority formed under N.D.C.C. ch. 23-11 is the body created to fulfill the definition of a public housing agency under federal law.¹⁷ Senate Bill 2227 contains no provision permitting preemption by or requiring transfer to newly formed city housing authorities of existing certificate and voucher authority currently being exercised by county housing authorities or other local housing authorities.

According to information provided by Housing Finance Agency staff, they no longer administer any Section 8 certificates and vouchers in the state and existing certificates and vouchers are subject to contracts between local housing authorities and HUD. As you indicate, virtually all areas of the state are now covered by contracts between local housing authorities and HUD regarding administration of the Section 8 certificate and voucher program.

Thus, unless and until the contracts expire and are not renewed by HUD, or unless HUD would permit a newly formed local public housing authority to take over a certificate and voucher contract, as a practical matter, there would be no Section 8 certificates or vouchers available to administer. Again, there is nothing in the text of Senate Bill 2227 or necessarily implied from that language to indicate that the Legislative Assembly intended to permit newly formed local housing authorities to preempt or divest county housing authorities from administering the certificate and voucher program.

For the reasons discussed above, it is my further opinion that county housing authorities which exercised their power to preempt the Industrial Commission under prior law and administer federal Section 8 certificates and vouchers may continue to exercise that authority within cities under 5,000 population that have formed local housing authorities

¹⁵ 1993 N.D. Sess. Laws ch. 258, § 2. Because the Industrial Commission, acting as the North Dakota Housing Finance Agency, has transferred all of its certificate and voucher authority to local housing authorities at least a decade ago, the significance of the provision contained in N.D.C.C. § 23-11-11(33), granting local housing authorities the power to exercise within their areas of operation the Industrial Commission's certificate and voucher authority, today is mainly historical.

¹⁶ See N.D.A.G. 93-L-190, citing 42 U.S.C. § 1437f. Public housing agency means "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." 42 U.S.C. § 1437a.

¹⁷ N.D.A.G. 93-L-190.

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under Senate Bill 2227 at least until any existing contracts with HUD expire or as otherwise permitted by the terms of the HUD contract or by HUD.

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.¹⁸

¹⁸ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).