

LETTER OPINION
95-L-193

August 14, 1995

Mr. Bryan R. Dvirnak
Chief Executive Officer
North Dakota Development Fund
1833 East Bismarck Expressway
Bismarck, ND 58504

Dear Mr. Dvirnak:

Thank you for your June 28, 1995, letter asking whether the provisions of House Bill 1021 relating to the new North Dakota Development Fund can be effectuated by amending the articles of incorporation of the North Dakota Future Fund, Inc. (the "NDFF"). House Bill 1021 became effective July 1, 1995. See 1995 N.D. Sess. Laws ch. 21. Section 8 of House Bill 1021 created a new chapter to title 10 of the North Dakota Century Code and also created a statewide nonprofit development corporation to be known as the North Dakota Development Fund, Incorporated (the "NDDF"). This new chapter to title 10 of the North Dakota Century Code is substantially similar to former N.D.C.C. ch. 10-30.3, which was repealed in section 11 of House Bill 1021. Former N.D.C.C. ch. 10-30.3 created the NDFF.

What is presently the NDFF was originally created under the name of "Roughrider Equity Corporation." The Roughrider Equity Corporation was incorporated on October 20, 1989, according to records of the North Dakota Secretary of State's Office. The articles of incorporation for the Roughrider Equity Corporation have been amended twice. The second amendment occurring in September of 1991 changed the name of the corporation to the North Dakota Future Fund, Inc.

You indicate in your letter your belief that the reason for the establishment of the NDDF was to eliminate the so-called living wage requirement under existing law. Indeed, section 8 of House Bill 1021 does not contain a living wage requirement as had existed in former N.D.C.C. ch. 10-30.3. You ask whether amendment of the articles of incorporation for the North Dakota Future Fund will effectuate the purposes of House Bill 1021 or whether in changing the NDFF to the NDDF it is necessary to incorporate an entirely new entity.

In my opinion, the applicable provisions of House Bill 1021 can be effectuated by making certain amendments to the articles of incorporation for the NDFF which would change the

Mr. Bryan R. Dvirnak
August 14, 1995
Page 2

name of the North Dakota Future Fund, Inc., to the North Dakota Development Fund, Incorporated, and which would change the references to former N.D.C.C. ch. 10-30.3 to the new chapter created in section 8 of House Bill 1021.

Section 8 of House Bill 1021 provides that the purpose of the new chapter is to have a statewide nonprofit development corporation "that will have the authority to take equity positions in, to provide loans to, or to use other innovative financing mechanisms to provide capital for new or expanding businesses in this state, or relocating businesses to this state. The corporation's principal mission is the development and expansion of primary sector business in this state."

The stated purpose of the North Dakota Future Fund, Inc. (formerly known as the Roughrider Equity Corporation), is to "take equity positions in new and existing businesses in North Dakota. The corporation's principal mission is the development and expansion of primary sector business in North Dakota. The corporation shall have all the powers provided by chapter 10-30.3 and chapter 10-24, N.D.C.C."

Thus, the stated purposes of the NDDF and the NDFF are essentially the same. However, as indicated above, it would be necessary, in addition to amending the articles to reflect the new name, to also change the reference in article III of the articles of incorporation from the now repealed N.D.C.C. ch. 10-30.3 to the new chapter created by section 8 of House Bill 1021. I understand that the Legislative Council has identified N.D.C.C. ch. 10-30.5 as the newly created chapter. Because the NDDF is only subject to the provisions of section 8 of House Bill 1021, which does not include a living wage requirement, any new contracts or investments entered into by the NDDF following the effective date of House Bill 1021 would not be subject to a living wage requirement.

While the North Dakota Development Fund, Incorporated, could file new articles of incorporation, the same result may be achieved by changing the name of the North Dakota Future Fund, Inc., to the North Dakota Development Fund, Incorporated, via an amendment to article I of the articles of incorporation as well as by amending article III of the articles of incorporation to delete the reference to N.D.C.C. ch. 10-30.3 and to insert a reference to N.D.C.C. ch. 30.5. In my opinion, either method would achieve the same result.

Although you did not specifically raise the question in your letter, I understand that you are concerned about whether the repeal of N.D.C.C. ch. 10-30.3 and the enactment of section 8

Mr. Bryan R. Dvirnak
August 14, 1995
Page 3

of House Bill 1021 did away with the living wage requirement for those contracts and investments entered into before the effective date of House Bill 1021. I would note that whether the articles of incorporation for the NDFF are properly amended to change it to the NDDF, or whether an entirely new entity is incorporated, has no bearing on whether House Bill 1021 retroactively removed the living wage requirement from preexisting contracts entered into by the NDFF. House Bill 1021 does not contain a provision making any part of it retroactive.

Generally, all statutes enacted by the Legislative Assembly are to be applied prospectively. Reiling v. Bhattacharyya, 276 N.W.2d 237, 240-41 (N.D. 1979). Statutory provisions are generally not retroactive unless expressly declared to be so. Id.; N.D.C.C. § 1-02-10. A law is retroactive "if it takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new liability in respect to transactions or considerations already passed." Fairmount Township Board of Supervisors v. Beardmore, 431 N.W.2d 292, 295 (N.D. 1988) (emphasis supplied).

The determination of whether the living wage requirement is no longer applicable to the NDFF's preexisting contracts or investments turns on whether the Legislature intended the repeal of the living wage requirement in House Bill 1021 to be retroactive and not on whether the NDDF came into being by amendments to the articles of incorporation of the NDFF, or via a separately incorporated nonprofit organization. As I indicated above, there is no expression of legislative intent in the language of House Bill 1021 to make any part of it retroactive. Reiling v. Bhattacharyya, 276 N.W.2d at 241. Consistent with this interpretation is the "general principle of contract law . . . that existing law at the time of the formation of a contract becomes part of the contract." Hall v. GMC, Inc. v. Crane Carrier Co., 332 N.W.2d 54, 62 (N.D. 1983). It is therefore my opinion that the living wage provision in preexisting contracts or investments continues in effect.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jjf/dec/jfl