

INTERIM TAXATION COMMITTEE
Testimony of Marcy Dickerson, State Supervisor of Assessments

May 6, 2010

Mr. Chairman, Members of the Committee, for the record my name is Marcy Dickerson and I am employed by the State Tax Commissioner as State Supervisor of Assessments and Director of the Property Tax Division. My testimony today addresses property taxation of federally subsidized low-income housing.

Background

For a number of years, there has been disagreement on how subsidized housing should be assessed, and what method is best for valuing those properties. Some officials favor use of the cost approach, either alone or in conjunction with the income approach to value. Some officials favor using an income approach to value, considering both rent received and income tax credits received by the owners of the properties as income. Some favor excluding the income tax credits. There is disagreement on proper treatment of limitations imposed on the property. Numerous papers and articles on assessment of subsidized housing have appeared in assessment publications throughout the country. Some North Dakota jurisdictions tax those properties and some have exempted them.

In 2001, the North Dakota Legislature failed to enact Senate Bill 2348 (attached), which amended subsection 15 of section 57-02-01 and defined "true and full value" for property tax assessment of subsidized housing as value determined by use of the income approach. SB 2348 required the assessor to consider the restrictions imposed on the property by the subsidy program. A property owner seeking valuation of property under that subdivision was required to file an application for such valuation by February 1.

In 2002, bill draft no. 30036.0100 (attached) proposed a new subsection to N.D.C.C. § 57-02-08, as follows:

"The value of any leasehold rent limitation property rights or interests created by a claim of the credit under section 42 of the Internal Revenue code [26 U.S.C. 42] and the amount of, or value received for, the income tax credit claimed on the property under section 42 of the Internal Revenue Code [26 U.S.C. 42]. An exemption under this subsection does not apply in any taxable year in which rent restrictions do not apply to the property."

In effect, that would have limited income that could be considered in calculating an income approach to value to actual rent paid by the tenant, during the time the property was subject to rent restrictions. That bill draft was not introduced.

Note that both bill drafts assumed ad valorem taxation of subsidized low-income housing. Neither draft proposed to exempt subsidized low-income housing from taxation.

In 2003, Minot City Attorney Nevin Van de Streek requested an Attorney General's Opinion on whether a low-income housing project in Minot was exempt from ad valorem taxation. A focus of the request was on the ownership of the project by a limited partnership, the role of a nonprofit corporation as a co-general partner in that limited partnership, and the effect the form of ownership had on the question of whether the project was exempt from ad valorem taxation. In Letter Opinion 2003-L-16 (attached) the Attorney General said, " ... it is my opinion that if the housing project is being used exclusively for charitable or other public purposes, it is exempt from ad valorem taxation under the self-executing provision of article X, section 5 of the North Dakota Constitution, regardless of the form of ownership of the project."⁴ Following is footnote no. 4:

⁴ Whether the property is used exclusively for charitable or other public purposes is a question of fact the city must determine. 95-F-05; N.D.A.G. 94-F-07. The following standards apply to this factual determination:

[I]t is exempt only where the property is exclusively used to carry out the charitable purposes of the organization claiming the exemption. Riverview Place, Inc. v. Cass County, 448 N.W.2d 635, 640 (N.D. 1989). Further, 'the burden of establishing that property comes within [a] tax-exemption ... is upon the person or entity who claims the exemption, and ... any doubt as to whether the property is used for charitable or benevolent purposes so as to exempt it from taxation must be resolved against the claimant.' Riverview Place, Inc. v. Cass County, 448 N.W.2d at 640."

The City of Minot subsequently exempted the properties in question.

Current Issue

Owners of certain properties in the City of Grand Forks filed applications for abatement for several subsidized low-income housing properties, owned by nonprofit corporations having 501(c)(3) designation from the Internal Revenue Service, for tax years 2006, 2007, and 2008. They claim those properties qualify for exemption under Article X section 5 of the North Dakota

Constitution, which exempts property exclusively used for charitable or other public purposes; or under subsection 8 of N.D.C.C. § 57-02-08, which exempts property used wholly or in part for public charity and owned by a corporation that has a 501(c)(3) designation from the Internal Revenue Service. They did not appeal the 2006, 2007, and 2008 assessments to the State Board of Equalization. Grand Forks County denied the abatements. The district court rendered a decision in favor of Grand Forks County, dated April 28, 2010. A synopsis is attached.

For tax year 2009, the owners of the Grand Forks properties appealed to the city and county boards and to the State Board of Equalization. Their attorney asked the Board either to exempt the properties or to recognize that they are exempt under the Constitution or the statute. He acknowledged that property taxes are an allowable expense under the federal laws that apply to subsidized housing. Upon advice of counsel, the State Board of Equalization declined to make any change in the assessments, on the basis that the State Board of Equalization does not have authority to exempt property.

The owners of the Grand Forks properties appealed the State Board of Equalization action to the district court. The court rendered a decision in favor of the State Board of Equalization, dated April 28, 2010. A synopsis is attached.

Both the property owners and the City of Grand Forks have provided a great deal of material supporting their positions. The City of Grand Forks and Grand Forks County have taken the position that the subject properties are not being used for charitable or other public purposes. They say the property owners receive market rents for the properties through the rents they charge and the subsidies they receive. Any charity enjoyed by the tenants is provided by the government agency that subsidizes the rent, not the property owners. The City of Grand Forks presented additional facts that they believe show the properties are not being used for charity. As quoted above from Riverview Place, "the burden of establishing that property comes within [a] tax-exemption ... is upon the person or entity who claims the exemption, and ... any doubt as to whether the property is used for charitable or benevolent purposes so as to exempt it from taxation must be resolved against the claimant."

Fiscal Effect

The total 2009 true and full value of these properties for which applications for abatement have been filed exceeds \$11 million, or more than \$220,000 in 2009 property taxes.

Several of the Grand Forks properties have been subject to property tax for decades. Many of their residents have been eligible for and have received the Renter's Property Tax Refund. If those properties are exempted, those renters will no longer be eligible for a refund of a part of the rent they pay that is deemed to represent property taxes. Their rent will not decrease, because, under HUD regulations, it is based on each tenant's income. Only the property owners will receive the benefit of exemption from ad valorem taxation.

Other Cities

Properties described as similar to those in Grand Forks are currently exempt in Bismarck and Minot. The City of Mandan recently exempted an apparently similar property. Similar properties are taxed in Fargo, Jamestown, and West Fargo.

This concludes my prepared testimony concerning subsidized low-income housing. I will be glad to try to answer any questions.

Fifty-seventh
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2348

Introduced by

Senators Lee, Robinson, Trenbeath

Representatives Herbel, Nottestad

1 A BILL for an Act to amend and reenact subsection 15 of section 57-02-01 of the North Dakota
2 Century Code, relating to the definition of true and full value for property tax assessment of
3 subsidized housing; and to provide an effective date.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Subsection 15 of section 57-02-01 of the North Dakota
6 Century Code is amended and reenacted as follows:

7 15. "True and full value" means the value determined by considering the earning or
8 productive capacity, if any, the market value, if any, and all other matters that
9 affect the actual value of the property to be assessed.

10 a. This ~~shall include~~ includes, for purposes of arriving at the true and full value
11 of property used for agricultural purposes, farm rentals, soil capability, soil
12 productivity, and soils analysis.

13 b. For purposes of subsidized housing, true and full value means the value
14 determined by use of the income approach. In determining the value by this
15 approach, the assessor shall consider the restrictions imposed on the
16 property by the subsidy program. The owner seeking valuation of property
17 under this subdivision shall file a request for such valuation with the county
18 director of tax equalization by February first of each year. The request must
19 be accompanied by a schedule of rents collected and rental expenses
20 incurred in the prior year, information necessary to identify the property as
21 subsidized housing, and consent for assessment officials to review
22 information regarding the property in the possession of the housing finance
23 agency, department of housing and urban development, farmers home

1 administration, or other governmental agency or instrumentality, or their
2 successors.

3 **SECTION 2. EFFECTIVE DATE.** This Act is effective for taxable years beginning after
4 December 31, 2000.

April 2002

Introduced by

1 A BILL for an Act to create and enact a new subsection of section 57-02-08 of the North Dakota
2 Century Code, relating to a partial property tax exemption for certain subsidized housing
3 properties; and to provide an effective date.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** A new subsection of section 57-02-08 of the North Dakota Century Code
6 is created and enacted as follows:

7 The value of any leasehold rent limitation property rights or interests created by a
8 claim of the credit under section 42 of the Internal Revenue Code [26 U.S.C. 42]
9 and the amount of, or value received for, the income tax credit claimed on the
10 property under section 42 of the Internal Revenue Code [26 U.S.C. 42]. An
11 exemption under this subsection does not apply in any taxable year in which rent
12 restrictions do not apply to the property.

13 **SECTION 2. EFFECTIVE DATE.** This Act is effective for taxable years beginning after
14 December 31, 2003.

**LETTER OPINION
2003-L-16**

March 13, 2003

Mr. Nevin Van de Streek
Minot City Attorney
PO Box 1697
Minot, ND 58702-1697

Dear Mr. Van de Streek:

Thank you for your letter requesting my opinion on whether a particular parcel of real estate and its improvements located in Minot are exempt from ad valorem taxation. Although you enclosed extensive materials with your request, the salient facts were articulated in your letter. You indicated a multi-family housing project was constructed in Minot to be exclusively dedicated to tenancy by low-income renters at below-market rental rates. You stated that an entity named Neighborhood Development Enterprises Inc., a § 501(c)(3) non-profit corporation which was previously formed by the Minot Housing Agency, is a general partner in a limited partnership which owns the project. Under the partnership agreement the non-profit corporation owns 99% of the general partnership interest in the limited partnership. In addition, it has the right under the partnership agreement after fifteen years to purchase the project under a formula set out in the agreement.

Your letter and the enclosures focus, to a certain extent, on the ownership of this housing project by a limited partnership, the role of the nonprofit corporation as a co-general partner in that limited partnership, and the effect this form of ownership has on the question of whether the project is exempt from ad valorem taxation. The ownership issue adds, as you noted, considerable complexity to the question of the property tax exemption. However, as explained below, it is not necessary to reach that issue because the North Dakota Constitution provides a complete property tax

exemption¹ if the property is being used exclusively for charitable² or other public purposes.³

Article X, section 5 of the North Dakota Constitution addresses the issue of the taxable status of property used for charitable or other public purposes:

[P]roperty used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation.

(Emphasis supplied.)

Section 57-02-08(8), N.D.C.C., also addresses the issue of the taxable status of property used for charitable purposes:

¹ Property that may not be exempt from taxation under statutory exemptions may be exempt under article X, section 5 of the North Dakota Constitution. See N.D.A.G. 95-F-05.

² Black's Law Dictionary 234 (6th ed. 1990) defines the term "charitable purpose" as follows:

Term as used for purpose of tax exemption has as its common element the accomplishment of objectives which are beneficial to community or area, and usually recognized charitable purposes, not otherwise limited by statute, are generally classified as: relief of poverty; advancement of education; advancement of religion; protection of health; governmental or municipal purposes; and other varied purposes the accomplishment of which is beneficial to community.

"The North Dakota Supreme Court has instructed that the terms 'charity' or 'charitable' should be given a liberal and not a harsh or strained construction in order that a reasonable result be obtained effectuating the true intent of the constitutional and statutory provisions. Lutheran Camp. Coun. v. Board of Co. Com'rs, Ward Co., 174 N.W.2d 362, 366 (N.D. 1970); Riverview Place, Inc. v. Cass County, 448 N.W.2d at 640." N.D.A.G. 94-F-07.

³ A "public purpose" "has for objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residents within a given political subdivision." Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237 (N.D. 1964), quoting Green v. Frasier, 176 N.W. 11 (N.D. 1920), aff'd 253 U.S. 233 (1920).

All property described in this section to the extent herein limited shall be exempt from taxation:

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8. All buildings belonging to institutions of public charity . . . together with the land actually occupied by such institutions not leased or otherwise used with a view to profit,

(Emphasis supplied.)

The statutory language seems to be more restrictive than the constitutional language. In a 1988 letter to the Grand Forks City Attorney, this office considered the meaning of the term "belonging" with respect to the provisions of N.D.C.C. § 57-02-08(3). The opinion dealt with the exemption from taxation for property "belonging to" a political subdivision, and concluded it means ownership. N.D.A.G. Letter to Swanson (Mar. 7, 1988). The constitutional provision only requires an exclusive charitable or public use and does not address ownership.

In N.D.A.G. 95-F-05, this office compared the language of N.D. Const. art. X, § 5 to N.D.C.C. § 57-02-08(7) and (9), relating to exemptions for property used for public worship or religious services. The opinion concluded that the statutory provisions supplemented rather than restricted the constitutional provision and stated:

Article X, Section 5 . . . is self-executing except for the savings provision in the last sentence. Lutheran Campus Council, 174 N.W.2d at 367 (Teigen, C.J., concurring specially); [N.D.A.G. 70-394]. Thus, unless this savings clause applies, property used exclusively for religious purposes is exempt from tax without an enactment of the Legislature. This office has previously reached similar conclusions. See [N.D.A.G. 94-F-07] (property used for charitable or public purposes exempt under Article X, Section 5 but not N.D.C.C. § 57-02-08); [N.D.A.G. 81-13] (excess of two acres used exclusively for religious purposes exempt under Article X, Section 5 but not N.D.C.C. § 57-02-08(9)).

N.D.A.G. 95-F-05.

The opinion also noted that

Unlike the current constitutional exemption, former Article XI, Section 176 was not self-executing, but mandated action by the Legislature. Engstad v. Grand Forks County, 84 N.W. 577, 578 (N.D. 1900). In Engstad, the

Legislature had enacted a tax exemption only for property belonging to charitable institutions, but Article XI, Section 176 required the Legislature to exempt from tax all property used for charitable purposes, whether owned by institutions or private persons. The Supreme Court concluded that although the statutory exemption was narrower than mandated by the constitution, it was nevertheless valid. Engstad, 84 N.W. at 579.

Id.

Following Engstad in 1918, the former constitutional provision, article XI, section 176, was amended, inter alia, to eliminate the lead-in language ("the legislative assembly shall by a general law exempt from taxation") to the charitable and public purpose exemption clause. N.D.A.G. 95-F-05. As the present constitutional provision, N.D. Const. art. X, § 5, now reads, there are three specific clauses dealing with (1) exemption of classes of personal property from taxation, (2) immunity from taxation of state, county, and municipal property, and (3) the raising of revenue and situs of property, which all make explicit reference to the power or authority of the Legislative Assembly. The 1918 amendments deleted any reference to the power or authority of the Legislative Assembly in connection with the clause dealing with the charitable or public purpose property tax exemption.

As was further explained in N.D.A.G. 95-F-05 concerning the 1918 amendments to the charitable use clause:

[T]his amendment made the exemptions in that section self-executing rather than a mandate to the Legislature, effectively overruling the Supreme Court's decision in Engstad which had been affirmed just two years earlier in State ex rel Linde v. Packard, 160 N.W. 150, 156 (N.D. 1916).

The clear purpose of making these exemptions self-executing was to remove the discretion of the Legislature under Engstad to restrict exemptions that are . . . mandated by the constitution.

N.D.A.G. 95-F-05; see also N.D.A.G. 94-F-07.

Although N.D.A.G. 95-F-05 did not construe N.D.C.C. § 57-02-08(8), the same reasoning would apply. Article X, section 5 is self-executing so that property used exclusively for charitable or other public purposes is exempt; the exemption under N.D.C.C. § 57-02-08(8) for buildings belonging to institutions of public charity supplements rather than restricts the constitutional exemption. Therefore, ownership is

not a necessary prerequisite for property to be exempt from taxation under the constitutional provision if it is used exclusively for charitable or other public purposes.

Consequently, it is my opinion that if the housing project is being used exclusively for charitable or other public purposes, it is exempt from ad valorem taxation under the self-executing provision of article X, section 5 of the North Dakota Constitution, regardless of the form of ownership of the project.⁴

Sincerely,

Wayne Stenehjem
Attorney General

rww/vkk

⁴ Whether the property is used exclusively for charitable or other public purposes is a question of fact the city must determine. 95-F-05; N.D.A.G. 94-F-07. The following standards apply to this factual determination:

[I]t is exempt only where the property is exclusively used to carry out the charitable purposes of the organization claiming the exemption. Riverview Place, Inc. v. Cass County, 448 N.W.2d 635, 640 (N.D. 1989). Further, "the burden of establishing that property comes within [a] tax-exemption . . . is upon the person or entity who claims the exemption, and . . . any doubt as to whether the property is used for charitable or benevolent purposes so as to exempt it from taxation must be resolved against the claimant." Riverview Place, Inc. v. Cass County, 448 N.W.2d at 640.

Memorandum

To: North Dakota State Board of Equalization
From: Daniel L. Rouse, Legal Counsel
Date: May 6, 2010
Subj: District Court Orders – Grand Forks Exemption Cases

On April 28, 2010, the Grand Forks, North Dakota District Court issued its decisions in two cases. In the first case, "*In the Matter of Appeal of Grand Forks Homes, et al. v. State of North Dakota, by and through the State Board of Equalization and Grand Forks County*" Appellants sought a Court Order forcing the State Board of Equalization (SBOE) to determine certain properties in Grand Forks exempt from real property taxes for calendar year 2009 (and beyond).

In its Order, the Court ruled the SBOE did not have statutory authority to determine property to be exempt (with the exception of centrally assessed property) or reclassify property as exempt. Consequently, the SBOE was dismissed as a party to this action. The District Court also dismissed Grand Forks County as a party on procedural grounds unrelated to the SBOE's position.

In separate Orders dealing with applications for abatement filed by Appellants for calendar years 2006, 2007, and 2008, the District Court upheld the denial of those applications by the Grand Forks County Commission. The SBOE was not a party to those actions nor will the issues in them be subject to review by the SBOE.

We anticipate both decisions will be appealed to the North Dakota Supreme Court.