

Walstad, John M.

From: Clarice Liechty [clarice_liechty@yahoo.com]
Sent: Friday, January 06, 2012 9:28 PM
To: Walstad, John M.; Hogue, David J.; Headland, Craig A.; Cook, Dwight C.
Subject: My Comments for the January 19,2012 Taxation Committee meeting
Attachments: Brown Tax exemption 2.doc; BROWNMARVINGMEMORANDUM doc10.doc

Dear Mr. Walstad and the ND Taxation Committee,

On your Jan 19, 2012 Taxation Committee agenda is 9:30 am - Comments by interested persons in attendance. I am out of state and will not be able to attend the meeting. The following are my comments to be given to the committee.

Weeks ago I emailed you copies of my testimonies given to the Jamestown city council and also to their equalization board, the Stutsman County Equalization Board, the North Dakota State Board of Equalization, along with other correspondence regarding a property tax exemption payment in lieu of taxes given by the city council of Jamestown to Marvin Brown/Prairie Hills Apartments.

From my investigation, I cannot find that Mr. Brown has complied with what he said he would do in return for the tax exemption given - rent to those who need assisted living services and providing those services. The Jamestown city council, the Stutsman County Equalization Board and the State Board of Equalization (SBOE) all refuse to take any action to require the city of Jamestown to investigate and require compliance. All washing their hands of requiring compliance. I gave the SBOE and the ND Tax Department considerable testimony along with documentation to go with my testimony. You may get copies of that testimony and documentation from them.

The city council, in addition to their being not willing to investigate, are also hanging their action (lack of action) on the fact that the ND Health Department gave an Assisted Living License to Mr. Brown as his apartment building qualified for a license based on the construction of his building, not on the services provided. In this case - the no services provided. A question also arises, should the ND Health Department be giving out Assisted Living Licenses if there is no requirement to provide a level of assisted living services that is customarily provided?

I have been back to the Jamestown city council again (Jan 3, 2012) with my this request, and again they have declined to take any action other than to deny my request. Below is my recent communication with Jamestown Mayor Andersen and the council. The attachments are their city attorney's opinions.

So now I am coming to your committee to ask that you review the law passed during the last legislation session that gave the State Board of Equalization addition powers, and to now give

the SBOE the power to require a city/county government to (investigate) verify and require those getting tax exemption to hold up their end of the agreement.

Thank you.

Sincerely,
Clarice Liechty
PO Box 467
Jamestown, ND 58402-0467
701-320-5745

----- Forwarded Message -----

From: Clarice Liechty <clarice_liechty@yahoo.com>
To: Katie Andersen <mayorkatie@nd.gov>; Kenneth D. Schulz <kschulz@nd.gov>; Ramone Gumke <rgumke@gmail.com>
Cc: Pat Nygaard <nygaard77@mac.com>; Charlie Kourajian <charlie@csicable.net>; Keith Norman <knorman@jamestownsun.com>; Jeff Fuchs <jfuchs@daktel.com>; Connie Ova <connie@growingjamestown.com>
Sent: Wednesday, January 4, 2012 8:28 AM
Subject: Jmtn city council Jan 3rd council action re Prairie Hills tax exemption

Dear Mayor Andersen, Councilmen Schulz and Gomke,
Regarding your actions taken last evening at the council meeting and Councilmen Schulz comments reported in the Jamestown Sun - Are you asking/requesting me to sue you?

Schulz was on the Jamestown Stutsman Development Corporation board for years, Mayor Andersen and Gomke are serving (the term is used loosely) on that board now. Would you investigate any other individual/corporation who has received funds from our sales tax dollars to determine if they are holding up their end of the agreement? It would be irresponsible not to investigate.

Clarice Liechty

----- Forwarded Message -----

From: Jeff Fuchs <jfuchs@daktel.com>
To: 'Clarice Liechty' <clarice_liechty@yahoo.com>
Sent: Tuesday, January 3, 2012 4:30 PM
Subject: RE: Ken Dalstads opinions re Prairie Hills property tax exemption -

From: Clarice Liechty [mailto:clarice_liechty@yahoo.com]
Sent: Tuesday, January 03, 2012 3:13 PM
To: Jeff Fuchs
Subject: Ken Dalstads opinions re Prairie Hills property tax exemption -

Dear Jeff,
Please email me copies of Ken Dalsted's opinions regarding this matter.
Thank you.
Clarice Liechty

----- Forwarded Message -----

From: Ken Dalsted <kdalsted@csicable.net>

To: 'Clarice Liechty' <clarice_liechty@yahoo.com>

Sent: Tuesday, January 3, 2012 3:27 PM

Subject: RE: Prairie Hills property tax exemption - non performance.

Clairice,

You can obtain copies of my old opinion letter from the Auditor's office. I was not able to locate it.

Ken Dalsted

From: Clarice Liechty [mailto:clarice_liechty@yahoo.com]

Sent: Sunday, January 01, 2012 5:56 PM

To: Katie Andersen; Ken Dalsted; Ken Schulz; Pat Nygaard; Charlie Kourajian; Ramone Gumke

Cc: Keith Norman

Subject: Re: Prairie Hills property tax exemption - non performance.

Greetings,

I am out of town and will not be at the Jamestown city council meeting on Monday evening.

From your printed agenda it is stated that - If a member of the City Council or public requests to be heard on one of these items, the Council will remove the item from the consent agenda and consider that item individually.

I am asking you to remove this item from the consent agenda and consider the item individually.

C. Resolution to deny the request from Clarice Liechty for reconsideration of the property tax exemptions for Prairie Apartments.

Below is an email I sent to City Attorney Ken Dalstad. He did not respond to me. Below is Mayor Andersen response.

Good morning Mrs. Liechty,

I have attached my notes on this property tax exemption.

(I have copied below her notes and

my response Clarice)

Katie Andersen

Quoting Clarice Liechty <clarice_liechty@yahoo.com>:

> Dear City Attorney Dalstad,

> In reading an article in today's Jamestown Sun in regards to my request to the council to reconsider the tax exemption given to Marvin Brown that Mayor Anderson says "the issue involves legality and the city has no legal ground to reconsider the tax breaks issued earlier." I

am believing that you gave the council this legal advice. Please email me a copy of the opinion you gave to the council.

> Thank you,

> Clarice Liechty

1/1/12

Clarice Liechty's response to Mayor Andersen's notes on the Prairie Hills tax exemption are in RED.

In addition to what I have written below - Please refer to all the other correspondence have emailed you over time documenting my belief that the council should investigate my findings regarding the lack of performance by Mr. Brown as a requirement for him getting a property tax exemption.

Mayor Andersen notes to me are in black.

Katie's Notes on The Property Tax Exemption for Brown Bear Properties (Mr. Brown of Billings, Montana)

I believe we have to review the **history** and the **facts** about this tax exemption. Here are the highlights I have assembled. The documents referred to should be read in their entirety for full consideration of this issue.

On June 25, 2009 Marvin Brown made an **application for a tax exemption under Section 40-57.1 of the North Dakota Century Code**. This section authorizes a Municipality's authority to grant **tax exemption or payment in lieu of taxes** for new and expanding businesses. "...its purpose in preparing and adopting the provisions of the welfare of the state, its subdivisions, and people by assisting in the establishment of the additional industrial plants, **the expansion and retention of existing business and promotion of economic activities...**"

In his application, Mr. Brown stated that he would have a total estimated project cost of **\$3,025,000.00** and planned to **employ 2 people with an estimated payroll of \$25,000**.

On September 8, 2009 **Mayor Liechty made a motion** and Council Member Parisien seconded the motion to approve the Resolution to **grant** an ad valorem **tax exemption** to Marvin Brown, Billings Montana, for construction of a three story, thirty five unit apartment and assisted living facility at 12th Avenue and 5th Street NE, Jamestown, ND 58401. The exemption was a five year 60% ad valorem tax exemption from property tax based on the assisted living units, and five year payment in lieu of taxes on the assisted living units in the listed amounts plus the normal tax amount on the unassisted living units, pursuant to Section 40-57.1-03 of the North Dakota Century Code. **The City Council (Pat Nygaard, Ken Schulz, Kelani Parisien, Charlie Kourajian and Clarice Liechty) unanimously approved this resolution.**

On May 21, 2010 the licensing authority, the **North Dakota Department of Human Services**, did **issue "Assisted Living Facility License"** to **Brown Bear Properties, LLP** for 35 units at Prairie Hill 1221 5th St. NE, Jamestown, ND 58401

Two separate issues must be clarified. One, the City Council's (Pat Nygaard, Ken Schulz, Kelani Parisien, Charlie Kourajian and Clarice Liechty) original decision, and two, Can/should the City Council (Katie Andersen, Ramone Gumke, Pat Nygaard, Ken Schulz and Charlie Kourajian) revoke the tax exemption.

Issue one: The City Council's (Pat Nygaard, Ken Schulz, Kelani Parisien, Charlie Kourajian and Clarice Liechty) original decision. Did the City Council (Pat Nygaard, Ken Schulz, Kelani Parisien, Charlie Kourajian and Clarice Liechty) make a **poor decision** (The decision was based on Mr. Brown's pledge that he would provide assisted living services to and rent to renters who required assisted living services. If Mr. Brown had rented to those who require assisted living services and provided the services there would be no issue) when they granted a tax exemption to a business that would only employ 2 people with an estimated payroll of only \$25,000, when the authority to grant this tax exemption is for "...promotion of economic activities..." Further, did the City Council consider how only 2 people with a payroll of only \$25,000 would provide assisted living services to 21 assisted living units? Never the less, the City Council voted unanimously to approve this application for tax exemption. Perhaps a poor decision was made.

The city council gave Mr. Brown a tax exemption based on his application where he stated that he was going to provided **ASSISTED LIVING SERVICES** to clients (renters) who needed assisted living services – comparable to the Heritage Center. Mr. Brown specified exactly what those assisted living services would be – please review the application and his verbal testimony before the council. The tax exemption calculations stated were necessary so there was a dollar value attached. Mr. Brown could have made his 3 million dollar investment without the tax exemption (as did I). I believe that the council has a responsibility to the property tax payers in Jamestown and Stutsman to investigate whether or not Mr. Brown is complying with his application and testimony.

Issue two: Can/should the City Council (Katie Andersen, Ramone Gumke, Pat Nygaard, Ken Schulz and Charlie Kourajian) revoke the tax exemption? Attorney Dalsted provided a memo to the Council 11-1-10 to answer this question. "I am concerned relative to the potential liability of the city in reversing an action that once given was relied upon at considerable expense." In other words, **Mr. Brown made an over three million dollar investment based on a property tax exemption that was granted. Unless the city can prove How does the city know if it can prove unless it is willing to investigate! – what is keeping the city from investigating? that Mr. Brown did not comply with the terms of the tax exemption, the city should prepare for a lawsuit that case law precedent would indicate that the City of Jamestown would lose. Is there a chance that the city will need to prepare for a lawsuit if they do not investigate? A possibility.**

Given the information provided by the City's legal counsel, I do not believe that the city would be wise to proceed with any reconsideration of the property tax exemption for Mr. Brown. Not only would this open doors for legal action against the city, it would send a very bad message to all tax exemption recipients in the past and in the future. **The message that is being sent now is that the city of Jamestown is easy pickings and that the city will give out tax exemptions and never investigates the receiver's performance to determine if the receivers end of the agreement is being performed.** We would essentially be saying, "The city council today thinks you should invest in our community and we grant you the tax exemption, but look out because we might change our minds after you spend over \$3,000,000 and take away your tax exemption." **He did not need the tax exemption for his building to be a fair investment.** This would be very bad and will not have any part in that message.

Politically I think the council would not want the state property taxpayers to know that they (Jamestown city council) are unwilling to investigate Mr. Browns non- performance and this would be bad. I have not studied completely the Measure 2 that will be on the June ballot, but it appears to me that state wide inequities in property tax exemption etc. is going to be a big issue even if the measure does not pass this time around..

I do not believe the issue of whether or not the Brown Bear Properties is provided assisted living facilities like the council "thought" would be **provided** **It is not a matter of "thought" but of what Mr. Brown said he would perform.** is even a consideration. They are a licensed Assisted Living Facility. Period. **The issue is what Mr. Brown said he would perform and what he is not performing.**

MEMORANDUM

TO: JAMESTOWN MAYOR AND CITY COUNCIL

FROM: KENNETH L. DALSTED, CITY ATTORNEY

DATE: OCTOBER 11, 2010

RE: APPLICATION OF MARVIN BROWN, REQUESTED AD VALOREM TAX
EXEMPTION UNDER SECTION 40-57.1-03, N.D.C.C.

FACTS

Marvin Brown made an application for tax exemption under Section 40-57.1-03, N.D.C.C., which is dated June 25, 2009, prior to the construction of a building.

At the time of the application, he applied for exemption on the basis that some of the units would be assisted living units. In fact, 21 of the 35 units of the building were to be designated for assisted living. The application was approved by resolution dated September 8, 2009.

The resolution approved a five (5) years 60% ad valorem tax exemption from property taxes based upon the assisted living units, a normal tax amount on the unassisted units. Tax payment in lieu of taxes was approved for the years 2010 through 2014 at a 60% exemption based upon the assisted living units and a five year moving scale payment in lieu of taxes for the years 2015 through 2019 for the unassisted units. A copy of the resolution is attached.

At some point in time after construction was started, Brown discovered that the licensing from the state agency is necessary to qualify for assisted living designation could not be obtained for less than all units in the building as requested in his original application. In speaking with Ms. Lee Ann Thiel of the North Dakota Department of Human Services, she advised that it might be possible to license by floors, but you could not pick and choose units to license as assisted living units as they were rented. Therefore, from a practical standpoint, all the units would likely have to be assisted living units.

In speaking with Mr. Ken Bollinger, North Dakota Department of Health, Food and Lodging Division, I was advised that

division requires a pre-operation inspection before they will issue a license. That must be done after construction is essentially completed. He advised me that their inspector did such an inspection and approved the facility on April 21, 2010, and the Health Department issued a license effective May 4, 2010.

The Department of Human Services inspected the plans submitted. They do not do an actual physical inspection. Instead, they depend on the inspection done by the State Health Department, which includes the kitchens and safety measures for the unit. Once the Department of Human Services receives the license approval from the State Health Department and determines all is in order, they issue the license out of the Department of Human Services. They issued their license on May 21, 2010.

On May 7, 2010, the City Building Inspector, James Weight, issued a certificate of occupancy for the building. On May 17, 2010, the City Council, sitting as its Board of Equalization, determined that Mr. Brown did not have on that date the necessary licenses from the Department of Human Services and the Department of Health to operate an assisted living facility at that location.

The licensing authority, the North Dakota Department of Human Services, did issue the license as indicated above, to Mr. Brown, for the entire building consisting of 35 units on May 21, 2010.

On July 23, 2010, Mr. Brown filed a new application under Section 40-57.1-03 requesting a tax exemption for all 35 units commencing 2011 at 100% for the years 2011 through 2015 and for payment in lieu of taxes for the years 2016 through 2020.

LAW AND DISCUSSION

North Dakota Century Code 40-57.1-07(1) provides in part: No property tax exemption shall be granted under this chapter unless the application for it is granted as provided in this chapter prior to the commencement of construction.

In fact, the City Council has denied an application on that basis in the past.

Now it should be noted that the above may be modified as provided under North Dakota Century Code 40-57.1-05 which provides:

"The municipality or State Board of Equalization, upon presentation of additional facts and circumstances which were not presented or discovered at the time of the original application for tax exemption under the provisions of this chapter, may accept reapplication from the project operators at any time if the project operator's first published notice of application for tax exemption as required by this chapter."

It is my understanding that the notices were published as required prior to the hearing which was held in October of this year.

It appears that there are two options available for consideration by the City in this situation:

OPTION 1: The City could deny the application filed July 23, 2010, specifically finding no basis for considering a reapplication under North Dakota Century Code Section 40-57.1-05. That is, the City would find that there are no additional facts or circumstances which were not presented or discovered at the time of the original application. This would result in the resolution dated September 8, 2009, remaining in effect to the extent that the facts are consistent with the order. For example, the 60% exemption initially granted would apply to all 35 of the assisted living units. Since there ultimately will be no unassisted units, that aspect of the resolution would not be operative. The order of the City Board of Equalization would likewise remain in effect as it found that the 2010 tax reduction could not be allowed as the facility did not have the appropriate licensing as of the date of the hearing. The exemption for the building would remain available for the years 2011 through 2014 and 2015 through 2019 respectively, the balance of the term of the order.

The affect is that the project operator has lost the benefit of the 2010 tax exemption because he did not have his licensing in effect, but is still eligible for the balance of the time set forth in the resolution for the 60% tax exemption.

There may be an issue with this approach as the original application was made and granted on the basis of 21 of 35 units being assisting living units which we have now determined is not allowed. An interpretation of the resolution of the City might be that the amount of tax exemption granted for the building's

assisted living units is 60% exemption on all 35 assisted living units.

This issue is left unresolved. The number of assisted living units is not specifically set forth in the resolution. The 60% figure may be the result of dividing 21 units by 35 units to create a percentage, or the City Council may have just decided that 60% tax reduction is all that should be granted.

OPTION 2: The City Council could also elect to consider under North Dakota Century Code 40-57.1-05 the reapplication of Mr. Brown for the taxes incentive. To do so, the Council would have to consider that the licensing requirement stating no license could be issued until construction was essentially complete prevented Mr. Brown being licensed in time for the meeting requirement by the date of the City Equalization Board on May 17, 2010, and also that the information regarding the construction and licensing requirements for such licensing were not presented or discovered as of the time the facts and circumstances for exemption were initially brought before the Council. That is, the facts and circumstances that all units must be assisted and no license will be issued until construction was complete, may not have been presented or discovered at the time of the original consideration of the first application.

This is a factual matter that the Council would have to consider and make a specific finding about. Should the developer have known, planned the timing of construction, or presented these facts? There is sort of a "catch 22" because of the construction timeline, could not have the property inspected until completion and the certificate of occupancy was issued May 7, 2010. The Department of Human Service license was not issued until May 21, 2010, and the Board of Equalization met on May 17, 2010.

Mr. Brown is now asking for an additional exemption of 100% for all 35 units. This request is for a different timeframe. For this option, the Council must determine that there are facts and circumstances now present that were not present or discovered at the time of the original application for tax exemption. The Council only has to grant such exemption amount as it deems appropriate.

MEMO:

TO: City Council, City of Jamestown, ND

FROM: Ken Dalsted, City Attorney

DATE: 11-1-10

RE: Tax exemption Granted to Prairie Hills under NDCC 40-57.1-03 by resolution
Dated 9-8-09

At the October Finance and Legal Committee meeting of the City Council additional issues arose at the public meeting relative to the granting of the tax exemption to Mr. Marvin Brown relative to his Prairie Hills project.

- ISSUES:
1. What is meant by the phrase "Commencement of Construction" in NDCC 40-57.1-07?
 2. What authority does the City of Jamestown have to reverse its decision in granting the tax exemption?

Unfortunately, there is not a lot in the way of specific guidance on these issues.

1. What is meant by the phrase "Commencement of Construction" in NDCC 40-57.1-07?

To address this issue, we need to look at the section of the code that uses this phrase and the sections referred to in that section. NDCC 40-57.1-07 (1) provides:

1. No property tax exemption shall be granted under this chapter unless the application for it is granted as provided in this chapter prior to the commencement of construction of the project as that term is defined in section 40-57.1-02 or prior to occupancy by the project operator if the project is an existing building.

NDCC 40-57.1-02 (4) defines a "project" as "any revenue-producing enterprise, or any combination of two or more of these enterprises". For the purpose of tax the tax exemption, "project" means both "primary section businesses" and "tourism"

as defined by this section and includes the establishment of a new qualifying business or expansion of a qualifying existing business.

NDCC 40-57.1-02 (3) defines "primary sector business" as an individual, corporation, limited liability company, partnership, or association which through the employment of knowledge or labor adds value to a product, process, or services that results in the creation of new wealth.

The City Council in granting the exemption evidently determined that there was a "project" that employed knowledge and labor which would add value to services to the citizens of Jamestown.

Now, when exactly was the commencement of the "project", i.e. the beginning of construction of the apartment building. On September 2, 2009, seven days prior to the granting of the tax exemption when a representative of the city building inspector's office visited the site, he observed the following facts: there were holes for footings dug into the earth, wooden frames in place for footings in the holes and steel re-bar placed within the frames. No cement had been poured to give permanency to these items and nothing was visible above ground level.

As background information, the City building inspector advises that in general construction projects when he might get a call on a Friday night or weekend from a contractor wanting to get started with a construction job the first thing Monday morning but does not have a building permit, the contractor may be allowed to dig the holes, place the rebar but can not pour any cement until the project is inspected on Monday. I state this only to confirm that general practice in the city has allowed some actions prior to the issuance of a general building permit.

The State Tax Department issued Guidelines in July of 2005 which state:

1. Commencement of construction means the building or erecting of any improvements other than site preparation or excavation.

There is no other state statutory, state regulatory, city ordinance or city policy that specifically defines what is meant by "commencement of construction". However, under the city policies adopted October 2, 2000, under PROPERTY TAX APPLICATIONS PROCEDURES construction is parenthetically defines as anything other than site preparation.) Site preparation is not defined. So this uses the same brief language as the state Tax Department guidelines. The city council in 2009 apparently found the work done was not more that "site preparation".

It is recommended that the city draft specific definitions of what it believes "commencement of construction" and "site preparation" mean and proceed prospectively.

2. What authority does the City of Jamestown have to reverse its decision in granting the tax exemption?

Prior to the amendments to NDCC 40-57.1 which placed the authority of granting tax exemptions under this section, the state Tax Department was the body that was authorized to do so. In speaking with Ms Marcie Dickerson, of that office, she indicated they would generally interpret the phrase "commencement of construction" to mean there was nothing above ground level. When asked if that was what cities should use, she stated that when the statute was modified to place the decision making authority in cities and counties, it became their duties to determine what the phrase meant. The Policies of October 2, 2000, referred to above, appear to be as close as the city has come to address the issue and that is not totally definitive.

There is a general presumption that actions of a city, in exercising its discretionary authority, are not illegal acts. Generally, if the city does not act in an arbitrary or capricious or unreasonable manner, their actions are not subject to being overturned.

There is no mention in the statutes of a right to revoke a tax exemption previously granted. As previously indicated in my prior memo, NDCC 40-57.1-05 allows a city to modify an prior tax exemption in the case of new facts or circumstances being found that were not present at the time of the consideration of the initial application. The Council has indicated it does not find new facts or circumstances.

However, the North Dakota Attorney General has considered the possibility of a county having the authority to elimination of a tax exemption granted by a city in an opinion dated August 13, 1992. In this opinion, the Attorney General concluded that a county could commencing an action to eliminate the tax exemption "if it was improperly granted". See Shark Bros, Inc v. Cass County, 256 N.W. 701 (N.D. 1977)

The Attorney General went on to say that there is no authority for a county to modify an exemption that was properly granted by a city under NDCC 40-57.1 and if the qualifying project is to be located within a city, it is the city which has the discretion to grant a partial or complete exemption.

In another Attorney General's opinion dated March 14, 1990, the city of Stanton had granted a tax exemption that the County objected to as being improperly granted based upon the Guidelines of the state tax department. In that case, an applicant was seeking a tax exemption for an existing building that he was going to buy. The Tax department guideline said the exemption must be granted prior to the applicant taking possession. In that case, he took possession of the property of the existing property before the granting of the exemption. The Attorney General observed that city and counties only have powers granted to it or reasonable necessary to exercise those powers. The state tax department has the authority to issue guidelines that prohibited the action taken by the city in the matter in Stanton. In this case the Attorney General found a county has the authority to

initiate a proceeding to correct an assessment if an exemption was "improperly granted". In this case the Attorney General stated the city of Stanton should have followed the guidelines issued by the Office of the Tax commissioner and found the exemption was "improperly granted".

It is my opinion that if the County can initiate a proceeding to correct an improper granting of a tax exemption, the city should also be able to initial a proceeding if it determines that an improper action had been taken. In the case before us, it appears that the city approved the tax exemption and no complaint was filed by any person or entity as to the city improperly granting the exemption or failing to follow proper procedure. No action either by Stutsman County or the City was raised relative to the granting of the exemption as being "improperly granted". The property owner proceeded to complete his investment and construct a building at that point. It may be that that action was based upon a reliance the actions of the city. There was no attempt to find that the city, in granting the tax exemption, acted improperly. At this point, I am concerned relative to potential liability of the city in reversing an action that once given was relied upon at considerable expense.

If there is a concern that the exemption was improperly granted and the city want to reconsider the action taken in granting the tax exemption, I would at the very least recommend that they city hold a public hearing after due and proper notice is given. The city would need to specifically state in the notice of hearing what it thinks may have been improperly done