

N.D.A.G. Letter to Bye (Nov. 10, 1987)

November 10, 1987

Mr. Kermit Bye
Vogel, Brantner, Kelly,
Knutson, Weir & Bye, Ltd.
Law Offices
First Avenue North at Fifth Street
P.O. Box 1389
Fargo, ND 58107

Dear Mr. Bye:

Thank you for your letter of October 30, 1987, in which you request my opinion regarding the action taken by the board of directors of the Myron G. Nelson Fund, Inc., with respect to the bond guarantee renewal request of Primewood, Inc.

As stated in your letter, the bond guarantee was initially made by the North Dakota Economic Development Commission on June 30, 1987. This initial bond guarantee expired on October 31, 1987, prompting Primewood, Inc., to seek a renewal from the Myron G. Nelson Fund, Inc. At a special meeting of the board of directors of the Myron G. Nelson Fund, Inc., held on October 28, 1987, a resolution was passed whereby the requested renewal of the bond guarantee was approved subject to, among other conditions, receiving a favorable official opinion from my office that such a bond guarantee would not be in violation of North Dakota law (specifically, N.D.C.C. § 10-30.2-06).

In regard to your question whether the board's action renewing the bond guarantee is in compliance with North Dakota law generally, I assume that the primary issue is whether the corporation's present board of directors is lawfully authorized to extend the guarantee. The 1987 Legislative Assembly required that the Bank of North Dakota transfer the funds in the Industrial Development Revenue Bond Fund to the corporation in exchange for shares of the corporation. N.D.C.C. § 10-30.2-04.

Additionally, the responsibility of administering the Industrial Development Revenue Bond Guarantee Program was transferred from the Economic Development Commission to the Myron G. Nelson Fund, Inc.

N.D.C.C. § 10-30.2-08 states that "[t]he board of directors [of the Myron G. Nelson Fund, Inc.] may authorize that a portion of the corporation's investment fund be made available to guarantee industrial revenue bonds pursuant to chapter 6-09.2." Similarly, N.D.C.C. § 6-09.2-01 states that "[t]he corporation shall administer an industrial development revenue bond guarantee program as provided in this chapter." Although it is clear that the board of directors of the corporation is authorized to guarantee industrial revenue bonds, it must be determined whether the present board of directors elected by the incorporators or a future

board of directors elected by the shareholders is the body responsible for issuing such guarantees.

N.D.C.C. § 10-30.2-05 states as follows:

10-30.2-05. Board of directors. A board of directors, elected by the shareholders pursuant to initial bylaws adopted by the incorporators pursuant to section 10-30.2-02, shall direct the business and affairs of the corporation. There must be representation on the board of directors from the economic development commission, investors, and the business sectors of the North Dakota economy. The business sector and investors must constitute a majority of the board.

(Emphasis supplied.) The underscored portion of N.D.C.C. § 10-30.2-05 raises the issue whether the initial board of directors, which has not been elected by the shareholders, can direct the business and affairs of the corporation, including guaranteeing industrial revenue bonds.

N.D.C.C. ch. 10-30.2 clearly establishes that the venture capital corporation should function like any corporation organized under the North Dakota Business Corporation Act. As stated in N.D.C.C. § 10-30.2-03, "[t]he corporation shall have the powers and privileges conferred upon domestic corporations under the Business Corporation Act, to the extent not limited by this chapter"

Under the North Dakota Business Corporation Act, it is required that the affairs of a corporation be managed by a board of directors and that "members of the first board may be named in the articles or elected by the incorporators pursuant to 10-19.1-30 or by the shareholders." N.D.C.C. § 10-19.1-32(1). In accordance with N.D.C.C. § 10-19.1-32(1), the incorporators of the Myron G. Nelson Fund, Inc., elected the first board of directors. Additionally, the first board of directors adopted bylaws that provide for a March, 1988, initial shareholders' meeting. At that meeting, the shareholders will elect a board of directors. Although the bylaws provide for the initial shareholders' meeting in March, 1988, shareholders have the right to call a special meeting at any time, N.D.C.C. § 10-19.1-72, and remove any or all of the directors of the corporation. N.D.C.C. § 10-19.1-41.

I do not consider the requirement set forth in N.D.C.C. § 10-30.2-05 that the board of directors shall be "elected by the shareholders pursuant to initial bylaws adopted the incorporators" as a special limitation on this corporation, but merely a statement by the Legislature that the Myron G. Nelson Fund, Inc., is to be controlled by its shareholders like other private corporations. As such, it is my opinion that the initial board of directors elected by the incorporators is authorized to direct the affairs of the corporation until a board is elected by the shareholders. It is my further opinion that the present board of directors of the Myron G. Nelson Fund, Inc., is lawfully authorized to act on the request of Primewood, Inc., to renew the bond guarantee initially authorized by the Economic Development Commission.

My review of N.D.C.C. chs. 10-30.2, 6-09.2 and the North Dakota Business Corporation Act does not reveal any other legal issues concerning the board's action on Primewood's request for a renewal of its guarantee. Therefore, I will proceed to discuss the specific issue raised in your letter as to whether the board's action violates N.D.C.C. § 10-30.2-06.

N.D.C.C. § 10-30.2-06 states that "[t]he corporation's investment in any one entity may not exceed a maximum of forty percent of the entity's capital." I understand that Primewood's initial capitalization is \$5 million. Therefore, even if the commitment is considered an "investment" in Primewood, Inc., the 40% limitation would not be exceeded. Regardless of this fact, however, the term "investment" as used in N.D.C.C. § 10-30.2-06 clearly contemplates a direct contribution of capital as opposed to a bond guarantee whereby the commitment merely creates a contingent liability of the corporation but does not result in funds being directly invested in the entity.

If you have any further questions on this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

dfm