

N.D.A.G. Letter to Nelson (Feb. 19, 1991)

February 19, 1991
Honorable Gary Nelson
Senate Minority Leader
Senate Chambers
State Capitol
Bismarck, ND 58505

Dear Senator Nelson:

Thank you for your January 24, 1991, letter requesting my opinion as to whether the provision of Senate Bill No. 2058 authorizing the Statewide Nonprofit Development Corporation (to be renamed the "North Dakota Economic Development Corporation") to take equity positions in businesses in North Dakota is in violation of any provision of the North Dakota Constitution.

I have reviewed Senate Bill No. 2058 and presume that the following statement found in Section 15 of the bill contains the provision you reference in your question:

10-30.3-02. Purpose. It is the purpose of this chapter to create a statewide nonprofit development corporation that will have the authority to take equity positions in, to provide loans, or to use other innovative financing mechanisms to provide capital for new and existing or expanding businesses in North Dakota, or relocating businesses in to North Dakota.

N.D.C.C. ch. 10-30.3, as enacted by the Legislative Assembly in 1989, grants authority to the Statewide Nonprofit Development Corporation to take equity positions in North Dakota businesses. 1989 N.D. Sess. Laws ch. 136.

The relevant section of the North Dakota Constitution is N.D. Const. art. X S 18, which provides in part:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, ... but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

By letter to Representative Martin dated February 11, 1991, I have responded to an analogous question with respect to the authority which would be granted to city and county job development authorities with the enactment of House Bill No. 1177. The analysis set out in that letter with respect to when it is permissible for the state, a city, or a county to make loans, give credit or make donations, is also applicable to your question of

whether the state may take equity positions ("subscribe to or become the owner of capital stock") in North Dakota businesses.

Because that analysis is rather lengthy, I am enclosing a copy of my letter to Representative Martin with this letter.

Based upon the analysis in my letter to Representative Martin, it is my opinion that the state may take an equity position in North Dakota businesses' or subscribe to or become the owner of capital stock in North Dakota businesses, only through an industry, business, or enterprise in which the state is engaged. Further, it is my opinion that the industry, enterprise, or business engaged in by the state must have for its objective the promotion of the general welfare of all the inhabitants or residents of the state. In other words, the industry, enterprise, or business must be engaged in by the state for a public purpose.

N.D.C.C. § 10-30.3-02 provides that the principal mission of the statewide nonprofit development corporation "is the development and expansion of primary sector business in North Dakota" and further provides:

The exclusive focus of this corporation is business development in the state of North Dakota, however, it is not excluded from participation with other states or organizations in projects that have a clear economic benefit to North Dakota residents in the creation of jobs or secondary business.

By enacting N.D.C.C. ch. 10-30.3, the Legislative Assembly has declared that the development of business in North Dakota is a public purpose. Therefore, it is my opinion that, on its face, N.D.C.C. § 10-30.3-02, as set out in Section 15 of Senate Bill No. 2058, is constitutional.

I hope that this discussion is helpful to you in your consideration of Senate Bill No. 2058. Please let me know if you have additional questions.

Sincerely,

Nicholas J. Spaeth

Enclosure