

**OPINION
79-256**

December 17, 1979 (OPINION)

The Honorable James Gerl
State Representative
34th District
411 Seventh Avenue N.W.
Mandan, ND 58554

Dear Representative Gerl:

This is in response to your letter of November 9, 1979, in which you request an Attorney General's opinion on the following:

Does the granting of tax exempt status to a new business pursuant to chapter 40-57.1 N.D.C.C., require that the new business employ residents of this state to the extent qualified employees are readily available?

In further reference to this question you state that:

This inquiry is prompted by the granting of tax exempt status to Cargill by the City of Riverside. The situation as I understand it is that there is a large pool of qualified unemployed state residents readily available in the immediate area where Cargill is now in the construction phase. A large number of out-of-state workers have been brought in to work on the project, notwithstanding this local unemployment.

I question whether the declaration of legislative intent to alleviate in this state is consistent with what is happening at the Cargill site.

As explained below, we do not find any requirement in chapter 40-57.1 N.D.C.C. that North Dakota residents, to the extent they are qualified and readily available, must be employed by either the potential project operator or by a contractor engaged by the potential project operator to construct the plant.

The new industry tax exemption law, chapter 40-57.1 N.D.C.C., was enacted in 1969 and it included then, as it does now, various provisions relating to its purpose and scope. Section 40-57.1-01 provides a declaration and finding of public purpose by the Legislative Assembly for enacting the chapter which includes "assisting in the establishment of additional industrial plants and promotion of economic activities within the state, and thereby increasing production of wealth, and adding to the volume of employment, particularly during those seasons when employment in farming and ranching is slack, thus alleviating unemployment among the people of the state."

Section 40-57.1-03 includes the following provisions authorizing a municipality (a city or county), in its discretion:

* * * to grant, after negotiation with a potential project operator, partial or complete exemption from ad valorem taxation on all tangible property used in or necessary to the operation of a project for a period not exceeding five years from the date of commencement of project operations, which date shall be determined by the tax commissioner. * * * The municipality shall, before granting any such exemption, make application to the state board of equalization for approval and the board shall, if it finds that such exemption will not result in unfair tax reduction competition between political subdivisions of this state, determine whether the granting of the exemption is in the best interest of the people of North Dakota, and if it so determines, shall give its approval. The board shall, after making the determination, certify the findings back to the municipality and to the tax commissioner.

Section 40-57.1-04 authorizing an income tax exemption for a project is as follows:

40-57.1-04. EXEMPTION FROM INCOME TAX - LIMITATIONS. The net income of any project granted an exemption from ad valorem taxation may be exempt from state income tax for a like period, provided application for the exemption is made by the municipality on behalf of the project to the state board of equalization, and the board, after full investigation, determines the granting of the exemption is in the best interest of the people of North Dakota and approves the exemption. The board shall, after making its determination, certify the findings back to the applicant and to the tax commissioner. Nothing contained herein shall have the effect of exempting the project from filing an annual income tax return.

Your inquiry relates to employment of North Dakota residents during the period the project is being constructed, not after it is completed and in operation. In this regard we note that the phrase "from the date of commencement of project operations" in the first part of the quote above from section 40-57.1-03 was interpreted by this office in an opinion issued to Mr. Bruce L. Bartch, Director, North Dakota Business and Industrial Development Department, on July 29, 1969. The question considered there was whether that phrase related to the date of commencement of construction of the plant facilities or, in the case of a manufacturing plant, whether it related to the date of commencement of the manufacturing of its products. In that opinion we said:

Looking to chapter 40-57.1 as a whole and its purposes, 'date of commencement of project operations' would be the date the plant actually goes into its planned operations. To use the example you cite, if a manufacturing plant actually begins manufacturing of its products in December 1970, that would be the date of commencement of project operations. The Act does not purport to authorize granting of tax exemptions for the time of construction of plants.

We believe the above ruling is correct and we therefore adhere to it. chapter 40-57.1 does not authorize or allow the granting of any tax

exemption for either the property or the income of a potential project operator or the construction contractor or anyone else during the construction phase of the project. Any tax exemption granted can take effect only after the plant (project) commences project operations by producing the products it was constructed to produce. There is no provision in chapter 40-57.1 which either expressly or by necessary implication requires that North Dakota residents, to the extent qualified and available, be employed either in the construction of the project or after the commencement of project operations when the project is producing the products it was intended to produce. The part of the stated legislative purpose in section 40-57.1-01 that is quoted earlier in this opinion does refer to "alleviating unemployment among the people of our state" as one of the purposes of chapter 40-57.1, but we do not believe that this can be construed as a requirement in the statute that employees hired for either the construction of or the operation of a project be North Dakota residents to the extent that they are qualified and readily available.

We do note that in the 1977 North Dakota Supreme Court case of Southern Valley Grain Dealers Association v. Board of County Commissioners of Richland County, 257 N.W.2d. 425, 430, the Court in upholding a five year property tax exemption for the project operator, Froedert Malt Division, said:

We hold . . . that the action of the State Board of Equalization on May 29, 1975, approving a five-year exemption with the added condition prohibiting direct purchase from farmers was a valid action by that Board; and that the action of the Board of County Commissioners on June 3, 1975, approving the exemption, with the condition attached, was a valid ratification of the five-year tax exemption.

While chapter 40-57.1 does not expressly provide that the State Board of Equalization and the local governing board can attach conditions to an exemption which they approve and grant, the Court did hold that the condition that they did attach was valid, probably because section 40-57.1-03 authorizes the local governing board, in its discretion and after negotiation with the potential project operator, to grant the property tax exemption after the State Board of Equalization has approved the local board's application for the exemption. Therefore, while those boards can in their discretion, to some degree at least, add a condition to an exemption they approve and grant for a project operator, the adding of any such condition is not required by chapter 40-57.1, regardless of whether the condition restricts the type of purchases or the employment practices or any other activity of the project operator.

Recent United States Supreme Court decisions and other state supreme court decisions suggest that federal constitutional questions could be raised as to the extent that the Legislature of the State Board of Equalization and a local governing board may go in attaching as a condition to the approval of an exemption under chapter 40-57.1 a requirement that a project operator or persons with whom he contracts give employment preference to North Dakota residents. The right of a nonresident to pursue a livelihood in the state other than his own has generally been recognized by the United States Supreme Court to

be within the protection of the Privileges and Immunities Clause (Article 4, Section 2, Clause 1) of the United States Constitution. See *Baldwin v. Fish and Game Commission of Montana*, 98 S. Ct. 1852, 1861 (1978). See also *Lynden Transport, Inc. v. State of Alaska*, 532 P. 2d. 700, 710 (1975).

We hope that the foregoing will be of assistance to you.

Sincerely,

ALLEN I. OLSON

Attorney General