

LETTER OPINION
93-L-190

June 25, 1993

Ms. Patricia L. Burke
Burleigh County State's Attorney
Burleigh County Courthouse
415 East Thayer Avenue
Bismarck, ND 58501

Dear Ms. Burke:

Thank you for your June 4, 1993, letter requesting my opinion on several questions concerning the transition process for Housing and Urban Development (HUD) Section 8 certificate and vouchers from the state program to the local program as provided by House Bill 1240.

In addition to House Bill 1240, N.D.C.C. chs. 23-11 and 54-40, House Bill 1347 and Senate Bill 2457 enacted during the 1993 Legislative Session are pertinent to the transition of the Section 8 certificates and vouchers to the local housing authorities (LHAs).

House Bill 1240 permits LHAs "established under chapter 23-11" to preempt the Industrial Commission "from acting with regard to housing certificates and vouchers within the area of operation of that housing authority." Thus under House Bill 1240, an LHA may preempt the state housing authority and assume responsibility for HUD Section 8 certificates and vouchers within the LHA's jurisdiction. The purpose of the bill is to eliminate state involvement in the provision of the HUD Section 8 certificate and voucher service.

Senate Bill 2457 removed the prohibition against county commissioners serving on an LHA.

N.D.C.C. ch. 23-11 establishes LHAs in each

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jurisdiction and provides a means for "activating" those authorities. Generally, the authority of an LHA is limited to the "area within its jurisdiction."

N.D.C.C. ch. 54-40 allows political subdivisions to enter joint powers contracts with each other. N.D.C.C. ? 54-40-08, which provides the authority for joint powers agreements has been interpreted by the courts and this office to mean that the parties must each have the power which they are contracting to share. See, City of Hazelton v. Daugherty, 275 N.W.2d 624, 629, fn.1 ("Chapter 54-40, NDCC, in effect authorizes one or more governmental units to do jointly what each may do individually."); 73 N.D. Op. Att'y Gen. 150 (chapter 54-40 only grants authority to do jointly what may be done separately). In other words, two political subdivisions can only enter a joint powers agreement to exercise a specific power when each entity has that power itself.

House Bill 1347, also known as the Tool Chest Bill, provides methods for political subdivisions to streamline and consolidate local government and expands their ability to contract to allow a joint powers agreement between two entities which do not share the same power.

Federal law also plays a part in determining which entities can administer Section 8 certificates and vouchers. Although local political subdivisions may be able to contract with each other to share their powers under the Tool Chest Bill, the ability to contract with HUD to administer Section 8 certificates and vouchers depends in part upon whether the contracting entity is a Public Housing Agency (PHA). 42 U.S.C.A. ? 1437f (Supp. 1993). A PHA is defined as "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development of operation of low-income housing. The term includes any Indian housing authority." 42 U.S.C.A. ? 1437a (Supp. 1993). In North Dakota an LHA is the body which is created to fulfill the definition of a PHA. Thus in the remainder of this letter, a reference to a PHA

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includes an LHA and vice versa unless the context clearly indicates otherwise.

Because several jurisdictions in North Dakota do not have LHAs, you are exploring the means available to allow preemption under House Bill 1240 in those areas which are now served only by the State. In pursuit of that goal you ask four questions:

1. Whether a county commission has the authority to contract and/or administer the HUD Section 8 certificate and voucher program?

2. Whether two or more county commissions may jointly establish a multi-county housing authority?

3. Whether a county commission may contract with a local housing authority from another jurisdiction, either a county or city, to serve as the housing authority for the contracting county?

4. Whether a county commission may contract with a local housing authority from another jurisdiction, either a county or city, to provide administration of services of the Section 8 certificate and voucher program for the contracting county?

I. Whether a county commission has the authority to contract and/or administer the HUD Section 8 certificate and voucher program?

N.D.C.C. ch 23-11 establishes LHAs in each county. An LHA may only be "activated" by following the procedure set forth in that chapter. An LHA must be properly established pursuant to state law before HUD can contract with it and can allocate certificates and vouchers to the LHA. 42 U.S.C.A. ? 1437f (Supp. 1993). A county commission itself is not an LHA and has no authority to act as an LHA. Thus a county commission may not, acting as the county commission, unilaterally contract with HUD or administer the HUD Section 8 certificate and voucher programs because it is not a PHA.

Currently no commissioner of a local housing authority "may be an officer or employee of the city or county for which the authority is created." N.D.C.C. ? 23-11-05. Senate Bill 2457, effective August 1, 1993, amends N.D.C.C. ? 23-11-05 to remove that prohibition.

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Thus, beginning August 1, 1993, a county commission may become an LHA by following the procedures set forth in N.D.C.C. ch 23-11 and then appointing the county commission's membership as housing authority commissioners. Therefore, although a county commission must still activate the LHA as provided in N.D.C.C. ch. 23-11 to cloak itself with the authorities found in N.D.C.C. ch. 23-11, on August 1, 1993, it could appoint its own members to serve as commissioners of the LHA and thereby "become" an LHA. This course of action should satisfy HUD's requirement that HUD may only contract with a PHA. Additionally it would satisfy the requirements of House Bill 1240 including the requirement that only a local housing authority established under N.D.C.C. ch. 23-11 may preempt the Industrial Commission.

This question also raises a different possibility to effect the preemption. Arguably a county commission might contract with an LHA from another jurisdiction under the Tool Chest Bill to have that authority serve as the LHA for the contracting county. However, even under the Tool Chest Bill, a contract with another political subdivision does not transform the contracting entities into each other. As far as HUD is concerned the entity with whom it contracts must be a PHA. It is my opinion that when a county and a local housing authority enter a contract under the provisions of the Tool Chest Bill, they do not together become a PHA. Thus, if this option is chosen, in my opinion the county commission should follow the procedure established under N.D.C.C. ch. 23-11 to activate an LHA and appoint the commissioners from the existing LHA to serve as the commissioners for the new LHA.

II. Whether two or more county commissions may jointly establish a multi-county housing authority?

In my opinion N.D.C.C. ch. 54-40 provides the authority for two or more counties to use the process set forth in N.D.C.C. chs. 23-11 and 54-40 to form a joint LHA. See N.D.C.C. ? 54-40-08(1) (allowing any political subdivision to enter into an agreement for joint or cooperative action "to carry out any function or duty which may be authorized by law or assigned to one or more of them.") Furthermore, it is my opinion that Section 49 of House Bill 1347, commonly known as "The Tool Chest Bill," would also authorize one or

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more county commissions to jointly establish an LHA under chapter 23-11.

III. Whether a county commission may contract with a local housing authority from another jurisdiction, either a county or city, to serve as the housing authority for the contracting county?

This question was discussed and answered under I above. Because both House Bill 1240 and HUD require an LHA to be established pursuant to N.D.C.C. ch. 23-11 to implement the Section 8 program through the preemption process, and because a joint powers agreement does not create an LHA, it is my opinion a county commission does not meet the HUD requirements or the requirements of House Bill 1240 by contracting with an LHA from another jurisdiction to serve as the LHA for the contracting county.

IV. Whether a county commission may contract with a local housing authority from another jurisdiction, either a county or city, to provide administration of services of the Section 8 certificate and voucher program for the contracting county?

A county has no authority to act as a housing authority unless it follows the procedures set forth in N.D.C.C. ch. 23-11. N.D.C.C. ? 23-11-01 sets out the jurisdiction of a local housing authority. A local housing authority may not act as a local housing authority outside its own jurisdiction. Therefore, under current law (N.D.C.C. ch. 54-40) a county commission may not contract with a local housing authority to provide administration of services of the Section 8 certificate and voucher program for the contracting county. However, on August 1, 1993, when the Tool Chest Bill becomes effective that situation will change.

Although the Tool Chest Bill uses the same language as currently found in N.D.C.C. ch. 54-40, the intent of the drafters and the Legislature was to allow entities to contract to do those things which only one entity had the authority to do. General statutory construction principles require application of a presumption that when the Legislature uses language which has previously been interpreted by the courts to mean one thing, that meaning will continue. Nonetheless, a presumption can be overcome by other factors. In this case the Legislature's intent in enacting the Tool Chest Bill was to allow local governments to provide effective yet efficient government by engaging in activities including entering joint powers agreements, and taking other actions. H.B. 1347 ? 1(2). This intent is furthered by interpreting House Bill 1347's language to allow a county commission to contract with an LHA of another jurisdiction to administer the Section 8 certificate and voucher program on behalf of the contracting county. Consequently, in my opinion, beginning August 1, 1993, a county commission may contract with an LHA to administer the Section 8 Certificate and voucher program for the contracting county.

A difficulty remains, however, since only an LHA established under N.D.C.C. ch. 23-11 may proceed under House Bill 1240 to preempt the state from acting with

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regard to housing certificates and vouchers. HB 1240, ? 2. Further an LHA may only exercise the authority granted the state under N.D.C.C. ? 54-17-07.6 within its "area of operation." HB 1240. Therefore it is my opinion that a county commission cannot preempt the state housing authority unless it creates an LHA under N.D.C.C. ch. 23-11. However, if the county commission first establishes an LHA under N.D.C.C. ch. 23-11, the new LHA could preempt the state housing authority. If the county chooses to preempt in this manner, it could either administer the program itself or contract with an existing LHA to administer the certificates and vouchers.

Underlying all of this is the fact that HUD is unable to contract for the provision of services with an entity which is not a PHA. Because a contract between a county commission and an LHA does not recreate either of those entities as a local housing authority for that county, HUD may not contract with either entity for the provision of Section 8 certificate and voucher services in the contracting county.

I trust this gives you the guidance needed to implement the provisions of House Bill 1240. If other questions arise during this process, please feel free to contact me or the members of the transition team appointed by the Industrial Commission who are Tim Roby in the Governor's office, and Pat Fricke in the Housing Finance Agency. In addition you may contact Assistant Attorney General Rosellen Sand.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rms/vkk
cc: Deb Carpenter
Pat Fricke, Housing Finance Agency
Karlene Fine, Industrial Commission
Tim Roby, Governor's Office

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Burleigh County State's Attorney
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415 East Thayer Avenue
Bismarck, ND 58501

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Ms. Deborah J. Carpenter
Attorney at Law
P.O. Box 2761
Bismarck, ND 58502-2761