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LETTER OPINION
2005-L-28

October 6, 2005

Mr. Thomas Christensen
North Dakota State Soil Conservation Committee
2718 Gateway Ave Ste 104
Bismarck, ND 58503-0585

Dear Mr. Christensen:

Thank you for your letter asking whether farm tree planting operations are exempt from North Dakota's one-call excavation notice system established under N.D.C.C. ch. 49-23. It is my opinion that two possible exceptions apply: (1) trees may be planted for agricultural purposes so long as the soil is not disturbed to 18 inches or deeper, or (2) trees may also be planted for gardening or landscaping so long as the soil is not disturbed to 12 inches or deeper.

ANALYSIS

North Dakota established a one-call excavation notice system to prevent damage to underground facilities near excavation sites. See N.D.C.C. § 49-23-05. This law generally requires an excavator to give notice to a service center before excavating so that underground facilities may be marked on the surface. N.D.C.C. § 49-23-04. There are five specific exceptions from the notice requirement, two of which are applicable to planting activities:

> "Excavation" means any operation in which earth, rock, or other materials in or below the ground is moved or otherwise displaced by means of hand or power tools, power equipment, or explosives and includes grading, trenching, digging, ditching, drilling, auguring, tunneling, boring, scraping, and cable and pipe plowing and driving. The term does not include:
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> * * *
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> b. Plowing, cultivating, planting, harvesting, and similar operations in connection with agricultural activities, unless any of these activities disturbs the soil to a depth of eighteen inches [45.72 centimeters] or more.

c. Gardening and landscaping unless it disturbs the soil to a depth of twelve inches [30.48 centimeters] or more.

* * *

N.D.C.C. § 49-23-01(7) (emphasis supplied). It is my understanding that your question concerns planting windbreaks and shelterbelts for farms and ranches, and also for rural residents who do not farm or raise livestock.

The exception for agricultural activities that do not disturb the soil to a depth of 18 inches or more is a very broad exception. Words used in a statute are to be understood in their ordinary sense, unless a contrary intension plainly appears or the words are otherwise explained. N.D.C.C. § 1-02-02. The plain meaning of agriculture is the "science, art, and business of cultivating the soil, producing crops, and raising livestock, farming." The American Heritage Dictionary, 88 (2d coll. ed. 1991). A similar definition was used to define agriculture in Lowe v. Workmen's Comp. Bureau, 264 N.W.837, 838 (N.D. 1936).

Planting trees has generally been considered an agricultural activity. Tree and planting nurseries have been held to come within the tax exemption for a farm plant, plainly implying that they are agricultural in purpose. See generally Boehn v. Burleigh County, 130 N.W.2d 170, 176 (N.D. 1964) (the term agriculture is sufficiently broad to include horticulture).[1]

Planting trees and shrubs to produce shelterbelts and windbreaks increases crop yields, protects and promotes healthy livestock, and protects homes and farm buildings from winter weather. Norman G. Jensen, Inc. v. United States, 408 F.Supp. 1379, 1383 (U.S.C.C. 1976). Planting shelterbelts and windbreaks is part of the science, art, and business of producing crops and raising livestock. Shrub or tree planting is also an activity eligible for funding as an agriculturally related permanent soil and water conservation project under the Agriculture Development Act. N.D.C.C. § 4-36-03(1).

Accordingly, it is my opinion that the act of planting trees for nurseries, or for farm and ranch windbreaks or shelterbelts, is excluded from the requirement to notify the one-call excavation notification center as an agricultural activity, so long as the planting activity does not disturb the soil to a depth of 18 inches or more.

The exception for gardening and landscaping may also apply to tree planting. Gardening means to cultivate a plot of land for a garden, and a garden is a plot of land used to cultivate flowers, vegetables or fruit, or is ground adorned with flowers, shrubs, and trees. The American Heritage Dictionary, 548 (2d. coll. ed. 1991). Landscaping generally means

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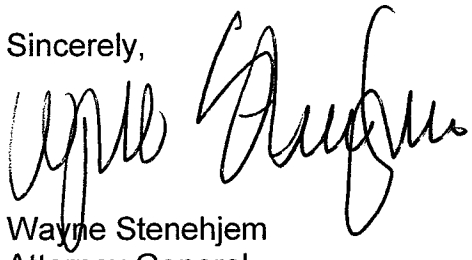
[1] But see Unemployment Compensation Division v. Valkers Greenhouses, Inc., 296 N.W. 143 (N.D. 1941) (a greenhouse laborer is not an agricultural laborer).

to adorn or improve a section of ground by contouring the land and planting flowers, shrubs or trees. The American Heritage Dictionary, 713 (2d coll. ed. 1991). It is my further opinion that, if trees are planted for gardening and landscaping activities, the person planting the trees is not required to notify the one-call service center if the planting does not disturb the soil to a depth of twelve inches or more. This exception applies to non-agricultural windbreak or shelterbelt planting activities.

Sincerely,



Wayne Stenehjem
Attorney General

wm/eee/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).