

CAPITAL CONSTRUCTION PROJECTS - AUTHORIZATION OF EXPANSIONS BY THE BUDGET SECTION

This memorandum was prepared in response to a request for information regarding the authority of a state agency or the Budget Section to expand a capital project authorized by the Legislative Assembly, Budget Section authority to authorize a new capital project, and the constitutionality of the Budget Section's authority.

CONSTITUTIONAL AND STATUTORY REQUIREMENTS FOR SPENDING PUBLIC FUNDS

The Constitution of North Dakota Article X, Section 12 provides that all public moneys, from whatever source derived, must be remitted to the State Treasurer monthly for deposit in the state treasury and may be spent only pursuant to legislative appropriations. The North Dakota Supreme Court has stated that it has "consistently held that an appropriation is the setting apart of a definite sum of money for a specific purpose in such a way that public officials are authorized to spend that sum, and no more, for the specified purpose." *Red River Human Services Foundation v. State*, 477 N.W.2d 225 (1991). Nonetheless, the Supreme Court has also indicated that continuing appropriations do not violate Article X, Section 12 of the constitution. In *Gange v. Clerk of Burleigh County District Court*, 429 N.W.2d 429 (1988), the court stated that continuing appropriations are not new to the legislative process and are a valid appropriation made by the Legislative Assembly.

AUTHORITY OF STATE ENTITY TO EXPAND CAPITAL CONSTRUCTION PROJECT

North Dakota Century Code Section 54-27-12 prohibits state agencies and the State Board of Higher Education from making "any expenditure in the matter of the erection or improvement of any public building" in excess of any appropriation made for that purpose by the Legislative Assembly. Section 54-44.1-10 prohibits state officials from making payments unless authorized by law.

Absent a continuing appropriation, there does not appear to be any specific authority to allow a state entity to expend additional funds beyond what has been appropriated by the Legislative Assembly to expand a capital construction project if the expansion is using public funds. However, Section 15-10-12.1 provides that the State Board of Higher Education may, with the approval of the Budget Section of the Legislative Council, authorize the use of land under the control of the board and construct buildings and

campus improvements that are financed by donations, gifts, grants, and bequests. That section also provides that the Budget Section may establish guidelines regarding the types of gifts for minor improvements that do not require the approval of the Budget Section based upon the financial impact of the construction projects upon the state. Section 15-10-12.1 provides no limitations upon the authority of the Budget Section to accept buildings and improvements financed by donations, gifts, grants, or bequests.

Although Section 15-10-12.1 allows the State Board of Higher Education to accept certain buildings and improvements, another statutory provision prohibits campus improvements without legislative approval. Chapter 15-55, which allows the State Board of Higher Education to set aside portions of campuses for authorized revenue-producing buildings or other revenue-producing campus improvements, prohibits the construction of buildings or campus improvements without specific legislative authority. Section 15-55-10 provides that "[n]o building or buildings or other campus improvements may be erected or constructed, and no bonds may be issued for the payment of the cost of any building or buildings or other campus improvements under the terms of this chapter, save and except for such specified buildings or other campus improvements as may be from time to time designated and authorized by legislative act, nor may any such building or buildings or other campus improvements be erected at a cost exceeding the amount fixed by the Legislative Assembly in such act as the maximum to be expended for such buildings or other campus improvements."

It could be argued that the prohibition in Section 15-55-10 is limited to the construction of revenue-producing buildings and campus improvements funded by bonds under Chapter 15-55 because the section is in a chapter on the funding of campus improvements by revenue bonds. However, it appears that the quoted language is a clear prohibition on the construction of any building on a campus without legislative approval. Nonetheless, if Section 15-55-10 is interpreted to prohibit the construction of buildings and campus improvements in general, Section 15-10-12.1 appears to provide an exception for buildings and improvements financed by donations, gifts, grants, and bequests.

Section 1-02-07 provides that whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions. However, if the conflict between

the two provisions is irreconcilable, the special provision must prevail and must be considered as an exception to the general provision, unless the general provision is enacted later, and it is the manifest intent that the general provision prevail. Therefore, because Section 15-10-12.1 is more specific and was enacted at a later time, it appears that that section would supersede Section 15-55-10 insofar as it applies to buildings financed by donations, gifts, grants, and bequests if those two sections are in conflict.

There still may be some question as to whether a state entity has the authority to expend excess funds from a project to expand the project if the project authorized by the Legislative Assembly is completed under the budgeted amount. It is a common rule that where a condition or limitation is attached to an appropriation, that condition or limitation must be followed. *63C Am. Jur. 2d Public Funds § 42.*

In general, legislation authorizing a construction project identifies the project and appropriates a sum of money for the project but does not contain specific information regarding the scope of the project. Although there have been no North Dakota judicial decisions that have addressed this specific question, it can be argued that an expansion of a project using excess appropriated funds is not a violation of Article X, Section 12 of the constitution and the statutory provision relating to the use of appropriations because the funds have been appropriated for the purpose of constructing or renovating a particular building or structure. Therefore, the expansion of the project using the excess funds could be considered an approved use of the appropriated funds for the specified purpose.

It could also be argued that the excess funds could only be spent upon approval of the Emergency Commission. Section 54-16-03 prohibits a state officer from spending appropriated funds for purposes other than the specific purpose for which the funds were appropriated without approval from the Emergency Commission. Section 54-16-04 also limits the authority of the Emergency Commission to approve a transfer without Budget Section approval if the transfer exceeds \$50,000.

On the other hand, an argument could also be made that because specific information is often included in the budget requests and other documents accompanying the legislation authorizing a project, the scope of the project must be limited to that which was proposed in those documents. If a court were to review the legislative history of legislation appropriating money for a project and determine that the intent of the Legislative Assembly was to limit the scope of the project, it could reasonably conclude that any expansion of the project may violate Article X, Section 12 of the constitution because the expansion would be beyond the specified purpose of the Legislative Assembly.

CONSTITUTIONALITY OF SECTION 15-10-12.1

The United States Constitution provides for three branches of government--legislative, executive, and judicial and the Constitution of North Dakota Article XI, Section 26 provides that the "legislative, executive, and judicial branches are coequal branches of government." As stated by the North Dakota Supreme Court in *State v. Kromarek*, 78 N.D. 769, 52 N.W.2d 713 (1952), each of these three branches has powers separate and distinct and, as far as practical, independent of each other.

The North Dakota Supreme Court, in *Verry v. Trenbeath*, 148 N.W.2d 567 (N.D. 1967), described the allocation of powers to the three branches as follows:

The legislative branch deliberates upon and decides the policies and principles to be adopted for the future and enacts them into law. The executive branch administers the law so enacted. The judicial branch construes the law, passes on its constitutionality, and determines, in accordance with the law, the rights and interests of the individual citizen.

This tripartite division of powers is a fundamental theory in State and Federal government. . . .

The North Dakota Supreme Court spelled out the distinctions between the three branches of government in the case of *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392 (N.D. 1987), in which the court said:

The legislative, executive, and judicial branches are coequal branches of government, and each branch is supreme in its own sphere. Art. XI, 26, N.D. Const.; *State ex rel. Mason v. Baker*, 69 N.D. 488, 288 N.W. 202 (1939). This court has long recognized that the creation of the three branches of government by our constitution operates as an apportionment of the different classes of power **whereby there is an implied exclusion of each branch from the exercise of the functions of the others.** (emphasis supplied)

The North Dakota Supreme Court, in *State ex rel. Johnson v. Baker*, 74 N.D. 244, 21 N.W.2d 355 (1945), said all governmental sovereign power is vested in the Legislative Assembly, except such as is granted to the other departments of government or expressly withheld from the Legislative Assembly by constitutional restrictions. The court further said constitutional provisions are in the nature of grants of powers to the executive and judiciary but are limitations upon the power of the Legislative Assembly. In *State ex rel. Agnew v. Schneider*, 253 N.W.2d 184 (N.D. 1977), the court said the Legislative Assembly has plenary powers except as limited by the state constitution, the United States Constitution, and congressional acts in matters in which the federal government is supreme. This principle was reiterated

in *State v. Anderson*, 427 N.W.2d 316 (N.D. 1988), and in *State v. Ertelt*, 548 N.W.2d 775 (N.D. 1996), in which the court also contrasted the state and federal constitutions and noted the latter is an instrument of grants of authority.

In *ex parte Corliss*, 16 N.D. 470, 114 N.W. 962 (1907), the North Dakota Supreme Court said that because the Constitution of North Dakota provides for the election of a Governor and an Attorney General, "[i]t seems too obvious for discussion that the framers of the Constitution, in providing for the election of these officers by the people, thereby reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided." In *State v. Erickson*, 72 N.D. 417, 7 N.W.2d 865 (1943), the North Dakota Supreme Court quoted this language and found that the Legislative Assembly had no constitutional power to abridge the inherent powers of the Attorney General.

North Dakota is not unique in separating the powers of the three branches of government and in prohibiting the legislative branch from entrenching upon the powers of the other branches of state government. There are at least two cases in which the United States Supreme Court has found unconstitutional congressional actions that infringed upon the role of the executive branch. In *I.N.S. v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), the United States Supreme Court found unconstitutional a section of the Immigration and Nationality Act which authorized one house of Congress, by resolution, to invalidate decisions of the executive branch of the federal government relating to certain immigration matters. In that case, the Court said legislative action must be performed by the constitutional requirements of passage of a measure by a majority of both houses and presentation to the President for possible veto.

Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986), involved the legislation popularly known as the Gramm-Rudman-Hollings Act, which was intended to eliminate the federal budget deficit. The legislation required certain across-the-board budget cuts if the federal deficit exceeded certain maximums allowed by the law. The legislation gave considerable authority to the Comptroller General, an official nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President Pro Tempore of the Senate and confirmed by the Senate. However, the Comptroller General was removable only at the initiative of Congress. The Court said:

To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . . The structure of the Constitution does not permit Congress to execute the laws;

it follows that Congress cannot grant to an officer under its control what it does not possess.

The United States Supreme Court concluded that, because Congress had retained removal authority over the Comptroller General, that official could not be entrusted with executive powers. The Court said Congress could control the execution of its enactment by passing new legislation, but Congress could not retain control over the execution of the legislation passed by Congress and therefore Congress had intruded into the executive function.

The separation of powers doctrine is well-established in other jurisdictions. An example is the case of *People v. Tremaine*, 168 N.E. 817 (N.Y. 1929). In this case, portions of the executive budget were passed and approved in lump sum form by the Legislature, with the provision that the Governor and the chairmen of the legislative finance committees would act in approving segregation of the lump sums within certain departments. The action was brought to prevent expenditure of funds segregated without approval of legislators. In striking down the segregation provisions of the act requiring approval by the chairmen of the legislative finance committees, the Court of Appeals of New York said that while the Legislature is supreme in the appropriation of money, it cannot appoint two of its members to carry out the law. The court said that this was a clear attempt by the Legislature to confer administrative power upon two of its members and thus usurp the executive power by indirection. Thus, the court held that while the Legislature has the power to appropriate money, the executive has the power to administer and spend the money appropriated, except as to legislative and judicial appropriations.

The issue of an unlawful delegation of legislative power arises whenever a law attempts to give someone else, usually in the executive branch, the authority to make policy decisions without adequate guidelines. The Legislative Assembly must declare the policy of the law and must definitely fix the legal principles that are to control the action taken. See *MDU v. Johanneson*, 153 N.W.2d 414 (N.D. 1967).

Ralston Purina Company v. Hagemeister, 188 N.W.2d 405 (N.D. 1971), was a case in which the authority of the Poultry Improvement Board to establish license fees was challenged as an unlawful delegation of legislative authority. The board was given the authority to reduce the maximum license fees established by law if the board determined that any or all of such fees or charges were excessive or unduly burdensome or that a lesser schedule of fees would produce all the income necessary. The court said:

It is elementary that . . . the Legislature may not delegate purely legislative powers to any other board, body, commission, or person. However, although it may not delegate purely legislative power, it has been held that the

Legislature may authorize others to do certain things and to exercise certain powers which are not exclusively legislative and which the Legislature itself might do but cannot because of the detailed nature of the things to be done

Thus the power to ascertain certain facts, which will bring the provisions of a law into operation by its own terms, is not a delegation of legislative power. If the law sets forth reasonably clear guidelines which will enable the administrative board to ascertain the facts, so that the law takes effect on such facts under its own provisions and not according to the discretion of the administrative board, the power so delegated is not legislative. . . .

. . . Society in recent years has become more and more complex, and the courts have held that the vesting in other bodies of some powers ordinarily exercised by the Legislature so that this complex society may function, is not unconstitutional so long as the Legislature itself retains the right to revoke the power which it delegates. The power to make a law is legislative, but the conferring of authority as to its execution, which authority is to be exercised under the provisions of the law itself, as enacted by the Legislature, may be delegated. The true distinction between the powers which the Legislature may delegate and those which it may not is to be determined by ascertaining whether the power granted gives authority to make a law or whether the power pertains only to the execution of the law which was enacted by the Legislative Assembly.

On petition for rehearing, the court determined the license fee was a tax and upheld the law. Concerning the delegation of power question, the court stated:

Pure legislative power never may be delegated by the Legislature to a public officer, board, or commission. Legislative power which may not be delegated includes a determination of whether the law should be enacted, the fixing of a time when the law shall take effect, and a designation of the persons to whom the provisions of the law shall apply. In other words, legislative power which may not be delegated is the power to make a complete law. However, if the law as enacted by the Legislative Assembly furnishes a reasonably clear policy or standard of action which will guide and control the public officer, commission, or board in determining the facts or situations to which the provisions of the law shall apply, so that the law will take effect upon the existence of such facts or situations by virtue of its own terms and not according to the whim, notion, or fancy of the administrative officer, commission, or board, then the power which is delegated by the Legislature to such

officer, commission, or board is not legislative, but is administrative. . . .

In 1985 the North Dakota Supreme Court upheld a statute granting the State Historical Board the authority to put historical sites on a registry. In *Stutsman County v. State Historical Soc. of North Dakota*, 371 N.W.2d 321 (N.D. 1985), the court found this power did not give the board the authority to make law but only to execute the law.

In 1990 the North Dakota Supreme Court in *North Dakota Council of School Administrators v. Sinner*, 458 N.W.2d 280, stated that the court now follows the modern view that recognizes that "in a complex area, it may be necessary and appropriate to delegate in broad and general terms, as long as there are adequate standards and procedural safeguards." In that case, the Supreme Court concluded that the Legislative Assembly's delegation of authority to the director of the budget to make allotments reducing appropriations was not an unconstitutional delegation of the authority of the Legislative Assembly.

There are no North Dakota cases in point concerning whether a delegation of authority to the Budget Section by statute represents an unlawful delegation of legislative authority. In 1987 in a letter to Mr. Richard L. Rayl, Director of the Office of Management and Budget, the Attorney General addressed the propriety of a statute authorizing the Budget Section to approve budget reduction allotments made by the director of the budget in response to initiative or referendum actions. The Attorney General concluded that "there exists a substantial question whether the role reserved by the legislature in executing N.D.C.C. Section 54-44.1-13.1 impermissibly usurps executive functions and violates fundamental separation of powers principles." The Attorney General repeated this conclusion as follows:

Again, I must emphasize, however, that there is considerable doubt that the Budget Section has any constitutional authority in the process in light of relevant United States Supreme Court decisions.

It is significant that under the Constitution of North Dakota Article VI, Section 4 a legislative enactment may not be declared unconstitutional unless at least four of the five members of the Supreme Court agree that the enactment violates the constitution. Also, there is a presumption of constitutionality that applies to all enactments of the Legislative Assembly. Among cases that have reviewed the presumption of constitutionality are *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979), *Menz v. Coyle*, 117 N.W.2d 290 (N.D. 1962), and *State v. Moore*, 286 N.W.2d 274 (N.D. 1979). Therefore, the burden would be on anyone challenging the constitutionality of any statute that provides authority to the Budget Section.

SUMMARY

The Constitution of North Dakota provides that public moneys may be spent only pursuant to legislative appropriations. North Dakota Century Code Section 15-55-10 prohibits the construction of any campus buildings or improvements without legislative approval. However, the Legislative Assembly has also created an exception to the prohibition in Section 15-10-12.1, which allows the State Board of Higher Education to accept campus buildings or improvements that are financed by donations, gifts, grants, or bequests.

There is some question regarding the authority of a state entity to expand a construction project using excess funds that have been appropriated for the project. It is a general rule that conditions or limitations may be attached to an appropriation. However, if an appropriation simply appropriates a sum of money for a particular project, it can be argued that any excess funds may be used to expand the project.

Although there is no controlling legal authority in North Dakota which addresses this matter, it appears that the authority of a state entity to expand a project will be dependent upon the specificity of the appropriation language.

Although it may be argued that the Budget Section's authority under Section 15-10-12.1 is an unlawful delegation of legislative authority and a violation of the separation of powers provisions in the Constitution of North Dakota, every enactment of the Legislative Assembly is presumed to be constitutional. Numerous court decisions in North Dakota and other state and federal courts, as well as an unofficial opinion of the Attorney General, indicate that a provision such as Section 15-10-12.1 may be constitutionally defective. However, it is important to remember that the Constitution of North Dakota provides that it takes four of the five Supreme Court justices to declare a state law unconstitutional.