Prepared by the North Dakota Legislative Council staff for the Legislative Audit and Fiscal Review Committee

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STATE LIABILITY FOR BOARDS, COMMISSIONS, AND COMMODITY GROUPS

This memorandum addresses the issue of whether the state is financially liable for the debts of a board; commission; or other entity, such as a commodity group. As a related issue, this memorandum addresses whether any statutory restrictions exist which would prohibit a board, commission, or commodity group from maintaining a deficit fund balance. This term "commodity group," as defined in North Dakota Century Code Section 4-01-26, includes the following entities: North Dakota Barley Council, North Dakota Beef Commission, North Dakota Beekeepers Association, North Dakota Corn Utilization Council, North Dakota Dairy Promotion Commission, North Dakota Dry Bean Council, North Dakota Dry Pea and Lentil Council, North Dakota Oilseed Council, North Dakota Potato Council, North Dakota Soybean Council, North Dakota Turkey Federation, and North Dakota Wheat Commission.

LIABILITY OF BOARD, COMMISSION, OR COMMODITY GROUP

In September 1994 the North Dakota Supreme Court abolished the doctrine of sovereign immunity in a 4-to-1 decision. In *Bulman v. Hulstrand Constr. Co. and the State of North Dakota*, 521 N.W.2d 632 (N.D. 1994), the Supreme Court held that Article I, Section 9, of the Constitution of North Dakota "does not bestow exclusive authority upon the legislature to waive or modify sovereign immunity of the State from tort liability and does not preclude this Court from abolishing that common-law doctrine." Although the court abolished sovereign immunity, the court indicated that its decision should not be interpreted to import tort liability for the exercise of discretionary acts, including legislative and quasi-legislative acts and judicial and quasi-judicial acts.

In 1995 the Legislative Assembly enacted legislation, codified as Chapter 32-12.2, which provided for the procedures, limits, and exclusions for bringing claims against the state for personal injury or property damage. Under Section 32-12.2-01(7), "state" is defined to include "an agency, authority, **board**, body, branch, bureau, **commission**, committee, **council**, department, division, industry, institution, instrumentality, and office of the state." (emphasis supplied) Section 32-12.2-01(2) defines "injury" as "personal injury, death, or property damage" and Section 32-12.2-01(5) provides that "property damage" includes "injury to or destruction of tangible or intangible property."

Based upon the definition of "state" contained in Chapter 32-12.2, a board, commission, or an entity that is included in the definition of commodity group is considered "state" and, therefore, participates in and is covered by the risk management fund. Pursuant to Chapter 32-12.2, the state would defend and be liable for up to $250,000 per person and $1 million for any number of claims arising from any single occurrence in an action against a state entity for an injury proximately caused by the alleged negligence, wrongful act, or omission.

While Chapter 32-12.2 deals with the state's liability with respect to personal injury or property damage, this chapter is relevant in the discussion of the state's liability for the debts of a board, commission, or commodity group. Some of the factors used by courts in determining whether an entity is a state entity for purposes of tort liability or immunity include whether the entity functions statewide, whether the entity does the state's work, whether the entity was created by an Act of the legislature, and whether the entity receives legislative appropriations. The same criteria may be used when determining whether a board, commission, or commodity group is considered to be a state entity for purposes of liability for other civil actions, including breach of contract. The boards, commissions, and commodity groups, which are included in the definition of "state" in Section 32-12.2-01(7), generally appear to meet this criteria. It would appear, therefore, that if a board, commission, or similar entity is considered to be "state" for purposes of liability, the state may be liable for the debts of such an entity.

DEFICIT FUND BALANCE OF BOARD, COMMISSION, OR COMMODITY GROUP

While there is no specific constitutional or statutory provision prohibiting a board, commission, or other state entity, such as a commodity group, from maintaining a deficit fund balance, there are several theories that may be applicable.

Powers of Commodity Groups

Titles 4 and 4.1 contain statutes relating to power, duties, and limitations of the various councils, commissions, associations, and federations that are statutorily referred to as commodity groups. Any powers granted to commodity groups contained in these titles exist by virtue of a legislative grant of those powers. The North Dakota Supreme Court has reviewed the extent of the authority of various legislatively created entities, including cities and school boards. In *Ebach v. Ralston*, 469 N.W.2d 801, 804 (N.D. 1991), the court held that cities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant. The court, regarding school boards, has held that public schools

of the state are under legislative control and that school boards have no powers except those conferred by statute (*Seher v. Woodlawn School Dist. No. 26*, 59 N.W.2d 805 (N.D. 1953)); that school boards may exercise only those powers as are expressly or impliedly granted by statute (*Fargo Educ. Ass'n v. Fargo Pub. School Dist. No. 1*, 291 N.W.2d 267 (N.D. 1980)); and that, in defining the powers of school officers, the rule of strict construction applies, and any doubt as to the existence or extent of those powers must be resolved against the school board (*Batty v. Board of Education of City of Williston*, 269 N.W. 49 (N.D. 1936)).

Based upon the court's analysis of legislatively created entities, a commodity group is a creature of statute and may exercise only those powers expressly or impliedly granted by statute. While several of the statutes contained in Titles 4 and 4.1 expressly grant to a member or commissioner of a commodity group the authority to spend the funds collected and appropriated by a continuing appropriation, none of the commodity groups contained in Title 4 or 4.1 has been granted the authority to overspend or maintain a deficit balance. Because the powers of the commodity groups do not include the express or implied authority to maintain a deficit fund balance, it may be concluded that a commodity group does not have the authority to do so.

Constitutional and Statutory Prohibitions on Indebtedness

Constitutional Prohibition

Article X, Section 13, of the Constitution of North Dakota, which deals with debt of the state, provides:

> The state may issue or guarantee the payment of bonds, provided that all bonds in excess of two million dollars shall be secured by first mortgage upon real estate in amounts not to exceed sixty-five percent of its value; or upon real and personal property of state-owned utilities, enterprises, or industries, in amounts not exceeding its value, and provided further, that the state shall not issue or guarantee bonds upon property of state-owned utilities, enterprises, or industries in excess of ten million dollars.
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> **No further indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes, to be clearly defined.** Every law authorizing a bond issue shall provide for levying an annual tax, or make other provision, sufficient to pay the interest semiannually, and the principal within thirty years from the date of the issue of such bonds and shall specially appropriate the proceeds of such tax, or of such other provisions to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war or to provide for the public defense in case of threatened hostilities. (emphasis supplied)

The North Dakota Supreme Court has addressed the indebtedness provision contained in Section 13 and has held that if a debt is backed by the state it must comply with the constitutional debt limitation of this section. *State ex rel. Lesmeister v. Olson*, 354 N.W.2d 690, 696 (N.D. 1984). The court, however, has made two exceptions, known as the "current expenses" exception and the "special fund" exception, to this general rule.

With regard to the "current expenses" exception, the court has stated that "[t]he term 'indebtedness,' as used in [Article X, Section 15] of our constitution as amended, means the amount of debts less collectible taxes and other funds." *Jones v. Brightwood Independent School District No. 1*, 247 N.W. 884, 887 (N.D. 1933). The court also has concluded that "'debt' and 'indebtedness' as used in [Article X, Section 15] refer to pecuniary obligations imposed by contract, except obligations to be satisfied out of current revenue." *Haugland v. City of Bismarck*, 429 N.W.2d 449, 455-56 (N.D. 1988). Using the court's rationale in these cases, debt incurred by a board, commission, or commodity group which is payable within the biennium is exempt from the constitutional debt limitation under the "current expenses" exception.

With regard to the state debt limit and the "special fund" exception, the court has concluded that a financial obligation which is "secured by and payable exclusively from revenues to be realized from public property acquired with the proceeds of the obligations or assessments on private property benefited by the special improvements" is exempt from the debt limitation of Article X, Section 13. *State ex rel. Lesmeister v. Olson*, 354 N.W.2d 690, 695 (N.D. 1984) (citing *Marks v. City of Mandan*, 296 N.W. 39 at 47 (N.D. 1941)). Based upon the "special fund" exception, if the deficit fund balance of a board, commission, commodity group, or other entity met the criteria of the "special fund" exception, the deficit may be considered an exception to the indebtedness provision in Section 13.

Statutory Prohibition

Chapter 54-16, which provides for the establishment, powers, and duties of the Emergency Commission, contains a provision that deals with the debt of a state officer. Section 54-16-03 provides that "[a] state officer may not expend, or agree or contract to expend, any amount in excess of the sum appropriated for that expenditure, and may not expend an amount appropriated for any specific purpose or fund or for any other purpose without prior approval in the form of a transfer approval or expenditure authorization as provided in this chapter."

This section provides that any debt or deficit created by a state officer in violation of this section is void. Under Section 54-16-00.1, "state officer" is defined as "an elected or appointed officer, board, commission, director, or employee of the state having the authority to transfer or expend any money appropriated by the legislative assembly."

Section 54-16-03.1 provides that when an emergency exists, a state officer may present to the Emergency Commission "an itemized petition requesting approval to transfer money and spending authority between funds or line items pursuant to section 54-16-04; accept and expend federal funds pursuant to section 54-16-04.1; accept and expend state contingency funds pursuant to section 54-16-09; accept and expend other funds pursuant to section 54-16-04.2; or recommend full-time equivalent positions pursuant to section 54-16-04.3." Section 54-16-04 gives the Emergency Commission the authority to order money or spending authority transferred from one fund or line item to another fund or line item belonging to or appropriated for the same institution or board or the same state enterprise, to order a transfer of spending authority from the state contingencies appropriation, or, in an extremity, to authorize money to be drawn from the state treasury to meet the emergency until the Legislative Assembly can make an appropriation available.

SUMMARY

A board, commission, or other entity, such as a commodity group, for the purposes of liability, is a state entity that participates in and is covered by the state's risk management fund. The state would defend and be liable for a claim against a board, commission, or commodity group for an injury proximately caused by the alleged negligence, wrongful act, or omission of the board, commission, or commodity group. Because boards, commissions, and commodity groups are treated as state entities for purposes of tort liability, it is likely that the liability for the debt of such an entity would also lie with the state.