

**LETTER OPINION
2005-L-44**

December 8, 2005

Mr. Gary D. Preszler
State Land Commissioner
State Land Department
1707 N 9th St
Bismarck, ND 58506-5523

Dear Commissioner Preszler:

Thank you for your letter in which you ask about non-compliance with statutory notice requirements for auctions at which state land is offered for lease. It is my opinion that the constitutional and statutory requirement of publishing notice of a proposed lease auction three times is mandatory.

ANALYSIS

At statehood, North Dakota received a significant amount of land from the federal government.¹ These lands - often referred to as "school lands" - are held in trust for the benefit of the state's schools and certain institutions.² The Board of University & School Lands ("Land Board") manages these lands.³ The Land Board's day-to-day work is carried out by the Land Commissioner and the Land Department staff.

The constitution sets forth uses to which school lands may be put. They may be leased, but only if the Legislature permits.⁴ The Legislature has so provided.⁵ Leases can be for no longer than five years and must be made at "public auction after notice."⁶ The notice required for the lease auctions is the same as that required when school lands are sold.⁷ Notice of land sales "shall" be published in the official newspaper for the

¹ N.D. Enabling Act §§ 10-19, 25 Stat. 676 (1889), reprinted in 13A N.D.C.C. 63; N.D. Const. art. IX.

² N.D. Const. art. IX, § 1; State Highway Comm'n v. State, 297 N.W. 194, 195 (N.D. 1941).

³ N.D. Const. art. IX, § 3.

⁴ N.D. Const. art. IX, § 8.

⁵ N.D.C.C. ch. 15-04.

⁶ N.D. Const. art. IX, § 8.

⁷ Id.

county in which the land is located once each week for three weeks prior to the sale date.⁸ State law restates this notice requirement for leases of school lands.⁹ Thus, the advertising requirement is clear: notice of the lease auction “shall be” (the constitutional language) and “must be” (the statutory language), published once a week for three weeks prior to the auction.

Lease sales are conducted at the county seat.¹⁰ The Land Department conducts these sales during October. At the auction, the high bidders must deposit one year’s rent, an amount based on their bids.¹¹ The Land Board, however, retains the authority to approve all leases.¹² As such, high bidders are not issued a lease until the Land Board reviews the auction and approves the leases.

Your letter indicates there are 27 tracts of school lands in Adams County currently eligible for lease. The Land Department intended to auction them in Hettinger on October 17, 2005. To prepare for the auction, the Department asked the Adams County Record to publish an auction ad for three weeks prior to October 17. On October 13, 2005, the Department received an affidavit of publication from the newspaper’s office manager stating that the ad had been published in the September 13, 20, and 27, 2005, editions of the Adams County Record. The Department went ahead with its October 17 auction in Hettinger. Each of the 27 tracts received bids. The successful bidders all paid the required one-year rental.

Your letter states that sometime after the auction the Land Department received a complaint. The complainant said that he had missed the auction because he had not

⁸ N.D. Const. art. IX, § 6.

⁹ N.D.C.C. § 15-04-09.

¹⁰ N.D.C.C. § 15-04-10.

¹¹ N.D.C.C. § 15-04-11.

¹² N.D.C.C. § 15-04-13. At these auctions the Land Department does not actually enter into leases; it accepts bids and takes a deposit from the high bidder but does not issue leases. The Department reports the auction results to the Land Board and the Land Board itself must approve any leases. N.D.C.C. § 15-04-13 (“The board of university and school lands approved and confirm such leases as in its judgment should be made. . . .”) The Board has wide discretion in managing school lands. Moses v. Baker, 299 N.W. 315, 316 (N.D. 1941); Fuller v. Bd. of Univ. & School Lands, 129 N.W. 1029, 1031 (N.D. 1911). In approving sales, it “must determine to its own satisfaction that the sale was in accordance with the law.” Id. at 1031. That same requirement applies to leases. A high bidder at a lease auction, therefore, is not entitled to a lease and may not assume he will actually secure one, but instead must wait until the lease is “approved and confirmed” by Land Board. N.D.C.C. § 15-04-13.

seen an ad in the paper. The Land Department sought to determine if the ads were properly run, and learned that the ad ran only twice, on September 13 and October 4, 2005. The affidavit of publication it received from the newspaper was therefore inaccurate.

These facts lead to your question whether the Land Board may approve the leases even though the auction was not advertised in full compliance with the notice requirements set forth in the constitution and Century Code.

The constitution states that the advertisement for lease auctions “shall” be published once a week for three weeks.¹³ The statute uses the word “must” in setting this same notice requirement.¹⁴ “Must” has the same meaning as “shall,”¹⁵ which generally imposes a mandatory duty.¹⁶ In Aquino v. Tinian Cockfighting Board,¹⁷ the agency neglected to fully comply with a statute requiring public notice for awarding a franchise license. The statute’s plain meaning mandated publication of the notice. “The word ‘shall’ is unambiguous . . . it means ‘must.’”¹⁸ It creates a mandatory duty, “absent any legislative intent to the contrary. . . . This is particularly so when the statute is addressed to public officials.”¹⁹ The publication requirement safeguards important public interests.²⁰ In Minnkota Power Cooperative, Inc., v. Lake Shure Properties,²¹ the Public Service Commission published notice 11 days before its hearing. The statute provided that notice “shall be given . . . at least 20 days prior to such hearings.”²² The court stated that the Commission’s failure to give the full 20 days was a “manifest abuse” of its discretion.²³ Therefore, it is my opinion that the use of “shall” and “must” in the constitution and statute are unambiguous and create a mandatory duty to publish notice three times.

¹³ N.D. Const. art. IX, §§ 6, 8.

¹⁴ N.D.C.C. § 15-04-09.

¹⁵ Greenwood v. Moore, 545 N.W.2d 790, 795 (N.D. 1996).

¹⁶ Solen Public School Dist. v. Heisler, 381 N.W.2d 201, 203 (N.D. 1986).

¹⁷ 1992 WL 396822, 3 N.M.I. 284 (N. Mar. I. 1992)

¹⁸ Id. at 292.

¹⁹ Id. at 292-93.

²⁰ Id. at 293.

²¹ 289 N.W.2d 230, 232-33 (N.D. 1980)

²² Id. at 233.

²³ Id. See also State ex rel. Johnson v. Clark, 131 N.W. 715, 718 (N.D. 1911) (statute required city to publish annexation resolution each week for two successive weeks; city council “had no power to either enlarge or limit the notice required by the statute”).

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Failure to comply with a mandatory duty has serious consequences: it “invalidate[s] subsequent proceedings.”²⁴ The Land Board must correct the non-compliance with the notice requirement before it can enter leases for its Adams County school lands.

Sincerely,

Wayne Stenehjem
Attorney General

cmc/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.²⁵

²⁴ Id.

²⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).