

**LETTER OPINION
2010-L-11**

June 28, 2010

The Honorable Robert R. Peterson
State Auditor
600 East Boulevard Avenue, Dept. 117
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter asking several questions regarding the performance audit of capital projects of the North Dakota University System (University System).¹ Your questions specifically involve North Dakota State University's College of Business building, Richard H. Barry Hall (Barry Hall),² and whether the University System complied with the requirements of 2007 N.D. Sess. Laws ch. 3, § 22. For the reasons stated below, it is my opinion that since the 2007 Session Law did not contain any requirements but rather was discretionary, and because the State Board of Higher Education (SBHE) has separate constitutional authority to allow North Dakota State University (NDSU) to lease a building from the NDSU Development Foundation (Foundation), there could be no violation of the Session Law.

ANALYSIS

In 2001, NDSU received legislative authorization and an appropriation of \$20 million to spend non-state general funds, or what are termed "Other Funds," from the Legislature to construct a College of Business Administration building and classrooms.³ The SBHE has statutory authority to approve certain construction projects, but legislative authorization is

¹ "The institutions of higher education under the control of the state board of higher education are a unified system of higher education, as established by the board, and are designated as the North Dakota university system." N.D.C.C. § 15-10-01.2.

² In 2007, the SBHE authorized North Dakota State University to rename the College of Business building to Richard H. Barry Hall. Minutes, N.D. State Bd. of Higher Educ., Sept. 20, 2007, p. 8.

³ Hearing on S.B. 2003 Before the Senate Comm. on Appropriations, 2001 N.D. Leg. (Jan. 2, 4) (on file with NDUS office).

required when the cost of a construction project exceeds \$385,000.⁴ In 2005, the Legislature authorized the SBHE to enter into an agreement with the Foundation for the construction of the College of Business building on the NDSU campus.⁵ In 2006, NDSU officials decided to relocate the College of Business off campus to a building in downtown Fargo that was owned by the Foundation instead of entering into an agreement for the construction of a building on campus.⁶ The Foundation agreed to renovate the Pioneer Building and lease it to NDSU for the College of Business.⁷

The SBHE approved NDSU's request for authorization to proceed with plans to relocate the College of Business to downtown Fargo indicating that, "gifts, donations, and other funds currently designated for the proposed College of Business building will be used to renovate and expand the Pioneer Building for its purposes."⁸ During the 2007 legislative session, NDSU officials discussed the change of plans for the College of Business in committee presentations, but did not initially request legislative approval because they did not believe legislative approval was required since NDSU was no longer constructing a building.⁹ In order to respond to legislators' questions about the relocation of the College of Business, NDSU officials decided to request language be added to the University

⁴ N.D.C.C. § 15-10-12.1 ("The state board of higher education may authorize campus improvements and building maintenance on land under the control of the board which are financed by donations, gifts, grants, and bequests if the cost of the improvement or building maintenance is not more than three hundred eighty-five thousand dollars. The consent of the legislative assembly is required for construction of any building financed by donations, gifts, grants, and bequests and for campus improvements or building maintenance financed by donations, gifts, grants, and bequests if the cost of the improvements or maintenance is more than three hundred eighty-five thousand dollars.").

⁵ 2005 N.D. Sess. Laws ch. 31, § 15 ("The state board of higher education may enter into an agreement or agreements with the North Dakota state university foundation or other private entity and do all things necessary and proper to authorize construction by the foundation or other private entity of a college of business building on the North Dakota state university campus, using donations, gifts, or other private funds.").

⁶ The Foundation purchased the Pioneer Mutual Life Insurance Company building and the Lincoln Mutual Life & Casualty Insurance Company building, both located in downtown Fargo. Facilities, Section 902.3 Attachment to Information Packet and Agenda for N.D. State Bd. of Higher Educ. Meeting (Nov. 9, 2006) (on file with NDUS office).

⁷ Facilities, Section 902.3 Attachment to Information Packet and Agenda for N.D. State Bd. of Higher Educ. Meeting (Nov. 9, 2006) (on file with NDUS office).

⁸ Minutes, N.D. State Bd. of Higher Educ., Nov. 8-9, 2006, p. 10.

⁹ E-mail from Pat Seaworth, Gen. Counsel, NDUS, to Matthew A. Sagsveen, Assistant Attorney Gen. (Feb. 23, 2010, 11:56 AM) (on file with author of e-mail).

System appropriations bill (H.B. 1003) to locate the College of Business off campus.¹⁰ The Legislature authorized the relocation of the College of Business building off the NDSU campus:

The state board of higher education may enter an agreement or agreements with the North Dakota state university foundation or other private entity and do all things necessary and proper to authorize construction by the foundation or other private entity of a college of business building off the North Dakota state university campus, using donations, gifts, or other private funds.¹¹

Even though the 2007 Session Law refers to “construction” of an off-campus building, the legislative history indicates the Legislature was aware that a new College of Business building was not being constructed and that NDSU was going to rent a building in downtown Fargo that was owned and renovated by the Foundation.¹² Based on

¹⁰ Id.

¹¹ 2007 N.D. Sess. Laws ch. 3, § 22.

¹² The legislative history for H.B. 1003 indicates the Legislature was aware of the change in plans for the College of Business location and structure and provides evidence of an intent to ratify (albeit reluctantly) what the SBHE and NDSU had already done. The chairman of the Senate Appropriations Committee noted that “[l]ast session NDSU asked for authority to construct a college of business building on the campus of NDSU. They were able to purchase through generous folks, a used building off campus and we had to change the law so they were not illegal when they cut the ribbon.” Hearing on H.B. 1003 Before the Senate Comm. on Appropriations, 2007 N.D. Leg. (Mar. 23) (Statement of Sen. Holmberg).

In a later conference committee, the following exchange took place:

Rep. Monson: Are there any other campuses that built off campus? Do we have specific language in other bills regarding purchasing buildings off campus?

Laura Glatt, Vice Chancellor of the University System: Not that I am aware of. The Foundation bought the buildings and NDSU pays rent to the foundation.

Hearing on H.B. 1003 Before Conference Comm., 2007 N.D. Leg. (Apr. 13) (Statements of Rep. Monson and Vice Chancellor Laura Glatt).

discussions that occurred during committee hearings, the Legislature arguably approved NDSU's plan to utilize the Foundation's downtown Fargo building.¹³

Your questions involve whether the SBHE and NDSU complied with the requirements of the 2007 Session Law. There are not actually any "requirements" in the 2007 Session Law. Rather, the Legislature only indicated that the SBHE "may enter an agreement" to authorize construction by the Foundation of a college of business building off the NDSU campus.¹⁴ The use of the word "may" is permissive and indicates it is a matter of discretion.¹⁵

After the Foundation purchased two buildings in downtown Fargo in 2006, NDSU made the decision to lease one of those buildings rather than proceed with constructing a new building on campus.¹⁶ The scope of the project fundamentally changed when the SBHE approved NDSU's request to lease a building off campus for the College of Business rather than constructing a new building. The Legislature's grant of authority to the SBHE to enter into an agreement with the Foundation to construct a building was not mandatory and thus, the SBHE could proceed in another manner if allowed by its powers. The

¹³ In discussing an amendment to H.B. 1003 that would have required legislative approval for any future off-campus university building, the following exchange took place:

Senator Holmberg: Does this amendment leave on the language that we put in that allowed NDSU to go off campus?

Representative Monson: Yes, it wouldn't change that. I guess we are going to have to bite the bullet because it's gone too far and we're not going [to] reverse it. This language would stop any other ones from happening without full disclosure and blessing of the full legislative body or at least the budget section so we don't end up with this dispute again. This would make it very clear that they tell us about anything that is going to be renovated, rented or whatever off campus by any institution.

Hearing on H.B. 1003 Before Conference Comm., 2007 N.D. Leg. (Apr. 20) (Statements of Sen. Holmberg and Rep. Monson).

¹⁴ 2007 N.D. Sess. Laws ch. 3, § 22 (emphasis added).

¹⁵ Bernhardt v. Bernhardt, 561 N.W.2d 656, 658 (N.D. 1997). See also Solen Pub. Sch. Dist. No. 3 v. Heisler, 381 N.W.2d 201, 203 (N.D. 1986) (ordinarily "shall" is mandatory).

¹⁶ Facilities, Section 902.3 Attachment to Information Packet and Agenda for N.D. State Bd. of Higher Educ. Meeting (Nov. 9, 2006) (on file with NDUS office). NDSU entered into a lease agreement for the lease of Barry Hall to NDSU by the Foundation. Lease Agreement Barry Hall between NDSU Dev. Found. and NDSU (Nov. 1, 2007).

manner and means by which a governmental entity exercises its authority where not prescribed by the Legislature is not subject to the rule of strict construction, but is left to the discretion of the agency.¹⁷ The issue is whether the SBHE had the authority to allow NDSU to enter into a lease agreement and make the lease payments for Barry Hall.

The SBHE was created in the North Dakota Constitution and approved and ratified by the people on June 30, 1938.¹⁸ The SBHE was created for the “control and administration” of the state’s institutions of higher education known as the North Dakota University System.¹⁹ The SBHE was given full authority over the institutions under its control to ensure that politics did not play a role in the administration of those institutions.²⁰

The North Dakota Constitution provides:

The said state board of higher education shall have full authority over the institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions. In furtherance of its powers, the state board of higher education shall have the power to delegate to its employees details of the administration of the institutions under its control. The said state board of higher education shall have full authority to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions.²¹

The provisions in N.D. Const. art. VIII, § 6 are self-executing.²²

¹⁷ See Haugland v. City of Bismarck, 429 N.W.2d 449, 453-54 (N.D. 1988) (the general statutory powers of a city to borrow money by issuing general obligation bonds did not provide the exclusive method of borrowing but rather only specified one method of exercising a city’s general borrowing authority).

¹⁸ See Posin v. State Bd. of Higher Educ., 86 N.W.2d 31, 34 (N.D. 1957). The alumni association started a petition for a constitutional amendment to remove control of the colleges from the Board of Administration and place it in the hands of a nonpolitical board of higher education in response to Governor Langer’s attempt, in 1937, to fire Higher Education employees and gain control of their payroll at NDSU. N.D.A.G. Letter to Hagen (Feb. 12, 1992).

¹⁹ N.D. Const. art. VIII, § 6; Peterson v. N.D. Univ. Sys., 678 N.W.2d 163, 167 (N.D. 2004).

²⁰ N.D.A.G. 86-16.

²¹ N.D. Const. art. VIII, § 6(6)(b) (emphasis added).

²² N.D. Const. art. VIII, § 6(8).

As a body established by the constitution, the SBHE is entitled to a degree of autonomy in its administration of the state's institutions of higher education.²³ The North Dakota Supreme Court determined that the powers vested in the SBHE are administrative in nature and that the constitutional provision does not vest the SBHE with legislative powers, i.e., the power to create laws.²⁴ In general terms this means the SBHE "manages and supervises" the institutions.²⁵

State agencies and departments are allowed to lease or rent buildings when additional space is needed provided that the lease is reviewed by the director of the Office of Management and Budget.²⁶ Institutions under the SBHE are exempt from the requirements of this law.²⁷ Article VIII, § 6 of the North Dakota Constitution specifies the primary missions and cities in which the institutions of higher education are located, but does not restrict the authority of the SBHE to decide on the locations of the various departments of each university.²⁸ It is my opinion that the language in the constitution which allows the SBHE to "do each and everything necessary and proper for the efficient and economic administration of said state educational institutions" provides the SBHE the power to enter into lease agreements for real property, i.e., that leasing classroom space is part of the SBHE's power to "manage and supervise" its institutions.²⁹ The SBHE can exercise its powers directly or it can delegate to its employees details of the administration of the institutions under its control.³⁰

The SBHE delegates the authority to negotiate and execute real property leases and rental agreements to the institutions.³¹ A lease of real property must be limited to the current biennium or include a non-appropriation clause.³² A non-appropriation clause allows the agency to terminate the lease if insufficient funds are appropriated by the Legislature for rent.³³ The lease agreement for Barry Hall contains a non-appropriation clause and also contains a provision that the obligation to pay rent "shall constitute a current expense of NDSU for such term and shall not constitute an indebtedness of

²³ N.D.A.G. 91-18; N.D.A.G. 86-16.

²⁴ Nord v. Guy, 141 N.W.2d 395, 402 (N.D. 1966).

²⁵ Id.

²⁶ N.D.C.C. § 54-21-24.1.

²⁷ Id.

²⁸ N.D. Const. art. VIII, § 6(1).

²⁹ N.D. Const. art. VIII, § 6(6)(b).

³⁰ Ellis v. N.D. State Univ., 764 N.W.2d 192, 199 (N.D. 2009).

³¹ SBHE Policy 909.

³² Id.

³³ Red River Human Servs. Found. v. Dep't of Human Servs., 477 N.W.2d 225 (N.D. 1991).

NDSU, the Board or the State within the meaning of the Constitution and laws of the State.”³⁴ Such clauses are necessary to ensure that a debt of the state is not created in violation of the constitution and ultimately give the Legislature the option to disallow the continued lease of real property by a state institution by electing to not appropriate funds for the lease.³⁵

In consideration of the above analysis, it is my opinion that the SBHE has the power to enter into a lease agreement for additional building space for classrooms off the NDSU campus.

The next question is whether the SBHE and NDSU have the authority to pay the rent for the lease of Barry Hall. As stated above, the SBHE has very broad powers including that the “state board of higher education shall have control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature, for the institutions of higher education in this state.”³⁶ In a previous opinion, this office offered this interpretation of this language in N.D. Const. art VIII, § 6:

The Legislature may appropriate any sum deemed necessary for the maintenance of the several state institutions, but it would appear that the Legislature has no control over other institutional funds. Or, stating it differently, the Legislature, of course, has control over all funds raised by any method of taxation, but the board of higher education has the control of other funds such as institutional collections, income and interest which under the constitution belong to and are allocated to the several state institutions.³⁷

Section 15-10-12, N.D.C.C., creates a special revenue fund for each institution under the control of the SBHE.³⁸ “All other funds, unless restricted by the terms of a grant, donation, or bequest, received by the institutions from federal, state, and local grants and contracts, indirect cost recoveries, tuition, special student fees, room and board fees and other

³⁴ Lease Agreement Barry Hall between NDSU Dev. Found. and NDSU (Nov. 1, 2007).

³⁵ N.D. Const. art X, § 13; N.D.A.G. 97-L-96.

³⁶ N.D. Const. art. VIII § 6(6)(e); see also N.D.C.C. § 15-10-16 (“The state board of higher education has the control of the expenditure of the funds belonging and allocated to the institutions under its control and also of those appropriated by the legislative assembly for such institutions, but funds appropriated by the legislative assembly and specifically designated for any one or more of such institutions may not be used for any other institution.”).

³⁷ N.D.A.G. 46-89.

³⁸ N.D.A.G. 79-6.

auxiliary enterprise fees, student activity fees, continuing education program fees, internal service fund revenues, and all other revenues must be deposited in the institution special revenue funds.³⁹ The funds in these accounts are appropriated on a continuing basis to the SBHE.⁴⁰

Each biennium the Legislature grants authority to the SBHE to spend the funds under its control.⁴¹ The control of how to spend these funds rests with the SBHE.⁴² According to information provided to my office by counsel for the University System, general fund moneys are not being used to make the lease payments.⁴³ The lease payments are made using “local funds” which revenues derive from indirect cost recoveries, interest income, soft drink commissions and transfers from auxiliary fund accounts, including parking revenues and other auxiliary funds.⁴⁴ Therefore, the SBHE has authority from several sources to spend the necessary funds. It has constitutional authority under article VIII, § 6, statutory authority under N.D.C.C. § 15-10-12, and authority granted by the Legislature to spend other funds received on a biennial basis.

Because the SBHE and NDSU elected not to proceed with the construction of a building pursuant to the authority granted by the Legislature in the 2007 Session Law, I need not address your individual questions relating to whether the University System was in strict compliance with the letter of the 2007 Session Law. NDSU had authority to proceed with the lease agreement for Barry Hall; however, NDSU and the SBHE might have kept the Legislature better informed about the plans for Barry Hall because the decision to lease changed a construction plan approved separately during two legislative sessions. A clearer course of action would have been for NDSU and the SBHE to immediately notify the Legislature of the new plans for Barry Hall when the decision was made in November 2006 to lease an existing building rather than construct a new building.

For the foregoing reasons, it is my opinion that since the 2007 Session Law did not contain any requirements and because the SBHE had separate powers that allowed NDSU to

³⁹ N.D.C.C. § 15-10-12.

⁴⁰ Id.

⁴¹ See, e.g., 2007 N.D. Sess. Laws ch. 3, § 11 (“[a]ll funds, in addition to those appropriated in section 3 of this Act, from federal, private, and other sources, received by the institutions and entities under the control of the state board of higher education are appropriated to those institutions and entities, for the biennium beginning July 1, 2007, and ending June 30, 2009.”).

⁴² N.D.A.G. Letter to Stenehjem (Mar. 6, 1987).

⁴³ E-mail from Pat Seaworth, Gen. Counsel, NDUS, to Matthew A. Sagsveen, Assistant Attorney Gen. (Feb. 23, 2010, 11:56 AM) (on file with author of e-mail).

⁴⁴ Id.

LETTER OPINION 2010-L-11
June 28, 2010
Page 9

lease a building to house the NDSU College of Business, there could be no violation of the Session Law.

Sincerely,

Wayne Stenehjem
Attorney General

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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.⁴⁵

⁴⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).