

**LETTER OPINION
2018-L-02**

June 14, 2018

Mr. Joshua Gallion
State Auditor
600 E Boulevard Ave
Bismarck, ND 58505

Dear Mr. Gallion:

Thank you for your office's opinion request asking whether legislative approval is needed for university system capital projects that are fully or partially funded by local funds. For the following reasons, it is my opinion that legislative approval or appropriation is not needed for higher education capital projects that are fully funded by local funds. It is my further opinion that, whether legislative approval is needed before local funds may be used to enhance a capital project funded by the Legislature, will depend on the reasonableness of the conditions that the Legislature attaches to the appropriation for that project. If there are no limiting legislative conditions, then it is my opinion that local funds may be used to enhance the project, without legislative approval or appropriation.

ANALYSIS

In 1938, an initiated constitutional measure was passed, creating a State Board of Higher Education "for the control and administration of the . . . state educational institutions . . ." ¹ This North Dakota constitutional provision states, "[t]he legislature shall provide adequate funds for the proper carrying out of the functions and duties of the state board of higher education."² It also provides, in subsection (6)(e):

The said state board of higher education shall have the control of the expenditure of the funds belonging to, and allocated to such institutions and

¹ N.D. Const. art. VIII, § 6(1). One of the reasons this provision was passed, was to limit political control over the institutions of higher education. See Richard B. Crockett, *Const'l Autonomy and the N.D. State Bd. of Higher Educ.*, 54 N.D. L. Rev. 531-33 (1978).

² N.D. Const. art. VIII, § 6(5).

also those appropriated by the legislature, for the institutions of higher education in this state³

This constitutional provision creating the State Board of Higher Education (Board) and specifying its duties, is self-executing and is effective without legislative action.⁴

Subsection (6)(e), N.D. Const. art. VIII, § 6, gives the Board control over 1) funds belonging to, and allocated to, the institutions, and 2) funds appropriated by the Legislature. The local funds you ask about fall into the first category, i.e., those belonging to, and allocated to, the institutions. These “local funds” are sometimes referred to by other names, such as “institutional funds” or “institutional collections.”

Another North Dakota constitutional provision states:

The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.⁵

This constitutional provision requires that public schools be free to students, except that the Legislature may authorize the charging of tuition, fees, and service charges to higher education students to assist in the financing of schools of higher education. “Local funds,” as used in this opinion, do not include those tuition, fees, and service charges the Legislature has authorized students to be charged.⁶

The North Dakota Supreme Court has decided only one case that relates to the Legislature providing funding to the Board for higher education buildings. That case, *Nord v. Guy*, raised the question of the constitutionality of a state law that authorized the “issuance of general obligation bonds of the state to provide and equip facilities at state supported institutions of higher education.”⁷ The North Dakota Supreme Court found that there was an unconstitutional delegation of legislative authority because the state law left it

³ N.D. Const. art. VIII, § 6(6)(e) (emphasis added).

⁴ See N.D. Const. art. VIII, § 6(8).

⁵ N.D. Const. art. VIII, § 2 (emphasis added).

⁶ The reason for this exclusion is that, even though these monies are derived from students at the local institutions, it is unclear whether the Legislature or the Board has control over these monies. It is also unclear whether the Board, as well as the Legislature, has constitutional authority to authorize tuition, fees, and service charges. C.f. N.D.A.G. 2005-L-07.

⁷ *Nord v. Guy*, 141 N.W.2d 395 (N.D. 1966).

up to the Board “to determine what facilities shall be constructed at the different institutions, and the amount . . . to be expended at each.”⁸

The *Nord v. Guy* case involved funding derived from general obligation bonds of the state, and not local funds, therefore it is not insightful on the issue of whether legislative approval is needed for university system capital projects, like buildings, that are funded by local funds.

Several North Dakota Attorney General opinions have addressed the control of local funds at the higher education institutions. A 1946 Attorney General’s opinion determined that the Board may set up a trust fund from a portion of the institutional collections, and “has full power to disburse such funds for the maintenance and legitimate expenditures of the institutions.”⁹

A 1950 Attorney General’s opinion determined that the Board has control over rental income from dormitories and other buildings. It stated:

The legislature, of course, may appropriate any sum deemed necessary for the maintenance of several state institutions, but the legislature has no control over other institutional funds; or stating [it] differently, the legislature has control over all funds raised by any method of taxation, but the state board of higher education under its constitutional powers has the control over other funds, such as institutional collections, income and interest, belonging to and allocated to the several state institutions, and rentals from

⁸ *Id.* at 404.

⁹ N.D.A.G. 46-89. This opinion also provides:

[I]f the Legislature should be of the opinion that the board of higher education is taking too many liberties with the institutional collections by expanding the activities of the several state institutions, the Legislature may reduce the appropriations to an extent which will require the board of higher education to resort to the institutional collections for general maintenance purposes.

We do not doubt, however, that a proper equilibrium will be maintained by the board of higher education in making use of the institutional collections, and that such funds will be expended for only such purposes as are appropriate and necessary in maintaining the educational standards of the institutions.

dormitories and other buildings located on the campuses of the several institutions.¹⁰

A 1977 Attorney General's opinion stated that subsection (6)(e) of N.D. Const. art. VIII, § 6 "divides the funds into two sources, i.e., those coming from the State and those coming from other sources."¹¹ The 1977 opinion questioned whether it was necessary for the Legislature to appropriate local funds of the institutions:

While the Legislature has apparently appropriated all funds to the University, not only those from State sources . . . there would appear to be considerable question under the North Dakota Constitution as to the effect of that appropriation of moneys from other than State sources. See, e.g., *Board of Regents of Higher Education v. Judge*, 543 P2d 1323 (Mont. 1975); *Regents of University of Michigan v. State*, 208 NW2d 871 (Mich. 1973); *State ex rel. Sego v. Kirkpatrick*, 524 P2d 975 (N. Mex. 1974).¹²

A 2010 Attorney General's opinion addressed whether the Board and a university had the authority to pay the rent for the lease of a particular building. The opinion stated:

[G]eneral fund moneys are not being used to make the lease payments. 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. Therefore, the [Board] has authority from several sources to spend the necessary funds. . . . [including] constitutional authority under article VIII, § 6. . . .¹³

Another North Dakota constitutional provision must be considered when determining the Legislature's and the Board's control over local funds. Article X, § 12 of the N.D. Constitution states that "[a]ll public moneys . . . shall be paid over . . . to the state treasurer . . . and shall be paid out and disbursed only pursuant to appropriation first made by the legislature. . . ."¹⁴ In relation to N.D. Const. art. X, § 12, the North Dakota Supreme Court has indicated that not every expenditure of public money requires a legislative appropriation.¹⁵ Several Attorney General opinions have been issued relating to this constitutional provision's effect on local funds at higher educational institutions.

¹⁰ N.D.A.G. 50-12 (emphasis added).

¹¹ N.D.A.G. Letter to Peterson (Jan. 6, 1977).

¹² *Id.* (emphasis added).

¹³ N.D.A.G. 2010-L-11 (footnotes omitted).

¹⁴ N.D. Const. art. X, § 12(1).

¹⁵ See *State v. Hagerty*, 580 N.W.2d 139, 145 (N.D. 1998).

A 1963 Attorney General's opinion determined that:

[A]ll income of institutions of higher learning, including income from tuition fees, produce, etc., must be deposited with the State Treasurer. . . . [T]he income is to be placed in a special fund by the State Treasurer and . . . it is to be used only for the purpose for which it was appropriated, raised or obtained. This conclusion is in harmony with . . . [Art. VIII, § 6] of the North Dakota Constitution.¹⁶

The underlined language implies that the income could be used for the purpose it was raised or obtained, as well as for the purpose it was appropriated, thus indicating that an appropriation is not always necessary.

A 1964 Attorney General's opinion determined that "[m]oney held in trust for a specific purpose is . . . not subject to appropriation" under North Dakota Constitution art. X, § 12, and "[m]oneys received in the form of a gift or grant with conditions attached . . . fall in the category of a trust."¹⁷

A 1984 Attorney General's opinion attempted to address the Board's authority over the institutions' funds, while considering the requirement that moneys deposited in the State Treasurer's office must be appropriated. The 1984 opinion determined that the state law which set aside special funds in the state treasury which could only be used for the institutions, would be considered an appropriation. The 1984 opinion stated:

[I]t is our opinion that with respect to public moneys contained in the special funds established by Section 15-10-12, that such public moneys have been appropriated pursuant to the requirements of . . . [N.D. Const. art. X, § 12] to the respective institutions of higher learning for the use of each such institution; [and] are subject to the control of the Board of Higher Education pursuant to the provisions of Section 6(e) of . . . [N.D. Const. art. VIII, § 6]. . . .

. . . .

Any possible conflict between the constitutional authority of the Board of Higher Education and Art. X, § 12, of the Constitution which states 'all public money . . . shall be paid out and disbursed only pursuant to appropriation

¹⁶ N.D.A.G. 63-180 (emphasis added).

¹⁷ N.D.A.G. 64-12.

first made by the legislature . . .' can be avoided, however, by holding that Section 15-10-12, N.D.C.C., is an appropriation.¹⁸

A 1990 Attorney General's opinion stated that "[t]he North Dakota Supreme Court has recognized that the term 'public monies' [as used in N.D. Const. art. X, § 12] does not include all monies in the custody of the state."¹⁹ The 1990 opinion also stated:

Other jurisdictions have recognized that monies received by public officials do not necessarily constitute public funds for which a special appropriation is necessary. For example, in *Board of Regents of University of Nebraska v. Exon*, 256 N.W.2d 330, 334 (Neb. 1977), the Nebraska Supreme Court held that the University of Nebraska could expend funds donated by the federal government to the University without a specific appropriation by the Legislature. See also, *Navajo Tribe v. Arizona Department of Administration*, 528 P.2d 623, 624-25 (Ariz. 1975); *Opinion of the Justices to the Senate*, 378 N.E.2d 433, 436 (Mass. 1978); *Button's Estate v. Anderson*, 28 A.2d 404, 410 (Vt. 1942).

It is my opinion that the term "public monies," as used in N.D. Const. art. X, § 12, refers to unencumbered funds received by the state that are available for legislative appropriation to defray the general expenses of government. Monies received by the state that are not available for legislative appropriation to defray general governmental expenses (e.g., certain federal funds, grants, gifts, and trust funds) are not "public monies" as stated in N.D. Const. art. X, § 12 and, therefore, do not require a specific appropriation. See Letter from Attorney General Spaeth to S.F. Hoffner (May 23, 1988).²⁰

The 1990 opinion then stated the following, which made the issue of whether an appropriation was needed less clear:

Rather, the Legislature may authorize an agency to expend such monies pursuant to continuing statutory authority. . . . Alternatively, the Legislature

¹⁸ N.D.A.G. 84-10.

¹⁹ N.D.A.G. Letter to Lamb (Feb. 12, 1990). Thus, moneys in the State Hail Insurance Fund, which was comprised of premiums paid by owners of crops, did not constitute state funds. See *id.*, citing *State v. Jorgenson*, 150 N.W. 565 (N.D. 1915). Also, moneys in the state bonding fund "are not state monies but are held in trust by the state treasurer for the benefit and protection of those who . . . may become claimants under such fund. See *id.*, citing *State v. Bonzer*, 279 N.W. 769, 771 (N.D. 1938).

²⁰ N.D.A.G. Letter to Lamb (Feb. 12, 1990) (emphasis added).

can always provide the necessary spending authority for such monies in the agency's biennial appropriation act.²¹

Because the answers to the questions raised are not clear after considering North Dakota Supreme Court cases and Attorney General opinions, it is useful to look to other states for guidance.

Numerous states with constitutional language giving broad powers to a governing board, similar to North Dakota's constitution, have determined that legislative appropriations or approval are not needed before local institutional funds can be spent. The Michigan Supreme Court has held that, since legislatively appropriated funds are not needed for construction contracts for self-supporting (also called self-liquidating) projects, no legislative approval is required prior to the letting of such contracts.²² The Nebraska Supreme Court has held that funds of the University of Nebraska, derived from the operation of the University, or received from the federal government or private donors, are subject to the control of the University's Board of Regents without an annual legislative appropriation.²³ The Minnesota Supreme Court has held that rentals from campus buildings belong to the University, and may be used for the construction of a dormitory or for other purposes as determined by the University's Board of Regents, without an appropriation of the Legislature.²⁴ The Montana Supreme Court has held that the Legislature does not have the power to appropriate private moneys received by the university system which are restricted by law, trust agreement, or contract.²⁵ The New Mexico Supreme Court has held that the Legislature has no power to appropriate federal funds made available to the institutions of higher learning, nor does it have the power to appropriate funds in the form of scholarships, gifts, donations, and private endowments granted to the institutions.²⁶

The Nebraska and Idaho Supreme Courts have also concluded that their states' constitutional language requiring that moneys deposited with the state treasurer be

²¹ N.D.A.G. Letter to Lamb (Feb. 12, 1990).

²² See *Regents of Univ. of Mich. v. State*, 235 N.W.2d 1, 8 (Mich. 1975).

²³ See *Bd. of Regents of Univ. of Neb. v. Exon*, 256 N.W.2d 330, 333-34 (Neb. 1977). See also, *State ex rel. Spencer Lens Co. v. Searle*, 109 N.W. 770 (Neb. 1906).

²⁴ See *Fanning v. Univ. of Minn.*, 236 N.W. 217, 219-20 (Minn. 1931).

²⁵ See *Bd. of Regents of Higher Educ. v. Judge*, 543 P.2d 1323, 1334 (Mont. 1975).

²⁶ See *State ex rel. Seigo v. Kirkpatrick*, 524 P.2d 975, 986 (N.M. 1974).

disbursed only pursuant to appropriation, does not apply to local institutional funds.²⁷ Thus, those funds may be spent without legislative appropriation.

The North Dakota Attorney General opinions cited above, and the court cases from other states cited above, support the conclusion that legislative approval or appropriation is not needed for higher education capital projects that are fully funded by local funds. I find these opinions and court cases convincing. Therefore, it is my opinion that legislative approval or appropriation is not needed for higher education capital projects that are fully funded by local funds.

The question remains whether legislative approval is needed for local funds to be used to partially fund capital projects. Another way to word this question is whether the university system can use local funds without legislative approval, to enhance a capital project that has been approved and funded by the Legislature.

If the Legislature has approved and appropriated moneys for a particular capital project, then, because I have concluded that the Board has control over its institutions' local funds, the Board could also authorize an institution to spend local funds to enhance the project, without legislative approval or appropriation.

However, if the Legislature has attached certain conditions to the appropriation, it is possible that the use of local funds for that project may be limited. For example, the Legislature, as a condition of appropriating state funds for a capital project, might attempt to require that the university not use any of its local funds to enhance that project. I have not located any court cases that address this exact issue. However court cases have determined that the Legislature may attach conditions to appropriations, within reason, and if the university accepts the appropriation, it must take it with the reasonable conditions attached.²⁸ Other courts have also addressed the extent of control a

²⁷ See *Bd. of Regents of Univ. of Neb. v. Exon*, 256 N.W.2d 330, 333-34 (Neb. 1977) (funds of the university, deposited with the state treasurer, that are not derived from taxation, are not subject to legislative appropriation); and *State ex rel. Black v. State Bd. of Educ.*, 196 P. 201, 204 (Idaho 1921) (the proceeds of federal land grants, direct federal appropriations, and private donations to the university are trust funds, and are not subject to the constitutional requirement that money must be appropriated before it is paid out of the state treasury).

²⁸ See *Regents of the Univ. of Minn. v. Lord*, 257 N.W.2d, 796, 800-02 (Minn. 1977) (citing *State ex rel. Univ. of Minn. v. Chase*, 220 N.W. 951 (Minn. 1928), and *Fanning v. Univ. of Minn.*, 236 N.W. 217 (Minn. 1931)).

Legislature may exercise over appropriations made to higher educational institutions.²⁹ Whether the conditions of particular appropriations are reasonable will depend on the particular facts, and therefore must be addressed on a case-by-case basis.

Thus, it is my opinion that whether legislative approval is needed before local funds may be used to enhance a capital project funded by the Legislature, will depend on the reasonableness of the conditions that the Legislature attaches to the appropriation for that project.

Sincerely,

Wayne Stenehjem
Attorney General

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.³⁰

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²⁹ See *Regents of Univ. of Mich. v. State*, 235 N.W.2d 1 (Mich. 1975); *Regents of Univ. of Mich. v. State*, 208 N.W.2d 871 (Mich. Ct. App. 1973); and *Bd. of Regents of Higher Educ. v. Judge*, 543 P.2d 1323 (Mont. 1975).

³⁰ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).