

**LETTER OPINION
2019-L-02**

March 18, 2019

The Honorable Chet Pollert
House of Representatives
151 Crossroads Estates Dr
Carrington, ND 58421

Dear Representative Pollert:

Thank you for your letter asking whether bonds which are payable from appropriations made by the Legislative Assembly each session implicate the debt limitations in Section 13 of Article X of the Constitution of North Dakota. For the reasons indicated below, it is my opinion that bonds payable from appropriations made by the Legislative Assembly each session do not violate the state constitutional debt limit found in N.D. Const. art. X, § 13.

ANALYSIS

The state's constitutional debt limit is contained in N.D. Const. art. X, § 13, which provides, in part:

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.

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.¹

¹ N.D. Const. art X, § 13.

The North Dakota Supreme Court, in *State ex rel. Lesmeister v. Olson*, 354 N.W. 2d 690 (N.D. 1984), found that bonds funded by any general state tax constitute a “debt” of the state within the meaning of the constitutional debt limitation.² In that case, the court rejected an argument that the legislation in question could be sustained on the theory that payment of the bonds was a “continuing appropriation.”³ You point out that since the *Lesmeister* case, statutes have created “appropriation bonds,” which you describe as bonds payable from appropriations made by the Legislative Assembly each session. You ask whether such bonds trigger the debt limitations of the constitution.

In *Lesmeister*, the revenue bonds were created to finance the Southwest Pipeline Project. The bonds financing the project were to be repaid from the oil extraction tax and were considered to be irrevocable by statute.⁴ In addition, the proposed bonds in *Lesmeister* were to be sold to the investing public.⁵ Because the bonds were funded by a state tax, the Court determined that the bonds were a “debt” of the State within the meaning of the constitutional debt limitation.⁶

Despite the use of the oil extraction tax, the respondents in *Lesmeister* argued the legislation in question could be sustained under the “continuing appropriation” theory.⁷ The Court reviewed a number of cases from other jurisdictions, and quoted:

An analysis of these decisions reveals that the “continuing appropriations” approved in most of these cases differ significantly from the legislation at issue in this case. With the exception of *Grossman*, which is distinguishable on the basis of the particular [Montana] State constitutional provisions involved, each appropriation in the other cases, although “continuing” in a sense, was nevertheless subject to repeal or modification by future legislative assemblies. However, the “continuing appropriation” in this case [*Lesmeister*] cannot be repealed once the bonds are issued without threat of a breach of contract action by the bond holders until the bonds and interest are paid in full.

Thus, “appropriation bonds” payable from appropriations made by the Legislative Assembly must be subject to modification or repeal by future legislative assemblies.

The *Lesmeister* case should not be read as a prohibition of any “continuing appropriation.” The North Dakota Supreme Court commented in a 1988 case that:

² *State ex rel. Lesmeister v. Olson*, 354 N.W.2d 690 (N.D. 1984).

³ *Id.*

⁴ *Id.* at 699-700.

⁵ *Id.* at 700.

⁶ *Id.* at 698.

⁷ *Id.* at 700.

Continuing appropriations are nothing new to the legislative process.⁸ Continuing appropriations are a valid ‘appropriation first made by the legislature.’⁹ Moreover, a continuing appropriation is ‘continuing’ only if future legislative assemblies choose not to repeal or modify it.¹⁰

The ability to repeal or modify is crucial to the analysis of whether a financing mechanism violates the constitutional debt limit. In an opinion from 2005, I noted several examples of cases that have considered the issue of whether unconstitutional debt is created when borrowed money is to be repaid from future annual or biennial appropriations by the Legislature.¹¹

One example highlighted in the 2005 opinion was *In Re Oklahoma Capitol Improvement Authority*, where the court considered the constitutionality of a proposed \$300 million highway improvement bond issue to be funded by annual appropriations.¹² In that opinion I set out the court’s position:

Here, the highway bond program is also subject to an annual review by current members of the legislative body. The Legislature will determine on a year-by-year basis in the appropriation process whether road improvements should be funded through the appropriations to the Highway Department. . . . The fact that the Legislature might, under the highway program, feel some moral obligation to continue the agreement or to ensure that highways are provided for all citizens of this state does not mean that it is legally obligated, and therefore, the [constitutional debt limit provisions] are neither implicated nor applicable — the bonds . . . are constitutional.¹³

⁸ *Gange v. Clerk of Burleigh Cnty. Dist. Court*, 429 N.W.2d 429 (N.D. 1988) citing *State v. Sorlie*, 219 N.W. 105 (N.D. 1928).

⁹ *Gange* citing e.g., *In re Cont. Approp.*, 32 P. 272 (Colo. 1893), *State v. Burdick*, 33 P. 125 (Wyo. 1893).

¹⁰ *Gange* citing *State ex rel. Lesmeister v. Olson*, 354 N.W.2d 690, 700 (N.D. 1984).

¹¹ N.D.A.G. 2005-L-02.

¹² *In Re Oklahoma Capitol Imp. Authority*, 958 P.2d 759 (Okla. 1998).

¹³ *Id.*

The court further noted that “this Court said the matter had been settled — multi-year commitments expressly made contingent on future legislative appropriations did not violate constitutional debt limitation provisions.”¹⁴

Finally, [T]he majority of jurisdictions considering the effect of financing mechanisms comparable to the one mandated by [the state statute], the obligations created are not “debts” within the meaning of constitutional and statutory provisions similar to [Oklahoma's constitutional debt limit provisions]. Under these cases, the financing procedures are not “debts” either because the enacting body is not bound legally to make future appropriations or because it is clear that the legislators did not intend them to be obligations of the states or their subdivisions.¹⁵

Several previous opinions from this office have determined that multi-year commitments expressly made contingent on future legislative appropriations do not violate the constitutional debt limit.¹⁶ In an opinion from 1997 about long-term financing by state agencies, this office stated “if an agreement by a state agency does not legally obligate appropriations beyond those currently available, the extension of this ‘credit’ does not constitute debt in the constitutional sense.”¹⁷

The North Dakota Supreme Court has similarly recognized that a state agency's obligation to pay rent under a 30 year lease that is expressly conditioned on the North Dakota Legislature appropriating sufficient funds for the purpose of paying the rent was legally sufficient to permit the agency to escape its lease obligation when the Legislature failed to appropriate sufficient funds.¹⁸

¹⁴ *Id.* at 770. See N.D.A.G. 2005-L-02.

¹⁵ N.D.A.G. 2005-L-02 citing *In re Oklahoma* at 773-774 (citing, e.g., *In re Anzai*, 936 P.2d 637, 642 (Haw. 1997); *Wilson v. Kentucky Trans. Cabinet*, 884 S.W2d 641, 644-45 (Ky. 1994); *Schulz v. State*, 639 N.E.2d 1140, 1148 (N.Y. 1994); *Dieck v. Unified School Dist. of Antigo*, 477 N.W.2d 613, 618 (Wis. 1991); *Dykes v. Northern Virginia Transportation Dist. Comm'n*, 411 S.E.2d 1, 4 (Va. 1991), *cert. denied*, 504 U.S. 941, 942, 112 S. Ct. 2275, 2277, 119 L. Ed.2d 201, 203; *Dept. of Ecology v. State Finance Comm.*, 804 P.2d 1241, 1246 (Wash. 1991); *State v. School Bd. of Sarasota County*, 561 So.2d 549, 552 (Fla. 1990)).

¹⁶ See N.D.A.G. 2005-L-02; N.D.A.G. 97-L-108; N.D.A.G. 97-L-96; N.D.A.G. 94-L-338.

¹⁷ N.D.A.G. 97-L-108.

¹⁸ *Red River Human Svcs. Found. v. Dep't. of Human Svcs.*, 477 N.W.2d 225 (N.D. 1991). See also *Haugland v. City of Bismarck*, 429 N.W.2d 449 (N.D. 1988).

Financing mechanisms that are subject to repeal or modification by the Legislature are already in operation. For example, under the North Dakota Building Authority, found in N.D.C.C. ch. 54-17.2, state buildings and other projects authorized by the Legislature are paid for by issuing bonds which are ultimately repayable from the general fund, but only to the extent the Legislature provides biennial appropriations for payment of lease rentals, which in turn pay for debt service on the Building Authority bonds.¹⁹ Similar financing arrangements have been upheld against constitutional debt limit challenges in other states.²⁰ The Building Authority bonds are successfully marketed even though bondholders are aware that the building rentals which support debt service payments are payable only to the extent biennial appropriations by the North Dakota Legislature are made.²¹

Thus, it is my opinion that an “appropriation bond” does not, by its very nature, run afoul of the constitutional debt limit found in N.D. Const. art. X, § 13. There are numerous opinions that explain that “a pledge by the state to pay an obligation out of current revenues which is not a general obligation of the state and which contains a nonappropriation clause does not constitute state debt proscribed by the constitution.”²²

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.²³

¹⁹ N.D.A.G. 2005-L-02.

²⁰ *E.g.*, *Barkley v. City of Rome*, 381 S.E.2d 34 (Ga. 1989); *State v. Brevard Cnty.*, 539 So.2d 461 (Fla. 1989); *Caddell v. Lexington Cnty. Sch. Dist.*, 373 S.E.2d 598 (S.C. 1988).

²¹ N.D.A.G. 2005-L-02. (The Official Statement for the bond offering informs bondholders that the building rentals which support debt service payments are payable only to the extent biennial appropriations are made by the North Dakota Legislature.)

²² N.D.A.G. 97-L-108 citing N.D.A.G. 97-L-96. *See also*, *Red River Human Svcs. Found. v. Dep't of Human Svcs.*, 477 N.W.2d 225 (N.D. 1991). *See also* *Haugland v. City of Bismarck*, 429 N.W.2d 449 (N.D. 1988).

²³ *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).