

LETTER OPINION
96-L-135

July 30, 1996

Ms. Sheila Peterson
Director, Fiscal Management
Office of Management and Budget
600 E Boulevard Ave
Bismarck, ND 58505-0400

Dear Ms. Peterson:

Thank you for your letter asking about deposit and expenditure of funds which may be received through settlement of the state's asbestos litigation. You ask first whether settlement funds received go to the individual agencies involved in the litigation or to the general fund. You also ask, if the funds go to the individual agencies, whether those agencies may spend the funds in a manner similar to an insurance recovery or whether the agencies must obtain Emergency Commission approval for acceptance and expenditure of the funds.

The state's asbestos actions are brought by the State of North Dakota on behalf of several state agencies and institutions. The agencies involved may be funded in whole or in part by the general fund or special funds. Presumably, if a settlement is reached in the subject litigation, the amount of the recovery attributable to each of the buildings in question will be calculated and related to the total amount of the settlement. That is, the settlement amount may be allocated between the named state agencies and institutions and the buildings operated by those agencies and institutions that are the subject of the litigation. Such amount would constitute proceeds of the buildings in question because the settlement is payment for loss or damage to the buildings. Cf. Production Credit Ass'n of Minot v. Melland, 278 N.W.2d 780, 788-9 (N.D. 1979) (citing Uniform Commercial Code). Therefore, portions of the settlement amount may be credited to the general fund or special funds from which money was initially drawn to construct and maintain the buildings in question.

Our statutes do not specifically address the use of monetary recoveries from property damage lawsuits such as that in question. Consequently, the basic requirement in North Dakota Constitution

Ms. Sheila Peterson
July 30, 1996
Page 2

Article X, Section 12(1) is controlling. That section provides, in part:

All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the state receiving the same, to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature; . . .

You ask whether the potential settlement funds could be treated in the same manner as an insurance recovery from the State Fire and Tornado Fund. N.D.C.C. ch. 26.1-22 governs the North Dakota State Fire and Tornado Fund. Specifically, N.D.C.C. § 26.1-22-19 provides:

If the commissioner and the insured agree that the fund shall repair or replace the building destroyed or damaged, no repairs, rebuilding, or replacement may be undertaken by the commissioner or any employees of the commissioner, but if they are deemed necessary or proper in any case, they must be performed by independent contractors. The cost of any repairs, rebuilding, or replacements may not exceed the amount of the insurance carried upon the particular risk.

Encyclopedic law on the use of property insurance on public buildings provides:

There is authority to the effect that proceeds of insurance on public buildings destroyed by fire constitute a trust fund to be used by the trustees for the sole purpose of erecting buildings to replace the ones destroyed, especially where a statute provides that all proceeds of the disposition of such buildings shall be applied to the construction of new ones, . . .

63A Am.Jur.2d Public Funds § 5 (1984) at 400. Relying on such authority, this office has previously concluded that:

Basically, in this State before any money may be expended an appropriation must first have been made for same. (Section 186, North Dakota Constitution.) [Renumbered as N.D. Const. art. X, § 12.]

Ms. Sheila Peterson
July 30, 1996
Page 3

This office on previous occasion has held that proceeds of an insurance policy constitute appropriated money and may be used to replace the losses.

This conclusion is based, in part, on the provisions of § 26-24-19 of the North Dakota Century Code and the policy itself. The policy permits the insurance company (North Dakota Fire and Tornado Fund), at its option, to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time and upon giving notice to do so. We draw little or no distinction whether the property is replaced by the insurer or the insured. If the proceeds are used to replace, they are considered the same as appropriated money.

We have also held in a former opinion that the property or building replaced with insurance proceeds must be located substantially on the same general location and must also be for substantially the same purpose. This is the only conclusion we can justify on the theory that the money is appropriated. The money was initially appropriated for such building and contents; thus if the insurance proceeds are used for replacement they are the same as appropriated funds if the funds are used for the same purpose. If the proceeds are used for other than replacement, it would be the expenditure of money for which no appropriation had been made.

If the money is not used for replacement, the Legislature would have to appropriate the money designating the purposes for which it may be expended. It is conceivable that the Legislature might wish to use the funds in some other manner or for a different purpose, keeping in mind the future educational needs and the purposes.

1970 N.D. Op. Att'y Gen. 188.

N.D.C.C. § 26.1-22-19 is effectively a self-executing legislative appropriation of funds from the State Fire and Tornado Fund. Cf. 1993 N.D. Op. Att'y Gen. 45. These funds may only be used pursuant to the specific purpose of the Fund, which is to provide state agencies and political subdivisions with proceeds to repair or replace damaged property. There is no equivalent appropriation, either as a permanent self-executing statutory or constitutional provision, or as a biennial appropriation, permitting the expenditure

Ms. Sheila Peterson
July 30, 1996
Page 4

of any money received via judgment or settlement of the asbestos litigation. In the absence of an appropriation, the proceeds from any judgment or settlement cannot be spent. North Dakota Constitution, Art. X, § 12(1).

The Emergency Commission has limited statutory authority. Although the Commission may transfer spending authority between funds or line items of an agency, may authorize use of the state contingencies appropriation or federal funds, or may draw money from the state treasury to meet an extreme situation until the Legislative Assembly can make an appropriation, N.D.C.C. § 54-16-04, it generally cannot use these powers to create a new fund or a new appropriation. See Letter from Attorney General Heidi Heitkamp to Wayne G. Sanstead (February 22, 1996). Backman v. Guy, 126 N.W.2d 910, 914-916 (N.D. 1964). See also 1993 N.D. Op. Att'y Gen. 107.

However, expenditures may be approved by the Emergency Commission when other sources of money become available to the state. Federal money may be received and spent under N.D.C.C. § 54-16-04.1. New sources of funds, aside from federal funds, may be received and spent under N.D.C.C. § 54-16-04.2, which provides:

The emergency commission, upon the advice of the office of management and budget, with approval of the budget section of the legislative council, may authorize a state officer to receive moneys from gifts, grants, donations, or other sources, not otherwise appropriated by the legislative assembly, for new or existing programs if the legislative assembly has not indicated an intent to reject the moneys or the program. The emergency commission may authorize the state officer to expend money received under this section from the date the money becomes available until June thirtieth following the next regular legislative session.

This statute authorizes acceptance of moneys "from gifts, grants, donations, or other sources, not otherwise appropriated. . . , for new or existing programs if the legislative assembly has not indicated an intent to reject the moneys or the program."

The state's claims in the asbestos litigation allege among many other things, that the state's buildings have been damaged because of the asbestos products in question being used in them and have been or will be contaminated by the release of the asbestos fibers. The state claims causes of action in strict liability, negligence, breach of implied warranties, breach of express warranties, breach of

Ms. Sheila Peterson
July 30, 1996
Page 5

Uniform Commercial Code implied warranties, fraud and misrepresentation, conspiracy, nuisance, and it requests various forms of relief. Any proceeds from this lawsuit would not be funds from the presently existing budget, nor federal funds, but would instead constitute money from "other sources," which would be available to an agency upon approval of the Emergency Commission under N.D.C.C. § 54-16-04.2.

The new or existing programs for which the Emergency Commission may authorize the receipt and expenditure of moneys does not appear to be limited except to the extent that the Legislative Assembly may have indicated an intent to reject the moneys or the program. N.D.C.C. § 54-16-04.2. State budgeting guidelines define a program as a functional unit activity concerning services provided by state government, as distinguished from a capital project which is an expenditure for new construction, additions, renovations, restorations, and demolition of buildings over \$1,500. See SIBR Manual (March 26, 1996), pp. 9-2, 9-6. However, those definitions concern the development of the state budget and do not address the authority provided the Emergency Commission by statute. See SIBR Manual (March 26, 1996), p. 1-3. There is nothing contained in N.D.C.C. ch. 54-16 indicating an intent to limit the Emergency Commission's authority by prohibiting funds from being used to improve or repair state buildings.

An asbestos abatement program would support the provision of services to the public by providing a safe workplace for the employees performing the services. The judgment or settlement received in the asbestos litigation reflect the State's losses caused by asbestos contamination. Therefore, pursuant to N.D.C.C. § 54-16-04.2, the Emergency Commission, upon the advice of the Office of Management and Budget and with approval of the budget section of the Legislative Council, may authorize a state officer to receive moneys from lawsuits on behalf of the state, and expend that money in a program designed to ameliorate the harm addressed by the lawsuit, unless the Legislative Assembly has indicated an intent to reject the money or such a program.

It is therefore my opinion that money recovered as a result of the lawsuit, whether through settlement or otherwise, should be allocated among the participating agencies and deposited to the credit of that agency in the fund, general or special, from which money for construction and maintenance of the building in question was obtained, that settlement money received by the subject agencies is not comparable to insurance recovery and may not be used accordingly,

Ms. Sheila Peterson
July 30, 1996
Page 6

and that the subject agencies may resort to the Emergency Commission for authorization to receive and spend funds recovered in a lawsuit.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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