

LETTER OPINION
96-L-100

May 10, 1996

Mr. Henry C. "Bud" Wessman
Executive Director
Department of Human Services
State Capitol Building, Judicial Wing
600 East Boulevard Avenue
Bismarck, ND 58505-0250

Dear Mr. Wessman:

Thank you for your April 24, 1996, letter concerning Ballot Measure 8, which authorizes the Administrative Committee of Veterans' Affairs (Committee) to establish a basic or long term care veterans' home at Grafton by renovating the Cedar Grove Building at the Westwood Park Developmental Center. Presently, the Department of Human Services (Department) has authority and control over the Cedar Grove Building. Assuming Measure 8 passes, you ask the following questions:

1. When would administrative authority and control of the Cedar Grove Building vest in the Committee?
2. Upon assumption of administrative authority and control by the Committee, would it have any authority to use the Cedar Grove Building as an intermediate care facility for persons with developmental disabilities or to lease that facility to the Department for a use other than a basic or long-term care veterans' home?
3. What entity would be responsible for the repayment of any debt obligation secured by the Cedar Grove Building?

Article III, Section 8 of the North Dakota Constitution, provides that "[a]n initiated or referred measure which is approved shall become law thirty days after the election, and a referred measure which is rejected shall be void immediately."

The North Dakota Supreme Court in Haugland v. Meier, 339 N.W.2d 100, 105 (N.D. 1983), determined that a statewide election could be a primary, general, or special election "if all the electors are entitled to vote in the election." N.D.C.C. § 16.1-11-01 provides for a primary election to be held on the second Tuesday in June of

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every general election year. The primary election in 1996 is scheduled to be held on June 11, 1996, and, therefore, an approved initiated measure would become effective thirty days after that date or July 11, 1996.

If amended by section 3 of the initiated measure, N.D.C.C. § 25-04-01 would give the Department administrative authority and control over Westwood Park "except as otherwise provided in Section 4" of the initiated measure. Section 4 of Ballot Measure 8 provides that "[t]he Administrative Committee on Veterans' Affairs has administrative authority and control of the Cedar Grove Building Module located at the Developmental Center at Westwood Park, Grafton, to be used as a state basic or long-term care veterans' home." (Emphasis added.) Section 4 further provides that "the Administrative Committee on Veterans' Affairs may purchase services and personal property from the Developmental Center at Westwood Park, Grafton under contract with the Department of Human Services." Section 4 speaks in the present tense and does not provide for any other contingency or condition on the Committee's assumption of control over the Cedar Grove Building. Thus, it is my opinion that if Measure 8 is approved, administrative authority and control of the Cedar Grove Building Module would vest in the Committee thirty days after the June 11, 1996, primary election.

Your second question centers on the degree of authority and flexibility that the Committee would have under the approved measure to accommodate an orderly transfer of control over the Cedar Grove Building, including the relocation of current residents. I understand that the Cedar Grove Building currently functions as an intermediate care facility for persons with developmental disabilities. Measure 8 designates the Cedar Grove Building as a basic or long-term care veterans' home, which is at odds with its current use. Thus, assuming Measure 8 passes, there exists a ready need for an interim arrangement to provide for the transfer and transitional use of the Cedar Grove Building until such time as its function as a veterans' home can be effected.

Measure 8 cannot be implemented overnight. Although the measure authorizes the Committee to borrow up to \$100,000 from the Veterans' Post War Trust Fund to renovate the Cedar Grove Building, the \$100,000 "loan must be used solely to meet matching requirements for obtaining federal funds under 38 U.S.C. [§] 5033 [recodified as 38 U.S.C. § 8133]." The grant application process produces a certain amount of lag time between the passage of Measure 8 and the eventual establishment of the veterans' home. Further, the facility would have to be approved by the United States Veterans' Administration. Finally, there is no guarantee that the federal monies will be

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granted. Section 2 authorizes the use of private or other funds, but such fundraising also takes time.

Administrative agencies are creatures of legislative action and as such "have only such authority or power as is granted to them or necessarily implied from the grant." First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-85 (N.D. 1984). Currently, administrative authority and control of the Westwood Park Developmental Center, including the Cedar Grove Building, rests with the Department. See N.D.C.C. § 25-04-01. The intent of Measure 8 is to carve out the Cedar Grove Building from the Department's authority and place it within the authority of the Committee. "Administrative authority and control" would include responsibility for maintaining the premises and paying for utilities. Section 4 authorizes the Committee to contract with the Department for these services.

If Measure 8 passes, many administrative issues must be resolved between the Department and the Committee, including providing for the transition of the Cedar Grove Building from an intermediate care facility to a veterans' home. It is my opinion that the authority to reach an interim agreement on these issues is necessarily implied from the grants of authority to the Department and the Committee.

The language of section 4 of Measure 8 reinforces this necessarily implied grant of authority. If the measure passes, the Committee "has" administrative authority and control of the Cedar Grove Building "to be used" as a basic or long-term care veterans' home. The language placing immediate authority and control with the Committee of the building to be used for a purpose contemplating receipt of a grant which would need to be requested following passage of the measure indicates contemplation of a transitional arrangement. Thus, if the measure passes both agencies are authorized to reach an interim agreement concerning the administration of the Cedar Grove Building.

Although not directly stated in the measure, it is my further opinion that the measure indirectly places the responsibility to negotiate an interim agreement on both agencies. Such an agreement could allow the Department to use the building as it does now until such time that federal, state, or other funds are available to renovate the building. It is my understanding from a discussion on this issue between a member of my staff and Dr. John Mullen, Chairman of the Committee, that it is the Committee's intent to work with the Department to provide for an orderly transition of the Cedar Grove Building, as I believe the measure contemplates.

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In addition to authorizing an interim agreement to cover issues that arise in the transfer of control over the Cedar Grove Building, Measure 8 is intended to remove the Department's control only to the extent necessary to accomplish the purposes described in section 4. Thus, if portions of the Cedar Grove Building are not necessary for use by the Committee as a basic or long term care veterans' home, the Committee has the implied authority to lease portions of the facility to the Department for uses consistent with N.D.C.C. § 25-04-01.

Your third question addresses the impact of Measure 8 on a series of bonds issued by the state of North Dakota. See Transcript, North Dakota Building Authority Refunding Revenue Bonds, 1991 Series A (closing September 17, 1991) (Transcript). The bond documents indicate the sources of payment as follows:

The Bonds are payable from the aggregate of Basic Rents due under the Leases, which constitute currently budgeted expenditures of the State, payable only if funds are appropriated by the Legislature for each biennium. The term of each Lease will commence as of the date of its execution (which will be the date of delivery of the Bonds to the initial purchaser thereof) and will expire on June 30, 1993 (the "Initial Term"), subject to successive automatic extensions under the provisions of the Leases of the term of each Lease for eight consecutive two-year renewal terms commencing on July 1 of the years 1993, 1995, 1997, 1999, 2001, 2003, 2005 and 2007 and a final renewal term commencing July 1, 2009, and ending June 2, 2011 (herein referred to individually as a "Renewal Term" and collectively as the "Renewal Terms"). The State's obligation under any of the Leases does not constitute a general obligation or other indebtedness of the State or any agency or political subdivision of the State within the meaning of any constitutional statutory provision or limitation. The Issuer has no taxing power.

There is no assurance that the Legislature will appropriate sufficient funds to extend the term of any of the Leases for the first Renewal Term or any additional Renewal Term thereafter.

Official Statement p. 3 at Transcript Tab 10. The state of North Dakota acting through the North Dakota Building Authority (Building Authority) has "mortgaged, pledged and assigned to the Trustee [the Bank of North Dakota], among other things, its right, title and

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interest in and to all of the Facilities and as lessor under each of the Leases, including the right to receive the Basic Rents . . . thereunder, as security for the payment of the principal of, and premium, if any, and interest on, the Bonds." Id. at p. 2; N.D.C.C. §§ 54-17.2-05, 54-17.2-17. See also Letter from Attorney General Nicholas J. Spaeth to the Industrial Commission of North Dakota (September 17, 1991) ("The Indenture creates a valid lien on the Facilities and the sites and on the leasehold estates created under the Leases and a valid security interest in the revenues, funds and other property pledged by the Indenture for the security of the Bonds.") at Transcript Tab 25. The Cedar Grove Building constitutes part of the Facilities which were pledged. See Amended and Restated Lease Agreement II, p. A-1 at Transcript Tab 6 (Lease). It should be noted that the Cedar Grove Building constitutes only part of the pledged properties and bond monies were not used to construct the building.

Under the lease agreement between the Building Authority and the Department, the Department must:

include in its submission to the Governor for mandatory inclusion by the Governor in the biennial executive budget of the State for each year of the respective biennium during any Renewal Term of this Lease an amount fully sufficient to pay the Basic Rent required to be paid in each year of the biennium, Additional Rent estimated to be payable in each year of the biennium and any Additional Rent remaining unpaid less the amount, if any, the Authority allocates to the payment of Rent from the Capital Construction Fund.

Lease at p. 3-6. Additionally, the Department is "contractually obligated to provide in each year of the biennium from Legislative appropriations for such purpose, amounts sufficient to pay the Rent required hereunder when due, the same being an ordinary annual expense for each year of the biennium and a contract obligation of the [Department] and the [Department] will do all things lawfully within its power to obtain and maintain the funds from which the Rent may be paid." Lease at p. 3-6.¹ The document also provides that:

¹ The actual lease rental payments for the Grafton Developmental Center are funneled through the Building Authority's budget. See Hearing on H. 1017 Before the House Comm. on Appropriations N.D. 54th Leg. (January 6, 1995) (Statement of Karlene Fine, Executive Director and Secretary of the Industrial Commission).

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The obligations of the Agency to make the payment of the Basic Rent and Additional Rent required in Sections 3.3 and 3.5 hereof and to perform and observe the other agreements on its part contained herein shall be absolute and unconditional and shall not be subject to abatement for any reason; and until such time as the principal, premium (if any) and interest on the Bonds shall have been fully paid or provision for the payment thereof shall have been made in accordance with the Indenture, the Agency (i) will not, subject to the provisions of Sections 3.8 and 3.9 hereof suspend or discontinue any payments of the Basic Rent and Additional Rent provided for in Sections 3.3 and 3.5 hereof, (ii) will perform and observe all of its other agreements contained in this Lease, and (iii) except as provided in Article VI, will not terminate this Lease for any cause, including, without limiting the generality of each of the foregoing, any acts or circumstances that may constitute failure of consideration, destruction of or damage to the Facilities, frustration of purpose, any change in the tax or other laws or administrative rulings of or administrative actions by the United States of American or the State, or any failure of the Authority to perform and observe any agreement, whether express or implied, or any duty, liability or obligation arising out of or connected with this Lease or the Indenture.

Lease at 3-4.

It is my opinion that passage of Measure 8 would not affect these contractual obligations of the Department. The transfer of administrative authority over the Cedar Grove Building would not serve to release the Department from its contractual obligations, including its obligation to maintain the facility. See Lease at p. 4-1. The Building Authority's title to the property remains the same. See Transcript Tab 5, part B.

The Building Authority and the Department could assign their interests under the Lease; however, the Department would remain liable for all Rent and its other obligations. In addition, any assignment must be accompanied by an opinion of Bond Counsel to the effect that any assignment would not affect the tax exempt status of the bonds. See Lease at p. 7-1.

Sincerely,

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Heidi Heitkamp
ATTORNEY GENERAL

dec/jcf/jrs