

**LETTER**  
**75-120**

January 30, 1975 (OPINION)

The Honorable Wayne G. Sanstead  
Lieutenant Governor  
Office of the Lieutenant Governor  
State Capitol  
Bismarck, ND 58505

Dear Lieutenant Governor Sanstead:

This is in response to your letter of 29 January "1985" indicating that a named senator has requested that you seek an attorney general's opinion to ascertain if there is a possible question of constitutionality in regard to the appropriation contained in Senate Bill 2282 on the basis that it would be a diversion of highway user funds and, therefore, be in conflict with Article 56 of the North Dakota Constitution. We assume that you are thereby designating the question as one requested by either branch of the legislative assembly as specified in subsection 8 of Section 54-12-01 of the North Dakota Century Code, to wit the Senate. Article 56 of the North Dakota Constitution provides:

ARTICLE 56) 1. Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, except revenue from aviation gasoline and unclaimed aviation motor fuel refunds and other aviation motor fuel excise and license taxation used by aircraft, after deduction of cost of administration and collection authorized by legislative appropriation only, and statutory refunds, shall be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways.

Section 3 of the bill in question requires the motor vehicle registrar to make an assessment in the amount of one dollar on the annual registration fee of each motor vehicle required to be registered in this state. It further requires the deposit of funds thereby collected less specified administration costs, in the general fund "for appropriation biennially to the state department of public instruction". On such basis we must conclude that the funds so derived will be "Revenue from \* \* \* excise and license taxation, motor vehicle registration and license taxes \* \* \*", within the meaning of said Article 56. As such the revenue thereby derived can be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and obligations incurred in the construction, reconstruction, repair and maintenance of public highways.

We note that the Supreme Court of this state has variously held under this article that:

Payment by the state of the nonbetterment cost for the relocation of utility facilities on interstate highways did not

violate this article. Northwestern Bell Telephone Company v. Wentz, 103 N.W.2d 245. That the terms "construction, reconstruction, repair and maintenance of public highways" as used in this article include the right to use the funds allocated by the article to control advertising the billboard use both on the right of way and on land abutting on the right of way, if such control be provided by law. Newman v. Hjelle, 133 N.W.2d 549. And expenditures for construction and maintenance of bridge, or culvert where drain crossed highway did not violate this article since fact that bridge or culvert was required because of construction of drain, rather than because of presence of regular watercourse or rough spot in terrain would not alter fact that such bridge or culvert would be part of highway. Brenna v. Hjelle, 161 N.W.2d 356.

It thus appears that the Supreme Court of this state has approved utilization of such funds for actual building of highway structure and accessories and acquisition of various rights for so doing. We know of no instance in which the Supreme Court has approved use of such funds for other than such purposes and on one occasion this office has ruled that the State Highway Commission may not use similarly derived funds for the establishment of rapid transit bus service on the highways. We would thus conclude that all prior rulings on this subject under North Dakota's fifty-sixth article of its constitution have indicated that such funds usage must relate to the creation and retention of highways rather than the use thereof.

As to your specific question, we note that Section 5 of the bill in question makes its appropriations out of "any moneys in the general fund of the state treasury not otherwise appropriated", rather than necessarily out of the funds raised pursuant to Section 3 of the proposed bill.

We would conclude that the funds specified in Section 3 of the act could be raised as designated therein, but that the direction thereof that same be deposited in the general fund for appropriation biennially to the state department of public instruction could not constitutionally be carried out. There would be no constitutional objection to appropriation of "moneys in the general fund of the state treasury, not otherwise appropriated" to the purpose designated in the bill unless the court determined that it was obviously the legislative intent that the funds raised under Section 3 were to be funds appropriated under Section 5. We would assume that any ambiguities in the legislative intent at this point in its consideration would be better handled by specific legislative language expressing such intent rather than by speculation by this office.

As the bill now stands, it is our conclusion that there is no question as to the constitutionality under Article 56 of the North Dakota Constitution of Section 5 of Senate Bill No. 2282 for reasons heretofore indicated, except for the possible question of legislative intent heretofore mentioned. We would likewise conclude that there are grave constitutional questions as to the validity of lines 10 and 11 of page 2 of Senate Bill No. 2282.

We hope the within and foregoing will be sufficient for your

purposes.

Sincerely,

ALLEN I. OLSON

Attorney General