OPINION
79-134

June 29, 1979 (OPINION)

Honorable Arthur A. Link

Governor

State Capitol

Bismarck, North Dakota 58505

Dear Governor Link:

This is in response to your request dated June 15, 1979, for an opinion regarding the authority of a state planning division established by Executive Order 1979-7, effective July 1, 1979. Your request states:

> Attached is a copy of Executive Order 1979-7 dated June 15, 1979.
>
> The State Planning Division is urgently in need of an opinion from your office regarding the Division's authority to do the following after June 30, 1979, relative to a grant from the U.S. Department of Housing and Urban Development under Section 701 of the Housing Act of 1954:
>
> 1. Perform the planning work proposed;
>
> 2. Contract with the federal government;
>
> 3. Accept and expend federal grant funds;
>
> 4. Provide or obtain the nonfederal share of the project cost.
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> Executive Order 1979-7 establishes a State Planning Division within the Federal Aid Coordinator Office, effective July 1, 1979. In accord with Senate Bill 2460 passed by the 1979 Legislative Assembly, this Executive Order delegates those powers and duties which are now the powers and duties of the present State Planning Division to the new Division within the Federal Aid Coordinator Office.
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> I would appreciate it very much if you would provide me with the opinion the State Planning Division needs by Friday, June 22. It is imperative that the flow of 701 comprehensive planning funds to state, regional, and local agencies are not interrupted.

In order to respond to your inquiry it is necessary to review Executive Order 1979-7 (copy enclosed), Senate Bill 2460 (1979 Legislative Assembly), relevant federal and state statutory authority, constitutional provisions and judicial decisions.

Executive Order 1979-7, in its preamble, sets forth a summary of the

history of Senate Bill 2460 which consolidated the powers and duties of four state agencies or offices, including the State Planning Division previously created by the Legislature with statutory powers set forth in chapter 54-34.1 of the North Dakota Century Code, in a newly created federal aid coordinator office in the office of the Lieutenant Governor. The preamble further states that Section 1 of Senate Bill 2460 creating the federal aid coordinator office and designating the Lieutenant Governor as federal aid coordinator was vetoed.

The Executive Order indicates that the existing statutory authority of these agencies was repealed by Senate Bill 2460 and for the most part reenacted and placed in the office of Lieutenant Governor. It further states that the appropriation in Senate Bill 2460 made to the federal aid coordinator office exceeds $19 million in federal funds for state and local agencies.

The Executive Order purports to create, in the office of the Governor, "A Federal Aid Coordinator Office" to be headed by a person appointed by the Governor. It also purports to create "A State Planning Division, a Division of Economic Opportunity, and a State Office of Energy Management and Conservation" as divisions within the Office of Federal Aid Coordinator assuming the responsibility for administering certain selected sections of law identified from Senate Bill 2460. The Executive Order provides that the Governor will appoint the heads of each of these divisions to serve at his pleasure. Duties of these divisions are set forth with certain administrative functions such as budget proposals and travel authorizations and claims to be forwarded to the federal aid coordinator and "plans and work programs" to be directed through the federal aid coordinator to the Governor for approval. In all, seven itemized functions are assigned to these divisions.

As for the Federal Aid Coordinator, the Executive Order details eleven "tasks" to be performed such as program coordination, reorganization proposals, grant review, direction of the State Clearinghouse, service as "resource person" to the Governor for public education programs and to serve as federal aid coordinator "under the direction of the Governor and his Director of Administration."

Finally, the Executive Order provides that its effective date is to be July 1, 1979.

While Executive Order 1979-7 makes repeated references to Senate Bill 2460 for the purpose of identifying and describing the duties and functions to be performed and the source of legislative appropriation to carry out these functions, we do not find any reference in Senate Bill 2460 to the offices, divisions and organizational structure contained in the Order. The only offices to which Senate Bill 2460 addresses itself are the federal aid coordinator office "created in the office of the lieutenant governor" and the Natural Resources Council. We find no reference in Senate Bill 2460 to a "Federal Aid Coordinator Office" created in the office of the Governor. The provisions of Senate Bill 2460 which provide for the functions of state planning, economic opportunity and energy management and conservation all relate to and are dependent upon the federal aid

coordinator office created in Section 1 of the bill and not the "Federal Aid Coordinator Office" created in Executive Order 1979-7.

The same situation exists for purposes of the appropriation found in Section 21 of Senate Bill 2460. Approximately $20,000,000 is appropriated "to the federal aid coordinator office" created in the Lieutenant Governor's Office in Section 1 of the bill. This appropriation is not made to any office or division within the office of the Governor.

Therefore, in the absence of any express or implied authority granted to any office in the office of the Governor to be found in Senate Bill 2460 or any other statutory authority for this purpose, it is our opinion that the "State Planning Division" to be created by Executive Order 1979-7 is without sufficient authority, either by statute or any other legal means, to do the following after June 30, 1979, relative to programs and grants authorized and administered by the United States Department of Housing and Urban Development under Section 701 of the Housing Act of 1954 ›40 USC 461!:

1. Perform the planning work proposed;

2. Contract with the federal government;

3. Accept and expend federal grant funds; and

4. Provide or obtain the nonfederal share of the project cost.

As you know, in our letter of June 7, 1979, to the assistant director of the State Planning Division (created pursuant to chapter 54-34.1 of the North Dakota Century Code) we stated that that Division had sufficient authority to accept federal grant funds and perform other functions required by the Federal Housing Act only through June 30, 1979. We stated that Senate Bill 2460 provided for the repeal of the statutory authority of the State Planning Division, thereby terminating its existence after July 1, 1979. We made reference to the recreation of the substance of chapter 54-34.1 authority under Senate Bill 2460 in the office of the Lieutenant Governor, but indicated that on April 3, 1979, Section 1 of that bill creating the office of federal aid coordinator was vetoed.

It would first appear that as a result of the veto of Section 1 of the bill, the repeal of chapter 54-34.1 and the absence of legal authority under Executive Order 1979-7 to accept and expend federal funds appropriated by Section 21 of Senate Bill 2460, that the funds appropriated by that section are not available for expenditure due to the lack of a statutorily authorized office or agency to accept the appropriation and perform the duties and functions necessarily related thereto. However, we consider such a result was certainly not the intent of the Legislature in passing Senate Bill 2460 and we also believe that such a result was not the intent of the Executive at the time of the partial veto. Therefore, in the interest of giving effect to both the intent of the executive and the legislative branches of state government and in the interest of protecting the public's right to enjoy the benefits of the projects and programs to be funded by Senate Bill 2460 we consider it appropriate to give substantive review to the extent and limit of the power of the

Executive to veto items or parts of a bill making appropriations.

Section 80 of the Constitution of North Dakota provides, in part:

> The governor shall have power to disapprove of any item or items or part or parts of any bill making appropriations of money or property embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items and part or parts disapproved shall be void. . . .

The issue of whether a governor with partial veto power over appropriation bills may veto substantive or "general" legislation parts of an appropriation bill was addressed in Patterson v. Dempsey, 207 A. 2d. 739 (Conn. 1964). In that case the governor of Connecticut vetoed three sections of an appropriation bill which were substantive in nature. The court ruled that the veto was impermissible since partial vetoes of "general" legislation were not allowed by that state's constitution. The court in Patterson stated:

> The fundamental reason why a partial disapproval or veto is not generally authorized, at least in the case of general legislation, is because of the separation of powers among the executive, legislative, and judicial branches of the government. All affirmative legislative powers are given exclusively to the General Assembly. . . . If the governor were allowed to disapprove or veto parts of a bill involving general legislation, he could, in the case of many if not most such bills, by the exercise of that power, eliminate selected portions of a bill in such a manner as to change its meaning and thereby, in effect, enact an entirely different bill. This would usurp the legislative function, which is committed to the General Assembly alone. But such legislative action through the use of the veto power would be impossible if the veto power were restricted to distinct items of appropriation in a bill, whether that bill did, or did not, include other items of general legislation. (P. 746) (Emphasis added).

The Connecticut court found that that state's constitution only gave the governor the authority to veto an item or items of appropriation. The veto in that case was found to be void and the entire bill became law. Section 80 of the Constitution of North Dakota is similar to the provisions of the Connecticut Constitution under review in the Patterson case.

The most recent case considering the issue of a governor's partial veto power with regard to bills "making appropriations of money" was considered by the Iowa Supreme Court in Welden v. Ray, 229 N.W.2d. 706 (1975). Governor Ray of Iowa had vetoed various sections and parts of sections of an appropriation bill. The parts vetoed were substantive in nature dealing with the manner in which the funds were to be spent and the purposes of the Legislature in appropriating the funds. The section of the Iowa Constitution under review stated:

> The Governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law. Any item of an appropriation bill disapproved by the Governor shall be

> returned, with his objections, to the house in which it originated. . . (Citing 1968 item veto amendment, Iowa Constitution)

The Iowa Supreme Court held, after extensive review of Supreme Court decisions from other states, that "if the governor desires to veto a legislatively imposed qualification upon an appropriation, he must veto the accompanying appropriation as well." (Page 713.) The Iowa Supreme Court relied upon the following quoted principles of law in reaching its conclusion in the Welden case:

> Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the Legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means, both of their collection and disbursement, is firmly and inexpugnably established in our political system. (Citing Colbert v. State, 86 Miss. 769, 775, 39 So. 65, 66.) (Emphasis added).
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> Every bill of the character in question has three essential parts: The purpose of the bill, the sum appropriated for the purpose, and the conditions upon which the appropriation shall become available. Suppose a bill to create a reformatory for juvenile offenders, or to build the capitol, containing all necessary provisions as to purpose, amount of appropriation, and conditions; may the governor approve and make law of the appropriation, and veto and defeat the purpose or the conditions or both, whereby the legislative will would be frustrated, unless the vetoed purposes or conditions were passed by a two-thirds vote of each house? This would be monstrous. The executive action alone would make that law which had never received the legislative assent. And after all, and despite pragmatic utterances of political doctrinaires, the executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power. If the governor may select, dissent, and dissever, where is the limit of his right? Must it be a sentence or a clause or a word? Must it be a section, or any part of a section, that may meet with executive disapprobation? May the governor transform a conditional or a contingent appropriation into an absolute one, in disregard and defiance of the legislative will? That would be the enactment of law by executive authority without the concurrence of the legislative will, and in the face of it. . . . To allow a single bill, entire, inseparable, relating to one thing, containing several provisions all complementary of each other, and constituting one whole, to be picked to pieces, and some of the pieces approved, and other vetoed, is to divide the indivisible; to make of one, several;

> to distort and pervert legislative action, and by veto make a two-thirds vote necessary to preserve what a majority passed, allowable as to the entire bill, but inapplicable to a unit composed of diverse complementary parts, the whole passed because of each. (State v. Holder, 23 So. 643 (Miss. 1898)) (Emphasis added).

The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge, or increase the effect of the remaining parts or items. It is not the power to enact or create new legislation by selective deletions. . . . Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses, or sentences. . .

> We have heretofore held that the Legislature has the power to affix reasonable provisions, conditions, or limitations upon appropriations and upon the expenditure of the funds appropriated. . . The Governor may not distort, frustrate, or defeat the legislative purpose by a veto of proper legislative conditions, restrictions, limitations, or contingencies placed upon an appropriation and permit the appropriation to stand. He would thereby create new law, and this power is vested in the Legislature and not in the Governor. (State v. Kirkpatrick, 524 P. 2d. 975 (N.M. 1974)) (Emphasis added).
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> Therefore, an appropriation bill is a measure before a legislative body authorizing an expenditure of public funds and stipulating the amount, the manner in which that amount is to be expended, the purpose of the various items of expenditure and any other matters germane to the appropriation. . . If any part could be disapproved, the residue which would become law might be something not intended by the legislature and against the will of the majority of each house. It is obvious that the item veto power does not contemplate striking out conditions and restrictions alone as items, for that would be affirmative legislation, whereas the governor's veto power is a strictly negative power, not a creative power.
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> Since each of the clauses involved in the acts before us is a qualification upon the particular appropriation, the Governor could not let the appropriation stand yet nullify the condition upon which the legislators gave their consent to the expenditure. (18 Drake L. Rev. 245) (Emphasis added).

The Welden court stated at page 710 of the opinion that "inherent in the power to appropriate is the power to specify how the money should be spent." And that this power to specify is exercised by directing in what manner the funds are to be spent and the purposes of the Legislature in making the appropriation. The supreme courts of the states involved in the above-quoted decisions hold that an attempted veto of a qualification on an appropriation is not within the scope of the partial veto in the case of bills making appropriations. The constitutional provisions under review in each of these states were

similar to Section 80 of our Constitution.

In addition, the Supreme Court of Virginia in Commonwealth v. Dodson, 11 S.E.2d. 120, at page 127, stated in a case reviewing the veto power of the governor of that state as it applies to bills making appropriations that "the veto power does not carry with it power to strike out conditions or restrictions. That would be legislation. Plainly, money devoted to one purpose cannot be used for another. . . ."

There is no question that Senate Bill 2460 as passed is a bill creating duties and responsibilities in and appropriating money to the office of the Lieutenant Governor for purposes of federal aid coordination. The manner in which the amounts are to be expended is clear from the several sections of the bill which set forth the duties and responsibilities of the Lieutenant Governor. It is also clear that by Section 21 of the bill the Legislature appropriated funds only to the office of Lieutenant Governor and not to any other office, such as that attempted to be created by Executive Order 1979-7. If the veto of Section 1 of the bill is considered to be effective, the Legislative Assembly's intent to appropriate approximately $20,000,000 to the office of Lieutenant Governor is defeated. As the Iowa Supreme Court stated in Welden, supra, at page 714:

> Since each of the clauses involved in the acts before us is a qualification upon the particular appropriation, the governor could not let the appropriation stand yet nullify the condition upon which the legislators gave their consent to the expenditure.

It is considered that to give effect to the veto of Section 1 would defeat the very purpose of Senate Bill 2460. The use of executive order powers to create an office within the office of the Governor, similar in name to the office created in Section 1 of the bill, for the purpose of expending the funds appropriated in Section 21 of the bill to the Lieutenant Governor, is in our opinion the type of affirmative legislative action on the part of the executive disallowed by the opinions and decisions cited above.

Article 105 of the amendments of the Constitution of North Dakota (formerly Section 25) states, in part, that ". . . the legislative power of this state shall be vested in a legislative assembly consisting of a senate and a house of representatives. . . ." The only exception to this constitutional provision is the direct reservation of power that the people of this state have elected to preserve to themselves by the Initiative, Referendum and Recall. (For a detailed discussion of the exclusive power of the Legislature to make appropriations, see Attorney General Opinion of December 20, 1978, to the Tax Commissioner. See also Attorney General Opinion of March 12, 1979, to the Speaker of the House.)

Therefore it is our opinion that the veto of Section 1 of Senate Bill 2460 was beyond the limits of the powers granted in Section 80 of the Constitution and was therefore of no effect. It is therefore our further opinion that Senate Bill 2460 as passed in its entirety by the 1979 Legislative Assembly will take effect on July 1, 1979.

While as a result of our opinion it is not necessary for us to rule on the issue of the effect of the veto of Section 1 on the remaining sections of Senate Bill 2460, if that veto were held to have effect there is convincing authority that the courts of this state would determine that the effect of the veto of Section 1 would be to destroy the office of federal aid coordinator created in the office of the Lieutenant Governor and therefore also destroy the appropriation made to that office. Montana-Dakota Utilities v. Johanneson, 153 N.W.2d. 414 (1967); Arneson v. Olson, 270 N.W.2d. 125 (1978).

In conclusion it is our opinion that as a result of the veto of Section 1 of Senate Bill 2460 having been determined to be of no effect, and the determination that Senate Bill 2460 will take effect as passed by the Legislative Assembly on July 1, 1979, that the Lieutenant Governor, in performance of his duties as the federal aid coordinator pursuant to the authority of Section 1 and other related sections of Senate Bill 2460, has sufficient authority, effective July 1, 1979, to 1) accept and expend federal grant funds; 2) contract with the federal government; 3) perform the planning work proposed; and 4) provide or obtain the nonfederal share of the project cost of those programs authorized under Section 701 of the Federal Housing Act of 1954. Also as a result of our opinion it is considered that the Lieutenant Governor, acting as the federal aid coordinator pursuant to Senate Bill 2460, has also the authority to perform the duties and responsibilities as authorized and directed by Senate Bill 2460 for purposes of the Economic Opportunity Act of 1964 (P.L. 88-452), all other state planning responsibilities authorized by Senate Bill 2460 and the energy policy and conservation responsibilities established by Section 8 of Senate Bill 2460.

A copy of this opinion is being forwarded to the Secretary of State to be attached to Senate Bill 2460 as filed with that office. A copy of this opinion is also forwarded to the Director of the Department of Accounts and Purchases for guidance in making available to the Office of Lieutenant Governor, during the forthcoming biennium, those funds appropriated to that office pursuant to Section 21 of Senate Bill 2460.

It is hoped that the foregoing will be of assistance in assuring the availability of federal funds to the state of North Dakota for the purposes intended by the Legislative Assembly in the passage of Senate Bill 2460.

Sincerely,

ALLEN I. OLSON

Attorney General