

LETTER OPINION
93-L-369

December 23, 1993

Robert Gruman
Senior Vice President
Bank of North Dakota
Bismarck, ND 58505

Dear Mr. Gruman:

Thank you for your December 10, 1993, memorandum requesting my opinion as to the legality of the lease/financing structure for the school leases the Bank of North Dakota plans to purchase from the State School Construction Fund. Because of the necessity to respond quickly to this request, I have chosen to address your question through a letter. I have previously advised the Bank that as Attorney General, I am the chief legal officer of and advisor to all state agencies. This is true although I serve as a member of the Industrial Commission. The North Dakota Supreme Court has concluded that "[t]here is no reason to believe because the Attorney General is a member of a board charged with implementing statutes enacted by the Legislature [the Attorney General] would be unable to perform his statutory duty to consult with and advise State officers and, 'when requested give written opinions on all legal or constitutional questions relating to the duties of such officers . . . ' as specified in [N.D.C.C. section] 54-12-01(6)." State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 693 (N.D. 1984). I also remind you that an opinion of the Attorney General expressed in a letter carries the same weight as an opinion prepared using a more formal style.

Your question arises in the context of the Legislature's requirement that the Industrial Commission "review and appraise the value of all contracts and leases in the possession of the superintendent of public instruction which were entered into before July 1, 1989, by the state board

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of public school education concerning the state school construction fund provided for by chapter 15-60." 1993 N.D. Sess. Laws ch. 186, § 1. Once the Industrial Commission appraises the value of the contracts it must "structure [them] for sale." *Id.* The superintendent of public instruction is to sell the contracts prior to January 1, 1994. *Id.* The proposed method of accomplishing this legislative directive is to have the Bank purchase the contracts from the superintendent. The Bank will then make a short term loan to the Municipal Bond Bank so the Bond Bank may purchase the contracts from the Bank and the Bond Bank may then issue bonds to finance the purchase of the contracts. The Industrial Commission has been advised by the staff of the Municipal Bond Bank and the Bank of North Dakota that the proposed method is legal and the most feasible and economical (given the timing of a bond sale) means of performing these activities. Your question is whether the lease financing structure entered into by the school districts is legal.

The leases in question are between various public school districts and the State Board of Public School Education, (previously the State School Construction Board) acting with regard to the State School Construction Fund. Prior to its repeal, the State School Construction Fund was codified in N.D.C.C. ch. 15-60. The Fund was "created for the purpose of constructing and improving public school buildings, and furnishing and equipping the same for use as public schools, as a part of the public school system of the state of North Dakota under the jurisdiction of the department of public instruction." N.D.C.C. § 15-60-03(1).

Using the method prescribed in N.D.C.C. ch. 15-60, a public school district could access funds from the State School Construction Fund by requesting the State Board of Public School Education to participate with the school board in a lease agreement. N.D.C.C. § 15-60-05 (repealed 1989). The leases were not a pledge of "the credit or taxing power of the state." N.D.C.C. § 15-60-03(2) (repealed 1993).

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To receive a lease, the school board was required to comply with several requirements including the requirement that the school pay the principle and interest of the lease at an interest rate of 2 1/2% per annum. The school was also required to levy at least 10 mills each year the contract was in place to repay the lease. N.D.C.C. ch. 15-60-03(2)(repealed 1993). The levy "must be maintained over the life of the contract." Id.

The North Dakota Supreme Court has addressed the validity of a lease entered pursuant to the State School Construction Fund on only one occasion. Halldorson v. State School Construction Fund, 224 N.W.2d 814 (N.D. 1974). In Halldorson a group of "residents and taxpayers" challenged the legality of a lease between the Edinburg Public School District and "the State Board of Public School Education in its capacity as the State School Construction Fund Board." Id. at 817. The North Dakota Supreme Court upheld the lease as valid. Although the lease transaction was attacked, the validity of the statutes under which the State Board of Public Education and the Edinburg Public School District proceeded was never questioned and the process itself was upheld. The court also established a standard of "substantial compliance" with regard to review of leases entered under chapter 1560. Id. at 820. Furthermore, with regard to these leases, the court stated that a "lending agency which acts in good faith and without fraudulent intent, is not required at its peril to verify compliance by the borrower with every technical requirement." Id. at 822.

Under the proposed scenario, the Bank will only be purchasing leases which were entered pursuant to N.D.C.C. ch. 15-60 from the State School Construction Fund. This method of financing school construction has been upheld by the North Dakota Supreme Court. Therefore, it is my opinion that the procedure provided in N.D.C.C. ch. 15-60 is a valid procedure for funding school construction. It is my further opinion that leases entered under that chapter will be enforceable.

I trust this answers your question.

Sincerely,

Robert Gruman
December 23, 1993

Heidi Heitkamp
ATTORNEY GENERAL

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