

LETTER OPINION
95-L-65

March 15, 1995

The Honorable Bill Oban
House Minority Leader
House of Representatives
State Capital
600 East Boulevard
Bismarck, ND 58505-0360

Dear Representative Oban:

Thank you for your March 9, 1995, letter requesting my opinion on the constitutionality of Senate Bill No. 2355 as amended by the Senate.

Engrossed Senate Bill No. 2355 provides that the State Board of Higher Education may sell a parcel of land to BHS Long Term Care, Inc. (BHS). The sale may be consummated only "after the property has been appraised and sold at public auction. The sale price must be at least ninety percent of the minimum appraised value. . . ."

The bill raises two constitutional issues: whether the sale authorized by the bill constitutes a gift or donation in violation of Article X, Section 18, of the North Dakota Constitution, and whether the sale authorized by the bill violates the privileges and immunities provision found in Article I, Section 21 of the North Dakota Constitution.

Article X, Section 18 of the North Dakota Constitution, provides in part:

The state, . . . may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor . . .

The North Dakota Supreme Court has determined that a transaction involving the sale of state owned property for

less than what could be obtained for the property violated Article X, Section 18. In Herr v. Rudolf, 25 N.W.2d 916 (N.D. 1947), the court addressed the proposed sale of land which the Bank of North Dakota had obtained through a foreclosure. A state statute permitted the lineal descendants of a foreclosed landowner to repurchase the property for the appraised value.

The land in question was appraised at \$2500 and the son of the former owner, Rudolf, offered to purchase the property at that amount. Prior to Rudolf's offer, a third party (Herr) indicated he would give \$2600 for the property at a private sale and would possibly go as high as \$3000 at a public auction. The court found the sale of the land to Rudolf for \$2500 when Herr was willing to pay at least \$100 more to be "a donation to a privileged buyer by enabling him to buy at the appraised value, though others are ready and willing to pay a greater price." Id. at 922. The court held the sale of land to Rudolf to be "contrary to the prohibition contained in [Article X, Section 18] of the Constitution." Id.

Thus, a sale of land owned by the state to a particular individual at a price lower than the price offered by another would be an unconstitutional donation pursuant to Article X, Section 18 of the North Dakota Constitution. See also, Solberg v. State Treasurer, 53 N.W.2d 49 (N.D. 1952) (holding that a state transfer of a 50% mineral interest reserved in property without consideration would be an unconstitutional gift).

The language of Engrossed Senate Bill No. 2355 permits a sale of the land in question for less than the minimum appraised value of the property. On its face the statute does not constitute a gift or donation. However, as can be seen by the Herr case, it is possible for a set of facts to arise in which the appraised value of the property is less than the amount a buyer is willing to pay. In that event the Herr case would require a conclusion that the sale of land for less than another individual was willing to pay would be prohibited by the constitution. Because this bill would permit purchase of the property at even less than the minimum appraised value, it is conceivable that another purchaser would be willing to pay more than the amount required in the bill. Consequently, although the language of the bill is not facially invalid, actual application to a particular case may result in an unconstitutional donation of state property. I propose subsection 2 of the bill be changed to eliminate that possibility. However before proposing new language to address this concern raised by the bill's current language, I will

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address the remaining constitutional issue raised by the bill.

Article I, Section 21, of the North Dakota Constitution provides:

No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

The North Dakota Supreme Court states that "where a statute creates a classification of citizens to be differently affected by the same general rule the classification must be natural and not artificial, reasonable and not arbitrary or capricious and 'must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.'" Ruldolf at 925. Thus, where the members of the "class created by the statute are granted privileges which cannot be exercised by any one without that class" the statute runs counter to Article I, Section 21 of the North Dakota Constitution. Id. at 926. A statute which grants a privilege to only one entity also could violate Article I, Section 21 if there is no natural reason to include the single entity in the classification and exclude all other entities which are similarly situated. Thus, a statute granting a privilege to do state work to printers affiliated with a named union discriminated against printers affiliated with other unnamed unions or printers who were not affiliated with any union violated Article I, Section 21. See International Printing Pressmen and Assistants Union of North America v. Meier, 115 N.W.2d 18 (N.D. 1962).

Conversely, where a statute "applies uniformly to all within a class under similar circumstances" and "proper facts justify such a classification" the statute can be upheld. State v. Knoefler, 279 N.W.2d 658, 660 (N.D. 1979). See Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960) (statute applying to "all cooperatively, municipally, publicly or privately owned utilities" held not to create a special privilege.) Additionally, where the state traditionally provides a service, such as public transportation, the granting of an exclusive right to provide that service, or the sale of state property to another governmental agency to provide that governmental service does not create a privilege which violates the constitution. Accord Patterson v. Wollmann, 67 N.W. 1040 (N.D. 1896) (granting of a ferry franchise to a single private entity held constitutional.)

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On its face, the bill does not apply "uniformly to all within a class under similar circumstances." Although it provides for a public auction, the statute does not provide for sale to a particular class. Instead, the bill only authorizes the State Board of Higher Education to sell the property to one entity - BHS. The inclusion of BHS and exclusion of all other entities is not a natural classification. There is no reasonable and just relation between the "class" of BHS and the sale of state property. While it could be argued that the property is most valuable to BHS, who therefore would be most likely to pay the highest price, the bill permits a sale at less than the minimum appraised value. Thus the inclusion of BHS as a classification alone does not bear "a reasonable and just relation to the act in respect to which the classification is proposed." Rudolf at 925. It is therefore my opinion that Senate Bill No. 2355 grants BHS a privilege not available to other citizens of North Dakota in contravention of Article I, Section 21 of the North Dakota Constitution.

To address the constitutional questions raised by the bill I am enclosing a proposed amendment to the engrossed bill.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

cc: Representative Glasshiem
Representative Dobrinski
Senator Thane
Representative Koppelman
Representative Soukup

PROPOSED AMENDMENT TO ENGROSSED SENATE BILL NO. 2355

On page 1, line 1, replace "convey" with "sell"

On page 1, line 2, remove "BHS Long Term Care, Inc"

On page 1, line 5, replace "convey to BHS Long Term" with "sell"

On page 1, line 6, remove "Care, Inc.,

On page 2, line 10, replace "The sale price must be at least ninety percent of the" with "At the public auction the property may not be sold for less than the minimum appraised value. If no bid which equals or exceeds the minimum appraised value is received at the auction, the board may negotiate a price for the land with a purchaser. The price negotiated may not be less than the greater of the highest bid received at the public auction or ninety percent of the minimum appraised value."

On page 2, remove lines 11 through 13

Re-number accordingly