

N.D.A.G. Letter to Peterson (April 1, 1991)

April 1, 1991

Mr. Robert W. Peterson
State Auditor
State Capitol
600 E Boulevard
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your February 14, 1991, letter concerning bonds of North Dakota, real estate series, which have been issued pursuant to N.D.C.C. ch. 54-30. Your 40 questions concern the real estate bond sinking fund the ("Fund") established pursuant to N.D.C.C. § 54-30-14.

The Bank of North Dakota (the "Bank") is required to deposit all monies paid on mortgages assigned by the Bank pursuant to N.D.C.C. ch. 54-30 as security for real estate series bonds into the Fund. The Bank is also to deposit "all sums collected for the purpose of retiring the principal of the bonds at their maturity and paying the interest thereon when due. . ." and "all monies received whether from the proceeds of taxes or from payments made by the industrial commission or from legislative appropriation or otherwise, which must be by law or by other authoritative designation made applicable to the payment of the principal of the bonds or the interest thereon" into the Fund. N.D.C.C. § 54-30-14.

Your first question is whether the definition of the term "Actual Deficit" as set out in the Bond Issuance Resolution of the Industrial Commission adopted on February 15, 1984, and amended and restated on March 5, 1984 (the "Bond Issuance Resolution"), and in the Commission's Supplemental Resolution No. 1 adopted on August 6, 1986, as amended by the Commission's Supplemental Resolution No. 2 (the "Supplemental Resolution"), is the definition which should be used for that term as it appears in N.D.C.C. § 54-30-26.

The Commission's definition of the term "Actual Deficit" is :

Actual Deficit shall mean that a deficit exists in the [real estate bond sinking fund] to the extent that (i) the Bank has not purchased Bond(s) presented to it pursuant to Section 4.04 of this Resolution; or (ii) on any interest or principal payment date sufficient funds are not on deposit in the [real estate bond sinking fund], plus reasonably anticipated interest earnings thereon, for payment at redemption or maturity of Bonds or the payment of interest thereon except Bonds purchased pursuant to Section 4.04 hereof.

N.D.C.C. § 54-30-26 reads as follows:

The industrial commission, in July of each year, shall prepare a statement showing the condition of the real estate bond sinking fund and the real estate bond interest payment fund. Such statement must be approved by the state treasurer and must be presented to the state board of equalization at its annual meeting of the same year, together with the recommendation of the commission. If an actual deficit exists in either or both of said funds, the board shall make an annual levy of taxes sufficient to make good the deficit in such fund, including a levy to restore the fund to solvency as hereinafter defined. If at the time the statement is made, an actual deficit does not exist, but by reason of adverse crop conditions, or for any other reason, the commission shall anticipate a deficit in either or both of said funds during the ensuing year, it shall recommend tax levies to meet such anticipated deficits, and the board shall make such levies in accordance with such recommendation.

Under both Section 4.04 of the Bond Issuance Resolution and Section 4.04 of the Supplemental Resolution, the Bank is ordered by the Commission to purchase real estate series bonds and uncertificated registered obligations which are presented to the Bank by the Trustee. Purchase is made by paying the Trustee the par amount of the bonds, plus accrued interest, and the amount of interest due and payable on an interest payment date other than accrued interest in connection with the purchase of bonds. The bonds and uncertificated registered obligations held by the Bank are payable by the Trustee from the Fund only if the payment will not result in an Actual Deficit.

It appears that the term "actual deficit" as used in N.D.C.C. § 54-30-26 is intended by the Legislative Assembly to have essentially the same meaning as the Industrial Commission has given to that term in the Bond Issuance Resolution and the Supplemental Resolution. The intent of N.D.C.C. § 54-30-26 is to provide a mechanism for the Industrial Commission, through a mandatory levy of taxes by the State Board of Equalization, to see that sufficient funds are available to pay the current principal of and interest on real estate series bonds. At the same time, by its definition of the term "Actual Deficit" and its order to the Bank, the Commission has put in place a mechanism designed to ensure that it is not necessary for the State Board of Equalization to levy a tax to meet the current principal and interest payment requirements of the real estate series bonds.

It appears to me that there will not be an actual deficit in the Fund as long as the Bank is subject to the order of the Commission to purchase bonds and uncertificated registered obligations presented to it by the Trustee. If the Commission knows or anticipates that there will be sufficient funds in the Fund to make current principal and interest payments on the bonds, it would not make sense for the Commission to submit a recommendation to the State Board of Equalization to levy a tax to provide funds to make current principal and interest payments on the bonds, nor would it be within the intent of N.D.C.C. § 54-30-26 to submit such a recommendation.

Therefore, it is my opinion that the definition of the term "Actual Deficit" which has been adopted by the Commission should also be used as the definition of the term "actual deficit" as set out in N.D.C.C. § 54-30-26.

Your second question is whether there is a "deficiency" in the Fund. Based upon the above discussion, and assuming that the Bank is performing as directed by the Industrial Commission, it is my opinion that there is not an actual deficit in the Fund within the meaning of N.D.C.C. § 54-30-26. I realize that your question is phrased in terms of a "deficiency" rather than an "actual deficit," however, the term "deficiency" has no legal consequence for the purposes of this discussion and I am able to express my opinion only with respect to legal matters.

It is apparent, however, that there would be an actual deficit in the Fund, as described in N.D.C.C. § 54-30-26, in the absence of the provisions in the Bond Issuance Resolution and the Supplemental Resolution requiring the Bank to purchase bonds and uncertificated registered obligations from the Trustee.

Your next question concerns the requirement that the Industrial Commission prepare a statement showing the condition of the Fund in July of each year. The statement, together with the Commission's recommendation concerning the condition of the Fund, is to be approved by the State Treasurer and presented to the State Board of Equalization at its annual meeting that year. You ask what steps can be taken to ensure that this requirement is satisfied.

It is my understanding that a report was prepared by the Industrial Commission in 1990 and approved by the State Treasurer. The report is being held by the Industrial Commission Secretary until all the legal questions that your office has posed are resolved. I will provide a copy of this letter to the Secretary of the Industrial Commission with instructions that she see that proper steps are taken to prepare the report each year for presentation to the State Board of Equalization.

Your final question is whether the Trustee has the authority to issue uncertificated registered obligations to the Bank as provided by Section 4.04 of the Bond Issuance Resolution and Section 4.04 of the Supplemental Resolution.

The Supplemental Resolution was amended by the Governor and the State Treasurer on September 3, 1987, to provide, among other things, for the issuance and sale of uncertificated registered obligations by the Trustee to the Bank. In a letter issued by me that same date, I stated it was my opinion that the amended provisions of the Supplemental Resolution are valid and binding upon the Industrial Commission, the Governor, the State Treasurer, and the Trustee.

I hope that I have been responsive to your questions. If you have further questions or want to discuss this matter in more detail, please let me know.

Sincerely,

Nicholas J. Spaeth

krb

cc: Karlene Fine