

**OPINION
67-12**

November 21, 1967 (OPINION)

Mr. William C. Smith

Director of Investments

The Bank of North Dakota

RE: Bank of North Dakota - Investments - Stock of Small Business

Investment Corporations

This is in reply to your letter requesting an opinion on the question whether or not the Bank of North Dakota may invest or purchase common stock, or stock in a corporation formed under the provisions of Chapter 10-30 of the North Dakota Century Code. You state you are unable to find any direct authority to invest in this type of venture. You also forwarded with your letter a brochure pertaining to the activities of the corporation formed under Chapter 10-30 and the functions and purposes of development corporations.

We find no statute which authorizes the Bank of North Dakota to invest in common stock. Section 6-09-02, amongst other things, provides as follows:

* * * The business of the Bank, in addition to other matters specified in this chapter, may include anything that any bank lawfully may do, except as it is restricted by the provisions of this chapter. * * * ."

The above statutory provision, however, must be construed together with the existing statutes relating to banks at the time it was adopted. We further believe that this language merely recognized the existing practices and standards followed by State banks in the State of North Dakota at that time. This thought is supported in the case of Egbert v. City of Dunseith, 74 N.D. 1, 24 N.W.2d., 907.

Section 6-03-38, as amended by Chapter 87 of the 1967 Session Laws, provides as follows:

ASSETS NOT TO BE USED IN OTHER BUSINESS - VIOLATION A MISDEMEANOR. No bank, except as otherwise specifically authorized in this title, shall employ its money or other assets as principal, directly or indirectly, in trade or commerce nor shall it employ or invest any of its assets or funds in the stock of any corporation, bank, partnership, firm, or association, provided, however, that a state bank may to the extent that banks subject to the laws of the federal government are permitted to do so, purchase shares of stock in small business investment companies organized under Public Law No. 85-699, 85th Congress, known as the Small Business Investment Act of 1958, and any amendments thereto, or chapter 10-30 of the North Dakota Century Code, but in no event shall any state bank hold shares in small business investment companies in an

amount aggregating more than two percent of the bank's capital and surplus, nor in speculative margins of stock, bonds, grain, provisions, produce, or other commodities, except that it shall be lawful for a bank to make advances for grain or other products in store or in transit to market. Any officer, director, or employee of any bank who shall invest or use its funds contrary to the provisions of this title shall be guilty of a misdemeanor."

The new language in the above quoted section is that portion referring to and authorizing banks to invest in corporations formed under Chapter 10-30. It should be observed, however, that the authority is conditional rather than direct. It is conditioned that the state banks may invest or purchase stock in such corporation to the extent that the national banks are authorized. In this respect it should also be observed that national banks, pursuant to the provisions of Section 15, U.S.C.A. 682(b), are authorized to make such investments to the extent that state banks are authorized.

Section 6-09-15, as amended by Chapter 91 of the 1967 Session Laws, provides as follows:

BANK MAY TRANSFER FUNDS TO OTHER STATE DEPARTMENTS - LOANS - REAL ESTATE LOANS LIMITED. The Bank of North Dakota may transfer funds to other departments, institutions, utilities, industries, enterprises, or business projects of the state, and such funds shall be returned with interest to the Bank. It may make loans to counties, cities, or other political subdivisions of the state, or to state or national banks, and may participate with state or national banks in loans being made by them, on such terms and under such rules and regulations as the industrial commission may determine. It shall not otherwise make loans or give its credit to any individual, association, or private corporation, except that it may make loans to actual farmers who are residents of this state, if such loans are secured by duly recorded first mortgages on real estate in the state of North Dakota in amounts not to exceed one-half the value of the security and except United States insured and guaranteed loans as specifically authorized by law. The Bank, however, shall not loan more than thirty percent of its capital, nor in addition thereto, more than twenty percent of its deposits on real estate security." (Emphasis supplied.)

This section does not specifically prescribe the investment or purchases of common stock or stock in a corporation formed under Chapter 10-30 of the North Dakota Century Code. The new language, which is underscored, authorizes the Bank to participate with state or national banks in loans being made by them on such terms and under such rules and regulations as the Industrial Commission may determine. The amendment to said section also eliminated the authority of the Bank to issue loans on warehouse receipts. It also appears that the Legislature from time to time used this section of either give specific authority to the Bank of North Dakota or to withdraw or limit its authority.

We believe that where the Legislature has historically used a direct method of granting or taking away of certain authority pertaining to

the Bank of North Dakota, as it has done in Section 6-09-15, the process of protracting or extending a basic implied power or authority, as found in Section 6-09-02, from one statutory provision to another, each in turn resting on inference, does not constitute sound legal construction which will support a legislative intent of granting such new authority or power which would result in substantially changing long standing, recognized standards and practices of the Bank of North Dakota. Such changes, which are new innovations or new concepts, we believe should be accomplished by direct legislation.

State banks are authorized to invest in corporations formed under Chapter 10-30 to the extent that national banks are authorized. National banks are authorized to the extent that state banks are authorized. Each has conditional implied authority but neither one has direct or outright authority to purchase or invest in stocks of a corporation formed under Chapter 10-30. Figuratively speaking, they are on "dead center" or "at a stalemate", waiting for an outside force (legislative or congressional) to supply the needed independent enabling legislation to either one or the other, or both, to act effectively.

It is therefore our opinion, based on the foregoing, that the statutory provisions do not authorize the Bank of North Dakota to purchase or invest either in common stock or in stocks of a corporation formed under Chapter 10-30. It should be observed, however, that Section 6-09-15, as amended, authorizes the Bank of North Dakota to participate with state or national banks in loans being made by them. This, in effect, permits the Bank of North Dakota to accomplish substantially the same objective as that of the corporation formed under Chapter 10-30. However, under this provision the Bank and the Industrial Commission could determine under what conditions and circumstances it would participate in the loan, whereas investing or purchasing stocks in a corporation formed under Chapter 10-30 the corporation then would determine the circumstances and types of businesses it would help by making loans to them.

HELGI JOHANNESON

Attorney General