

**OPINION
68-182**

November 25, 1968 (OPINION)

Mr. Kenneth Raschke

Commissioner of Higher Education

RE: Higher Education - Revenue Bonds - Authority to Issue

This is in reference to a letter of November 13, 1968, from Mr. John S. Holten, Faegre & Benson, 1260 Northwestern Bank Building, Minneapolis, Minnesota, which you referred to our office. You request our opinion on the questions raised in Mr. Holten's letter. They are as follows:

1. Has the authority to issue bonds and construct married student housing facilities in an amount up to \$300,000 granted by Chapter 147 of the Laws of 1959, as amended by Chapter 147 of the Laws of 1961, lapsed by reason of change of circumstances or expiration of time or for any other reason?
2. Has the authority granted by Chapter 147 of the Laws of 1959 (as amended) and by Chapter 117 of the Laws of 1965 to expend the proceeds of bonds for married student housing terminated by reasons of the provisions of section 54-44.1-11 N.D.C.C.?
3. May the State Board of Higher Education aggregate the amounts authorized for married student housing in Chapter 147 of the Laws of 1959 (as amended) and Chapter 117 of the Laws of 1965 with the amount authorized for that purpose in Chapter 155 of the Laws of 1967 so that married student housing at North Dakota State University can now be constructed and financed in the amount of \$3,225,000?"

As a general background, the board of Higher Education desires to construct married student housing at North Dakota State University and issue bonds therefor in the amount of \$3,225,000 under the Revenue Bond Law as found in chapter 15-55 of the North Dakota Century Code, as amended. The specific authorization for construction of married student housing at North Dakota State University in this amount is taken from Chapter 147 of the 1959 Session Laws, as amended by Chapter 147 of the 1961 Session Laws, Chapter 117 of the 1965 Session Laws and Chapter 155 of the 1967 Session Laws. Mr. Holten's questions indicate he is concerned with the matter of the lapse of the legislative authorization contained in the 1959 Session Laws, as amended, the cancellation of appropriations and the procedure whereby the Board aggregates dollar amounts from different legislative authorizations for the construction of a specific building or project. The reasons for Mr. Holten's questions and our replies thereto will be explained as we consider each question separately.

1. There is nothing in the North Dakota statutes which

provides that the legislative authorization to issue bonds to be paid from revenue producing buildings under the provisions of chapter 15-55 of the North Dakota Century Code, as amended, in any manner lapses after a certain period of time. Mr. Holten's letter is replete with citations of cases from other jurisdictions which are concerned with this general subject matter but which are not necessarily decisive of the matter here at hand.

The decision of the North Dakota Supreme Court in State v. Sorlie 56 N.D. 650, 219 N.W. 105 (1928) does discuss matters pertinent to both the first and second questions stated above. It was concerned with the lapse of an appropriation after the biennium in which such appropriation became available had lapsed. In that instance the appropriation did not, as was then and is now common practice for appropriations, contain a provision that the appropriation was for the biennium period only. The appropriation was for a specific purpose. The Court stated, page 108 of the Northwest Report:

In this case there was a specific setting apart of the sum of \$200,000 for the use of the Industrial Commission in carrying out the purposes of the act by which the commission was created. The purposes for which the appropriation was made were not attained during the biennial period ending June 30, 1921. These purposes have existed; and the various business activities placed under the management and control of the commission had been subjects of consideration at every legislative session since 1919. * * *

It is our opinion that when the act is construed as a whole, in light of the object sought to be accomplished thereby, it evidences a legislative intention that the appropriation therein made should remain available for the stated purposes until the appropriation was fully expended, or until it was repealed."

The Court also discussed the matter of administrative construction of statutes and noted that the Attorney General had issued an opinion relative to the appropriation. The Court stated, page 108 of the Northwest Report:

Where the meaning of a statute is doubtful, the construction placed upon it by the officers charged with the administration thereof is entitled to considerable weight; and this is especially so if it is apparent that the members of the state Legislature in dealing with the subject must have been aware of the construction which had been placed upon the statute by those administering it and failed to indicate any disapproval of such construction. * * *

It must be assumed that the different Legislative Assemblies were familiar with the former legislation and the construction that had been placed upon the appropriation contained in the act of 1919 by the officers whose duty it had been to interpret the law in the administration thereof. * * *."

In this instance the presentation of the requests for authorization

for self liquidating buildings at the institutions of higher education to the Legislature or legislative committees include statements relative to the unexpended authorizations remaining from previous legislative sessions. We therefore believe the rationale of the above statements are applicable to this situation.

In addition, we are unaware of any rule of law which would permit an executive office to declare invalid, lapsed, or ineffective an act of the legislative branch of government. The Legislature has not in any manner indicated this authorization has lapsed or that it becomes ineffective by the passage of time. There is no rule, judicial, legislative or administrative, by which we could determine such authorization had lapsed or expired. Nor can we exercise any discretion in concluding when same could occur. The proceedings and records of the Board of Higher Education will illustrate that in several instances revenue bonds, under the provisions of Chapter 15-55, have been issued in accordance with the specific authorizations of several preceding legislative sessions without any question as to the continued validity of those authorizations.

Also enclosed is a copy of an opinion issued to Mr. A. F. Arnason, Commissioner of Higher Education, dated June 22, 1956, which bears on this matter.

It is our opinion the authority to issue bonds and construct married student housing facilities in an amount up to \$300,000 granted by Chapter 147 of the Laws of 1959, as amended by Chapter 147 of the Laws of 1961, has not lapsed by reason of change of circumstances or expiration of time or for any other reason.

2. Section 54-44.1-11 of the North Dakota Century Code, as amended, provides as follows:

DEPARTMENT OF ACCOUNTS AND PURCHASES TO CANCEL UNEXPENDED APPROPRIATIONS - WHEN THEY MAY CONTINUE. The department of accounts and purchases, thirty days after the close of each biennial period, shall cancel all unexpended appropriations or balances of appropriations, which shall have remained undrawn after the expiration of the biennial period during which they became available under the law. The chairman of the appropriations committees of the senate and house of representatives of the legislative assembly with the auditing board may continue appropriations or balances in force for new construction projects and for major repair or improvement projects for not more than two years after the expiration of the biennial period during which they became available upon recommendation of the director of the budget."

Mr. Holten notes that the 1965 and 1967 legislative authorizations provide: "The proceeds resulting from the sale of bonds authorized under section 1 of this Act, or so much thereof as may be necessary, are hereby appropriated for the construction, purchase and equipment of the buildings and facilities authorized in section 1."

It is to be noted that prior to 1965 it was apparently not felt necessary to include any appropriation provision in chapter 15-55 or the authorizing legislation. It is to be further noted that the lack

of such a provision did not deter the approval of bonds issued by bond counsel. We cannot conclude that the fact an appropriation provision is now included makes such authorization subject to the cancellation provision of section 54-44.1-11. The provisions of chapter 15-55 clearly indicate the proceeds of the bonds are to be used and must be used for the construction of the revenue producing buildings. The Legislature surely did not contemplate a situation wherein the Board of Higher Education was authorized to issue bonds under the provisions of chapter 15-55 and the authorizing legislation but, if such bonds were issued more than two years and thirty days from the date of their authorization by the Legislature, the proceeds thereof could not be used for construction of the revenue producing building because of a cancellation of the appropriation. Such conclusion would be unfounded and unreasonable.

The answer to the first question herein concluded that legislative authorization for revenue producing buildings does not expire by the passing of time, change of circumstances or any reason other than repeal by the Legislative Assembly. We must therefore conclude that the proceeds of such bond authorizations do not expire because of the provisions of section 54-44.1-11. The Department of Accounts and Purchases, whose duty it is to cancel unexpended appropriations under section 54-44.1-11, was contacted relative to this matter and informed us that department does not consider the appropriations of the proceeds of revenue bonds subject to the provisions of section 54-44.1-11 and have taken no steps to cancel same.

In fact, of course, the Department of Accounts and Purchases could not cancel these appropriations since, until the bonds are sold, no proceeds are available to be canceled. In any event, it does not appear the provisions of section 54-44.1-11 are applicable to the proceeds of revenue bond issues which proceeds can only be used for the purpose for which the bonds were issued. The quotations from *State v. Sorlie* supra, contained in our reply to question one herein would appear applicable to this question also.

In summary, it is our opinion that the authority granted by Chapter 147 of the Laws of 1959 (as amended) and by Chapter 117 of the Laws of 1965 to expend the proceeds of bonds for married student housing are not subject to the provisions of section 54-44.1-11 and have not terminated by reasons of the provisions thereof.

3. This office on January 28, 1963, directed an opinion to Dr. A. E. Mead, Commissioner of Higher Education, holding that the provisions of Chapter 147 of the 1959 Session Laws, as amended by Chapter 147 of the 1961 Session Laws, and other legislative enactments authorizing the construction of revenue producing buildings under the provisions of chapter 15-55, are separate authorizations and have no relation to one another, i.e., the subsequent legislative enactments do not replace the previous legislative enactments (except where specifically so stated) but are supplemental thereto.

On February 2, 1963, this office directed an opinion to Dr. A. E. Mead, Commissioner of Higher Education, holding it was valid to add the unused authorization under Chapter 147 of the 1957 Session Laws to the unused authorization under Chapter 137 of the 1961 Session

Laws for an addition to the Student Union at the University of North Dakota. Copies of these opinions are enclosed herewith. This has been the consistent opinion of this office on this matter. Three Legislative Assemblies have convened since these opinions were issued and no changes were made in the statute. We believe that under the rules of statutory construction the Legislature can be deemed to have acquiesced in the construction placed upon this matter by this office. Furthermore bond issues have previously been approved in which the State Board has aggregated the amounts authorized for revenue producing buildings from various legislative sessions. The Legislature is aware that this has been the interpretation placed upon the provisions of chapter 15-55.

The Report of the Attorney General prior to 1967 contained only selected opinions of interest to state's attorneys and other practitioners of the law. While the opinions referred to herein are official opinions, they were not published in the Report of the Attorney General since their interest to the various state's attorneys or officials of the local political subdivisions of the State of North Dakota would be limited. The Supreme Court of North Dakota has not required the opinions of the Attorney General be published in order to apply the rule of statutory construction that the Court will give weight to the practical and contemporaneous construction placed upon a statute by the Attorney General and officers charged with its administration. See *Walker v. Weilenman* 143 N.W.2d. 689 (1966). In a rehearing on that case the Court held the Attorney General is not required to act personally in every matter or to approve all acts of his assistants and held the opinion of the First Assistant Attorney General is the opinion of the Attorney General even though such opinion is not personally signed or initialed by the Attorney General himself. In that instance the opinion in question had not been published in the Report of the Attorney General.

In summary, it is our opinion the State Board of Higher Education may aggregate the amounts authorized for married student housing in Chapter 147 of the Laws of 1959 (as amended) and Chapter 117 of the Laws of 1965 with the amount authorized for that purpose in Chapter 155 of the Laws of 1967 so that married student housing at North Dakota State University can now be constructed and financed in the amount of \$3,225,000.

HELGI JOHANNESON

Attorney General