

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-02

Date issued: January 28, 1993

Requested by: Senator Gary J. Nelson

- QUESTION PRESENTED -

Whether the State may use public funds to purchase stock in private corporations.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the State of North Dakota may use public funds to purchase stock in private corporations if the State does so through an industry, enterprise or business created for a public purpose.

- ANALYSIS -

The use of public funds in the context of the question presented is restricted by Article X, Section 18 of the North Dakota Constitution, the Fourteenth Amendment of the United States Constitution and its North Dakota counterpart, Article I, Section 16.

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

The state, any county or city 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, nor subscribe to or become the owner of capital stock in any association or corporation.

N.D. Const. art. X, ? 18.

It has long been established that Article X, Section 18 does not prohibit the State from making loans, giving its credit or making donations provided those activities are performed through an "industry, enterprise or business." Gripentrog v.

City of Wahpeton, 126 N.W.2d 230 (N.D. 1964). The present issue is whether Article X, Section 18 absolutely prohibits the State from purchasing or owning capital stock in any association or corporation.

In interpreting Article X, Section 18, the North Dakota Supreme Court has concluded that the section contains two distinct portions. The second portion, which begins "but neither the state" and includes the phrase regarding the purchase of capital stock, sets the initial scope and limitation of legislative authority. Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960). The first portion of the section sets "forth an exemption to the limitation." Id. at 253.

In other words, the second portion limits the State's actions by providing that unless "otherwise" allowed, the State may not "loan or give its credit or make donations to . . . nor subscribe to or become the owner of capital stock" As explained by the North Dakota Supreme Court the word "otherwise" in this context means "contrarily." The effect of the use of the word "otherwise" is that the limitations placed on a governmental unit by the second portion of Article X, Section 18 do not apply if the governmental unit is making internal improvements or engaging in any industry, enterprise or business. Id. at 254.

There is no grammatical logic for differentiating between the clause regarding loans and the clause regarding capital stock. Both portions are limited by the word "otherwise." The supreme court recognized as much when it offered the following logic for its conclusion that the limitation of the second portion did not apply to the first portion contained in Article X, Section 18. "It is common knowledge that a state or anyone else cannot successfully engage in an industry, an enterprise or a business without in some manner being involved in a loan, the giving of its credit or the making of donations, and that in some circumstances it might be advisable to become the owner of capital stock in an association or corporation." Wentz, 103 N.W.2d 245, 253. (Emphasis supplied.)

It is therefore my opinion that Article X, Section 18 of the North Dakota Constitution does not prohibit the State of North Dakota from purchasing capital stock in an association or corporation if it does so through an industry, business or enterprise.

The other relevant constitutional provision is the Fourteenth Amendment of the United States Constitution. That amendment

provides that the State may not "deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV. North Dakota's Constitution contains a similar provision in Article I, Section 16. N.D. Const. art. I, ? 16. Under these provisions the government may not use public moneys for a private purpose. Green v. Frazier, 253 U.S. 233 (1920). Thus, when the government spends tax dollars the legality of that expenditure turns on whether the expenditure was for a public or private purpose.

A public purpose is one which has as "its objective the promotion of the general welfare of all the inhabitants or residents within a given political division . . ." Green v. Frazier, 176 N.W. 11, 17; 253 U.S. 233 (1920). In Green the North Dakota Supreme Court reviewed grain farming's impact on the state's economy and the welfare of the state's inhabitants. 176 N.W. at 18-20. Noting that little business activity was conducted in the state that did not depend upon the farmer's ability to obtain a fair price for wheat, the North Dakota court concluded that the State Mill was a public entity created for a public purpose. Id.

Recent economic development efforts undertaken by the Legislature in the form of Growing North Dakota were established to allow North Dakota to strengthen and diversify its economy. See Hearing on S. 2058 Before the Senate Industry, Business and Labor Comm., 52nd N.D. Leg. (Feb. 6, 1991) (Statement of John Olson). One of the Legislature's goals continues to be to increase the number and financial strength of businesses in the state and thereby promote the general welfare of the state's residents. When the Legislature has determined that a particular activity will promote the welfare of the residents of North Dakota, the courts will defer to the judgment of the Legislature on that issue. Green, 253 U.S. 233 (1920).

It is therefore my opinion that the legislative goal expressed through the enactment of Growing North Dakota, including the Future Fund, Inc., is a public purpose and public moneys may be spent to affect that purpose. It is my further opinion that the State may use public moneys to purchase stock in private corporations provided the purchase is made through an "industry, enterprise or business" which was created for a public purpose.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It

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governs the actions of public officials until such time as the question presented is decided by the courts.

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