

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-12

Date issued: August 24, 1993

Requested by: Lt. Governor Rosemarie Myrdal

- QUESTIONS PRESENTED -

I.

Whether the Industrial Commission is required to seek a legislative appropriation to conduct the "financial transactions of the Bank of North Dakota."

II.

Whether the operation and financing of the Partnership in Assisting Community Expansion (PACE) program is a financial transaction of the Bank of North Dakota.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the North Dakota Constitution appropriates the funds necessary to conduct the financial transactions of the Bank of North Dakota and therefore the Industrial Commission is not required to seek a legislative appropriation to conduct the financial transactions of the Bank.

II.

It is my opinion that the operation and financing of the PACE program, as it is currently established, is a financial transaction of the Bank of North Dakota.

- ANALYSES -

I.

"Ordinarily, appropriation is a matter for the Legislature. But, if the people determine to make an appropriation in a constitutional provision, and manifest that determination by what is said in the provision, that is an end of the matter."

Langer v. State, 284 N.W. 238, 254 (N.D. 1939). Appropriations made by the Constitution "may be self-executing." State ex rel. Walker v. Link, 232 N.W.2d 823, 826 (N.D. 1975); Ford Motor Co. v. Baker, 300 N.W. 435 (N.D.

1941).

An example of the people's adoption of a self-executing constitutional appropriation is Article X, Section 12 of the North Dakota Constitution, which is also known as the "Jackpot Amendment." The pertinent portion of that Amendment provides:

All public moneys, from whatever source derived, shall be paid over monthly . . . to the state treasurer, . . . and shall be paid out and disbursed only pursuant to appropriation first made by the legislature; provided, however, that there is hereby appropriated the necessary funds required in the financial transactions of the Bank of North Dakota. . . .

N.D. Const. Art. X, ? 12.

Although the Jackpot Amendment requires an appropriation by the Legislature before public moneys which are deposited with the State Treasurer may be expended, it also makes several direct appropriations for various purposes for which no legislative action is required. Ford Motor Co. v. Baker, 300 N.W. 435 (N.D. 1941); and Langer v. State, 284 N.W. 238 (N.D. 1939). One of those direct appropriations made by the Jackpot Amendment is for the "financial transactions of the Bank of North Dakota." N.D. Const. Art. X, ? 12(1). The source of funding for this direct appropriation to the Bank is the Bank's accumulated and undivided profits. See, Sargent County v. Bank of North Dakota, 182 N.W. 270 (N.D. 1921) (Profit and surplus from the original two million in capital of Bank appropriated for the Bank's continuing transactions.).

It is therefore my opinion that the Industrial Commission is not required to seek a legislative appropriation from the Legislature to use the Bank's accumulated and undivided profits to conduct the Bank's financial transactions.

## II.

No case law, constitutional provision, nor statute defines the phrase "financial transactions of the Bank of North Dakota" as that provision is set out in the North Dakota Constitution. "The sole object sought in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and of the people who adopted it." Newman v. Hjelle, 133 N.W.2d 549, 555 (N.D. 1965). That intention is first sought from the language of the provision. Id. at 555-56. However, if the meaning of the language is unclear, other aids can be reviewed. Id. at 556. Thus the "history of the times and . . . the state of being existing

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when the constitutional provision . . . was framed and adopted" can be considered. Id. Likewise the Executive Branch's implementation of the provision is "entitled to considerable weight." State ex rel. Gammons v. Sorlie, 219 N.W.105, 108 (N.D. 1928). This is especially true when the Legislature is "aware of the construction which [has] been placed upon the [constitutional provision] by those administering it and [has] failed to indicate any disapproval of such construction." Id.

The Jackpot Amendment was adopted "to carry on activities that were in operation when the amendment was proposed and approved." Ford Motor Co. v. Baker, 300 N.W. 435, 439 (N.D. 1941). Prior to the adoption of the Jackpot Amendment, the Legislature charged the Bank with "the purposes of encouraging and promoting agriculture, commerce, and industry" by engaging in the banking business. 1919 N.D. Sess. Laws ch. 147, ? 1 (codified at N.D.C.C. ? 6-09-01). Those purposes continue today.

Since the Bank's inception the Industrial Commission has served as the Board of Directors for the Bank. As such the Industrial Commission may direct the Bank to transact any business or engage in any activity which "any bank or bank holding company lawfully may do, except as it is restricted by the provisions of [chapter 6-09]." 1919 N.D. Sess. Laws ch. 147, ? 1 (codified at N.D.C.C. ? 6-09-02); State v. Olson, 33 F.2d 848 (8th Cir. 1929); See also, Sarles v. Scandinavian American Bank, 156 N.W. 556 (N.D. 1915) (Among the powers conferred upon a bank's board of directors is the distribution of undivided profits within the limits prescribed by law.)

The power of the Industrial Commission to establish programs and use the Bank's accumulated and undivided profits to fund them is not unfettered. The Legislature has enacted statutes defining the Industrial Commission's authority and the Industrial Commission must comply with those statutes which are properly enacted into law and meet constitutional muster. Martinez v. Florida Legislature, 542 So.2d 358 (Fla. 1989) ("The legislature cannot give the force of law to something which it refuses to enact into law." Id. at 362.); See e.g., 1981 Op. N.D. Att'y Gen. 13 (opining that the Bank was prohibited from transferring future undivided profits when the Legislature had set a ceiling on a legislatively established program.); and N.D.C.C. ? 54-30-33 (requiring the Bank to transfer funds from the Real Estate Trust to the State Treasurer quarterly.) Nevertheless, any legislative control of the Industrial Commission's and Bank's authority must be structured to recognize the practical and constitutional

constraints on the Legislature's authority.

As a practical matter, no body, whether legislative or executive, can predict each and every issue which must be addressed while operating a bank. The Legislature is not in session for 80 percent of the biennium, and is thus poorly positioned to react in a timely manner to market fluctuations and unexpected income and losses which may occur. Thus, it must leave ongoing management of the Bank to the Executive Branch. Therefore, legislative constraints must be tailored so the Industrial Commission can select the best means of implementing legislative policy, protecting the Bank's capital, and assuring the Bank's profitability. In addition to the practical problems of having the Legislature run a bank, there are constitutional constraints on the Legislature's ability to manage the activities of the Industrial Commission with regard to the Bank.

The separation of powers doctrine requires the Legislature to exercise its activities within its sphere of authority. See, City of Carrington v. Foster County, 166 N.W.2d 377 (N.D. 1969). The Legislature must take care not to intrude into the executive's management of the agency itself. "Allocation of resources and establishment of priorities are the essence of management." Chaffin v. Arkansas Game and Fish Com'n, 757 S.W. 2d 950, 953 (Ark. 1988). Furthermore, this case is unique because the appropriation to the Bank is a constitutional appropriation. Where the constitution appropriates money directly, as it does for the "financial transactions of the Bank", the Legislature may not enact any legislation which "'will impair the operation of [the] constitutional appropriation.'" Langer, supra at 254 (Citing 59 C.J. pp. 237-38.) Therefore, while the Legislature may establish general policies and set funding limits to implement those policies, it must take care that its directives do not unlawfully limit management's flexibility nor interfere with the expenditure of the constitutionally appropriated funds and thereby prevent the Bank from fulfilling its mission.

Unlike private businesses whose goals are generally to "acquire a financial profit for their exclusive benefit, improvement, and enjoyment," the Bank of North Dakota's mission has always included a public purpose. Green v. Frazier, 176 N.W. 11, 17 (N.D. 1920), aff'd, 253 U.S. 233 (1920). Thus the Bank has traditionally engaged in two types of activities: those whose purpose was to make a monetary profit for the Bank and the State; and those whose primary purpose was to further a public purpose. Both activities are essential to the Bank's mission. To be financially sound and thereby have funds to achieve its public purpose activities,

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the Bank must make a profit. The public purpose activities are essential to meet the constitutional standard set in Green v. Frazier.

The Bank has engaged in both of these activities both before and after the Jackpot Amendment was adopted. Although one activity is profit making and the other may not be, each is carried out through such traditional financial transactions as making loans, taking and paying deposits, and other activities conducted by private banks. Thus, the Bank's history supports a conclusion that the Bank's accumulated and undivided profits were appropriated by the Jackpot Amendment to fund both the profit and public purpose components of the Bank's financial transactions. The Legislature's own actions acknowledge the status of the Bank's accumulated and undivided profits as a standing constitutional appropriation, the Industrial Commission's control over those funds, and the appropriateness of using the funds to achieve the Bank's public purpose.

The Legislature first earmarked the Bank of North Dakota's accumulated and undivided profits to supplement other legislative initiatives in 1949. Commencing with that first transfer the Legislature has treated the surplus profits of the Bank as separate from the general fund and not directly available for legislative use. Each legislative "withdrawal" directs the transfer of money from the Bank's undivided and accumulated profits only upon the order of the Industrial Commission. 1949 N.D. Sess. Laws ch. 89, ? 1. The Legislature has continued that practice each biennium since 1949. E.g., 1973 N.D. Sess. Laws ch. 75, ? 1. ("There is hereby transferred to the general fund of the state the sum of ten million dollars from the accumulated and undivided profits of the Bank of North Dakota. Such moneys shall be transferred during the 1973-75 biennium upon order of the industrial commission." Id.)

Consistent with the understanding that the money has been appropriated by the North Dakota Constitution for the "financial transactions of the Bank of North Dakota," the Industrial Commission has not always transferred the entire amount earmarked by the Legislature to the general fund. In June of 1980, the Industrial Commission reduced the amount the Legislature earmarked during the 1979 Legislative Session from \$14,500,000 to \$10,000,000. The Legislature's acquiescence in that reduction lends considerable weight to the conclusion that the Industrial Commission correctly interpreted the constitutional appropriation and the Legislature's authority to earmark that money for other purposes. State ex rel. Gammons v. Sorlie, 219 N.W.105 (N.D. 1928).

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The Legislature has also been aware of the Bank's activities both in traditional profit making financial transactions and the less traditional public purpose financial transactions. When the Legislature is "aware of the construction which [has] been placed upon the [constitutional provision] by those administering it and [has] failed to indicate any disapproval of such construction" that construction is entitled to great weight in determining the meaning of language in the constitutional provision. Sorlie, supra at 108. Thus, the Legislature's actions confirm that the financial transactions of the Bank include both the traditional profit making financial transactions which can be conducted by any bank and the public purposes financial transactions which are required of the Bank because it is a public entity.

The PACE program was first conceived and implemented by the Industrial Commission as a Bank of North Dakota program funded with accumulated and undivided profits. The PACE program was codified and the Legislature appropriated general fund money to fund the program in 1991. 1991 N.D. Sess. Laws ch. 95, ? 55. The fund continued under the Bank's control as it was conducted before the Legislature became involved. 1991 N.D. Sess. Laws ch. 95, ? 9. (In the same bill a substantial amount of money was transferred to the general fund from the accumulated and undivided profits of the Bank. Id. at ? 50.)

In addition to the appropriation to the PACE fund from the general fund, the Legislature also provided that any money "transferred into the fund, interest on fund moneys, and payments to the fund are hereby appropriated for the purposes of [chapter 6-09.14]." Id. at ? 9. (Emphasis supplied.) The purpose of the PACE program is to foster economic development.

The Legislature has determined that this is a public purpose. The program requires the participation of a local economic development entity with the Bank in the buy-down of interest for a loan which is made by the Bank and a participating lender. As directed by the Legislature, the Bank has established the rules under which the participation will occur.

In 1992 the Industrial Commission engaged in two types of financial transactions related to the PACE fund. The Bank transferred additional funds to the now statutory PACE fund when the Legislature's appropriation from the general fund was depleted in the first six months of the biennium. Resolution of the Industrial Commission (Feb. 7, 1992). Immediately thereafter the Industrial Commission reported its first financial transaction to the Legislature's Budget Section and its intention to engage in the second financial transaction of

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using the transferred funds for the buy-down of interest rates under the PACE program.

Both the making of loans and the donation of money to appropriate causes are financial transactions in which private banks can engage in. In addition the North Dakota Constitution provides that the State may make donations for a public purpose if the donation is conducted through a business, enterprise or industry. N.D. Const. Art. 10, ? 18; 1993 Op. N.D. Att'y Gen. 4. Therefore these financial transactions were appropriate for the Bank.

Furthermore, the Budget Section passed an unanimous motion supporting these financial transactions. Minutes of the Budget Section (March 4, 1992). The fact of the Bank's actions and the Budget Section's support was reported to the full Legislature prior to the commencement of the 1993 Legislative Assembly. Report of the North Dakota Legislative Council, Fifty-third Legislative Assembly 1993, p. 37 (1992).

Armed with this knowledge of the Industrial Commission's actions, the Legislature again appropriated money to the PACE fund. 1993 N.D. Sess. Laws ch. 45, ?1. It failed to restrict the Bank's activities and retained the language placing the program under the Bank's control. This action is strong support for the conclusion that the PACE program is one of the "financial transactions of the Bank of North Dakota" and that it is appropriate for the Industrial Commission to use the Bank's accumulated and undivided profits to continue the program. Sorlie, supra.

It is my opinion that, although the Legislature may set the parameters as to what is a public purpose and can prohibit the Industrial Commission from engaging in specified activities, it approved the Industrial Commission's involvement when it placed the PACE fund under the Bank's administration. Based upon the above considerations it is therefore my opinion that the Industrial Commission is not required to seek a legislative appropriation when it transfers accumulated and undivided profits of the Bank to the PACE fund and then uses the money transferred for the operation and financing of the PACE program because, as it is currently established by the Legislature, the PACE fund has a public purpose and the money placed into the PACE fund is used for the financial transactions of the Bank of North Dakota. It is my further opinion that the Industrial Commission need not seek a legislative appropriation to transfer accumulated and undivided profits of the Bank of North Dakota to the PACE fund for use in the PACE program.

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- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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