

LETTER OPINION
94-L-186

July 22, 1994

Mr. Richard Gilmore
Director
Centennial Trees Commission
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Gilmore:

Thank you for your letter asking a number of questions regarding the disposition of moneys in the Centennial Trees Program Trust Fund and the 1993 Legislature's directive in 1993 N.D. Sess. Laws ch. 15, § 10, that the Centennial Trees Commission study the feasibility of privatizing the activities of the Commission.

The resolution of your questions turn on a number of state and federal constitutional provisions, most specifically Article X, Section 18 of the North Dakota Constitution, and the fourteenth Amendment to the United States Constitution and its North Dakota counterpart, Article I, Section 16.

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

Section 18. 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.¹

¹Originally this constitutional provision provided:

Neither the state nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations

to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in any work of internal improvement unless authorized by two-thirds vote of the people.

It was first amended in 1914 and then again to its present form in 1918. Discussing the 1918 amendments the North Dakota Supreme Court in Egbert v. City of Dunseith said:

When the people amended section 185 of the constitution to its present form they said "The state, any county or city . . . may engage in any industry, enterprise or business, not prohibited by article 20 of the constitution" This amendment created a new government function - that of engaging in and carry on commercial and industrial enterprises theretofore considered as private, in competition with private business.

24 N.W.2d 907, 909 (N.D. 1946).

Historically the purpose of this constitutional provision was "primarily to inhibit the state from indulging in the practice, which theretofore had been in vogue in many other states, of making donations, or giving or loaning the state's credit, to companies promising to construct railways or other internal improvements." State v. Davis, 229 N.W. 105, 112 (N.D. 1930). Similar provisions can be found in most other state constitutions. Haman v. Marsh, 467 N.W.2d 836, 850 (Neb. 1991).

Two prohibitions can be found in Article X, Section 18. First, the state or political subdivision is prohibited from extending or loaning its credit such that future revenues are obligated. Second, the state or political subdivision is prohibited from making donations except for reasonable support of the poor. However, the prohibitions against loaning or extending the state or political subdivision's credit or making donations do not apply where the loan or extension of credit or donation is in connection with the state or political subdivision's engaging in a permissible industry, enterprise or business. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-238 (N.D. 1964). Rather, the prohibitions only apply where the state or political subdivision "otherwise" seeks to loan or extend its credit or make donations. Id.

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Generally, words in a statute or constitutional provision should be given their common ordinary meaning. N.D.C.C. ? 1-02-02; McCarney v. Meier, 286 N.W.2d 780 (N.D. 1979). The term "enterprise" has been defined as "[a]n undertaking, esp. one of some scope, complication, and risk."² The American Heritage Dictionary 456 (2d. coll. ed. 1991). The term generally describes a systematic, purposeful and ongoing activity. See Webster's Third New International Dictionary 757 (1967); Black's Law Dictionary 531 (6th ed. 1990). Interpretations of the term "enterprise" by the North Dakota Supreme Court, the Legislature, and this office have been consistent with this ordinary meaning. 1993 N.D. Op. Att'y Gen. 40.

Under the Fourteenth amendment to the United States Constitution a state may not "deprive any person of life, liberty or property without due process of law." North Dakota's constitution contains a similar provision in Article I, Section 16. Under these constitutional provisions, a state may expend public funds only for public purposes. Green v. Frazier, 253 U.S. 233 (1920). The legality of a given expenditure under these constitutional provisions turns on whether it is primarily for a private or public purpose.

"A public purpose or public business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residences within a given political subdivision." Gripentrog v. City of Wahpeton, 126 N.W.2d at 237 (quoting Green v. Frazier, 176 N.W. 11 (N.D.), aff'd, 253 U.S. 233 (1920)). Although each case is dependent upon its own unique facts and circumstances, courts will generally defer to a legislative determination that a particular expenditure will promote the public welfare. Green v. Frazier, 253 U.S. at 240. However, sufficient supervisory controls must generally be in place to insure that the public purposes are met. See Kelly v. Guy, 133 N.W.2d 853 (N.D. 1965); 1993 Op. Att'y Gen. 22.

²The term "industry" has been defined as "[t]he commercial production and sale of goods and services." The American Heritage Dictionary 657. The term "business" has been defined as "[a] commercial enterprise or establishment." The American Heritage Dictionary 220.

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You first ask whether the moneys in the Centennial Trees Program Trust Fund can simply be transferred to a private foundation.³ The resolution of your question first turns on whether the transfer constitutes a donation. A donation has been said to be a gratuity "unsupported by any consideration legal, equitable or moral." Peters & Co. v. Nelson County, 281 N.W. 61, 65 (N.D. 1938). Assuming the contemplated transfer amounts to a donation, it is my opinion that such a transfer would not constitute a donation in connection with the state's engaging in an enterprise. The very purpose of the transfer would be to end the state's direct involvement in achieving the goal of planting one hundred million trees. Accordingly, it is my opinion that such a transfer would constitute an unlawful donation in violation of Article X, Section 18 of the North Dakota Constitution.

You next ask whether the Centennial Trees Commission can make "grants" to private foundations to further the goal of planting one hundred million trees during the decade of the 1990s. Under current legislation the Centennial Trees Commission has express statutory authority to make grants to further the purposes of the Centennial Trees Program. 1991 N.D. Sess. Laws ch. 573, § 1. The grants authorized under the current legislation are part of this state's undertaking to plant one hundred million trees during the decade of the 1990s. The activities of the state, through the Centennial Trees Commission, are systematic, purposeful and ongoing. Therefore, it is my opinion that so long as sufficient supervisory controls are in place to insure that the public purposes of planting trees are met, the Centennial Trees Commission may make grants to private foundations.

³It is my understanding, through discussions you had with a member of my staff, that the contemplated transfer would be irrevocable and without limitation and would not involve any contractual relationship between the foundation and a state agency. Upon transfer, the state's involvement would simply end. Facts different from these may result in a different opinion on this issue than the one given in this letter. Thus, if the facts indicate the transfer is made in connection with the state's engaging in an enterprise, such transfer may be authorized.

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You also ask whether authorized grants would be limited to amounts appropriated by the Legislature. Article X, Section 12 of the North Dakota Constitution provides that all public money "shall be paid out and disbursed only pursuant to appropriation first made by the Legislature." Unlike the continuing appropriation language found in the statutory provision first establishing the Centennial Trees Program trust fund (1989 N.D. Sess. Laws ch. 27, § 1), the current legislation provides that "[m]oneys in the fund may be spent by the centennial trees commission within the limits of legislative appropriations" 1991 N.D. Sess. Laws ch. 573. See also 1993 N.D. Sess. Laws ch. 15. Accordingly the Centennial Trees Commission is limited to making grants within the limits of current legislative appropriations.

You next ask whether a foundation can receive income generated from assets currently in the Centennial Trees Program Trust Fund. The principles outlined above apply with equal force to both the current assets of the Centennial Trees Program Trust Fund and future income of the fund. Under 1991 N.D. Sess. Laws ch. 573, § 1, income earned on moneys in the Centennial Trees Program Trust Fund is credited and becomes part of the fund. Therefore, the answer to this question is the same as the answer to your second question. So long as sufficient supervisory controls are in place to insure that the public purpose of planting trees is met, the Centennial Trees Commission may make grants of income to private foundations.

You next ask whether a nonstate entity can directly receive voluntary contributions reported on state income tax returns the way the Centennial Trees Program Trust Fund currently does under 1989 N.D. Sess. Laws ch. 27, § 2. Although the moneys received would be voluntary contributions in principle, the use of state resources would nevertheless be required. As the state resources would not be utilized in conjunction with a state enterprise for which the voluntary contributions were given, it is my opinion that such an arrangement would violate Article X, Section 18 of the North Dakota Constitution.

Lastly you ask whether 1989 N.D. Sess. Laws ch. 27, § 2 expires on December 31, 2000, and whether it can be terminated earlier. Pursuant to 1991 N.D. Sess. Laws ch. 573, § 2, the provisions of 1989 N.D. Sess.

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Laws ch. 27, ? 2 are ineffective for taxable years beginning after December 31, 2000. Thus, 1989 N.D. Sess. Laws ch. 27, ? 2 expires at the end of the day of December 31, 2000. As the provisions of 1989 N.D. Sess. Laws ch. 27, ? 2, do not give the Tax Commissioner nor the Centennial Trees Commission discretion as to the effectiveness of the provision, the availability of the optional voluntary contribution to the Centennial Trees Program Trust Fund can only be terminated earlier through legislation.

I trust you will find this opinion beneficial. If you need further legal assistance with this matter, please contact Assistant Attorney General Tag Anderson, the attorney assigned to the Centennial Trees Commission.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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