

LETTER OPINION
94-L-338

February 24, 1994

John Hoeven, President
Bank of North Dakota
PO Box 5509
Bismarck, ND 58502-5509

Dear John:

You have asked this office to provide you with opinions on two issues which have been raised by the agency rating the Bank of North Dakota. The two issues which have arisen are whether debt issued by the Bank of North Dakota is subject to the state debt limit and what is the procedure for a creditor of the Bank to recover against the Bank.

1. Whether debt issued by the Bank of North Dakota is subject to the state debt limit.

Article X, section 13 provides:

The state may issue or guarantee the payment of bonds, provided that all bonds in excess of two million dollars shall be secured by first mortgage upon real estate in amounts not to exceed sixty-five percent of its value; or upon real and personal property of state-owned utilities, enterprises, or industries, in amounts not exceeding its value, and provided further, that the state shall not issue or guarantee bonds upon property of state-owned utilities, enterprises, or industries in excess of ten million dollars.

No further indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax, or make other provision, sufficient to pay the interest semiannually, and the principal within thirty years from the date of the issue of such bonds and shall specially appropriate the proceeds of such tax, or of such other provisions to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid.

N.D. Const. art. X, § 13.

Generally, if a debt is backed by the state it must comply with the constitutional debt limitation. State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 696 (N.D. 1984) There are

some exceptions to this general rule however. They include the "current expense" exception, and the "special fund" exception created either by statute or the constitution.

With regard to the "current expenses" exception the court has stated that "[t]he term 'indebtedness,' as used in [article X, section 15] of our constitution as amended, means the amount of debts less collectible taxes and other funds." Jones v. Brightwood Independent School District No. 1, 247 N.W. 884, 887 (N.D. 1933); See also, Schieber v. City of Mohall, 268 N.W. 44S (N.D. 1936). It has also concluded that "'debt' and 'indebtedness' as used in [article X, section 15 relating to political subdivisions] refer to pecuniary obligations imposed by contract, except obligations to be satisfied out of current revenue." Haugland v. City of Bismarck, 429 N.W. 2d 449, 455-56 (N.D. 1988) (citing Schieber v. City of Mohall, 268 N.W. 445 (N.D. 1936)).

It is my conclusion that debt incurred by the Bank of North Dakota which is payable within the biennium is exempt from the constitutional debt limitation under the "current expense" exception.

With regard to the state debt limit and the "special fund" exception, the North Dakota Supreme Court concluded that a financial obligation which is "'secured by and payable exclusively from revenues to be realized from public property acquired with the proceeds of the obligations or assessments on private property benefited by the special improvements'" is exempt from the debt limitation of article X, section 13. - State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 695 (N.D. 1984) (citing Marks v. City of Mandan, 296 N.W. 39 at 47 (N.D. 1941)).

Article X, section 12 provides 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. It is my conclusion that the capital and profits of the Bank which are appropriated to the Bank by article X, section 12, constitute a "special fund" exception to the state debt limit as that exception has been recognized by the North Dakota Supreme Court. Further, it is my conclusion that obligations incurred by the Bank of North Dakota which are payable from that "special fund" are not subject to the state debt limit provided for in article X, section 13.

II. What is the procedure for the depositor to recover his deposit?

There is no specific procedure set out in the statutes for accessing the funds appropriated to the Bank by article X, section 12. However, the Bank's refusal to return a deposit early in its history was addressed by the North Dakota Supreme Court in Sargent County v. State d/b/a Bank of North Dakota, 182 N.W. 270 (N.D. 1921). When the Bank was established, all government entities were required to deposit their moneys with the Bank. Recognizing that this requirement could create difficulties for many small banks throughout North Dakota, the Bank made arrangements with private banks that the public monies which were deposited with the Bank would be redeposited in local private banks. After the political climate changed, the legislature eliminated the requirement that all public funds of political subdivisions be deposited with the Bank. As a result, local governments sought to

remove their deposits from the Bank. Because the Bank was also shoring up other banks in the state by "redepositing" funds which were deposited with the Bank, it refused to return the deposits upon demand. The procedure which was successfully used in the Sargent County case was garnishment. Id.

North Dakota garnishment statutes still provide that, upon obtaining a judgment against the state, a garnishment action may be brought. N.D.C.C. § 32-09.1-02. The statutes specifically governing the Bank also provide that "[c]ivil actions may be brought against the state of North Dakota on account of claims for relief claimed to have arisen out of transactions connected with the operation of the Bank of North Dakota." N.D.C.C. § 6-09-27. Actions brought against the Bank must be designated as against "The State of North Dakota, doing business as 'The Bank of North Dakota,'" and, unless the action involves real property, it must be brought in Burleigh County.

It is my conclusion that a depositor seeking to collect upon the guarantee of deposits provided by N.D.C.C. § 6-09-10, or other creditors seeking to collect other obligations for which the Bank is liable, may do so by first obtaining a judgment against the Bank and then by executing a garnishment against the Bank based upon the judgement obtained.

I trust this answers your questions.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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