

## **N.D.A.G. Letter to Fine (March 16, 1990)**

March 16, 1990

Ms. Karlene Fine, Secretary  
Industrial Commission  
State Capitol  
600 East Boulevard  
Bismarck, ND 58505

Dear Karlene:

Thank you for your February 21, 1990, letter in which you ask whether the books, records (including mortgages), accounting methods, and internal controls (the "books and records") with respect to bonds of North Dakota, real estate series, issued under N.D.C.C. ch. 54-30 (the "Bonds") are subject to examination by the State Auditor.

Before addressing your question, it may be helpful to summarize the manner in which the Bonds are issued and certain relevant statutes pertaining to the Bond program.

The Industrial Commission may have first mortgages upon real estate held by the Bank of North Dakota, together with the obligations secured by the mortgages (the "notes"), assigned to the State Treasurer. N.D.C.C. § 54-30-02. The State Treasurer and his successors in office hold the mortgages and notes "in trust, as security for bonds to be issued under the designation of bonds of North Dakota, real estate series, as provided by law." Id. Following receipt of the assignments, the State Treasurer and the Governor are required to issue the Bonds in the amount of the notes plus certain other amounts. N.D.C.C. § 54-30-03. The Bonds are then to be delivered to the Industrial Commission, as the agent of the state, for sale and delivery. N.D.C.C. § 54-30-08.

The Industrial Commission must place the moneys received from the sale of the Bonds in the funds of the Bank of North Dakota (the "Bank"). N.D.C.C. § 54-30-09. The Bank must deposit all moneys received or collected for the purpose of paying the principal and interest of the Bonds, except for an administration fee which may be retained by the Bank, in a separate fund designated as the real estate bond sinking fund. N.D.C.C. § 54-30-14. The Bank must keep this fund apart from all other funds of the Bank. N.D.C.C. § 54-30-14.

After the Bank has assigned the mortgages and the notes to the State Treasurer, the Bank is to continue to receive the payments, but such payments are to be held by the Bank in trust for the security and payment of the Bonds and for delivery to the general fund of the state of any remaining balance after all of the Bonds have been retired. N.D.C.C. § 54-30-11. The Bank is then required, from time to time, to certify to the State Treasurer a list of the mortgages and notes delivered by it to the State Treasurer together with a showing of payments made and amounts remaining unpaid. N.D.C.C. § 54-30-12.

The State Treasurer, with the approval of the Industrial Commission, has the authority to invest the moneys in the real estate bond sinking fund in securities which are authorized for investment under N.D.C.C. § 15-03-04. N.D.C.C. § 54-30-15. The State Treasurer, through the Bank, must pay interest on the Bonds when due and redeem the Bonds upon their maturity with moneys in the real estate bond sinking fund. Id. The Bank must prepare a report of all payments. N.D.C.C. § 54-30-16. All moneys in the fund, except for the administration fee, are appropriated for the payment of principal of, and interest on, the Bonds. Id.

The Industrial Commission is required to prepare a statement in July of each year showing the condition of the real estate bond sinking fund. N.D.C.C. § 54-30-26.

As the foregoing discussion indicates, although the State Treasurer holds the mortgages and the notes, he holds no moneys, books, or records other than the periodic report prepared and delivered by the Bank. All moneys received or collected in connection with the mortgages, the notes, and the Bonds, and all books and records with respect to the Bonds, are held in trust by the Bank of North Dakota.

The State Auditor, under N.D.C.C. § 54-10-01(2), is generally charged with the responsibility of making a complete examination of the books and records of all state agencies once every two years. There is no question that the office of the State Treasurer is a state agency which must be examined by the State Auditor once every two years. It is my opinion, therefore, that the State Auditor may examine the mortgage and notes and periodic reports in the State Treasurer's possession.

The Bank of North Dakota, however, is not subject to examination by the State Auditor. N.D.C.C. § 6-09-29; State v. Waters, 176 N.W. 913 (N.D. 1920). The question then becomes whether the State Auditor has the authority to examine the books and records of the Bank pertaining to the Bonds because the State Treasurer holds the mortgages and the notes as security for payment of the Bonds.

ALL moneys, books, and records with respect to the Bonds are, by statute, held by the Bank of North Dakota, which is not subject to examination by the State Auditor. The State Treasurer only holds the mortgages and the notes. In addition, the resolutions adopted by the Governor, the State Treasurer, and the Industrial Commission under which the Bonds have been issued, govern and control the manner in which the Bank receives, handles, and disburses all moneys with respect to the Bonds.

If the authority of the State Auditor to examine the books and records pertaining to the Bonds, which are books and records of the Bank, is based upon the fact that the State Treasurer, whose office is subject to examination by the State Auditor, has custody of the mortgages and the notes (which are not property of the state but are being held in trust for the holders of the Bonds), then, by analogy, it would seem that the State Auditor would also have authority to examine the Bank for the reason that the State Treasurer has in his custody certificates of deposit or other instruments (which are property of the state)

representing deposits of public moneys at the Bank. Because the State Auditor has no authority to examine the Bank in the latter instance, State v. Waters, 176 N.W. 913, it follows that the State Auditor also has no authority to examine the Bank in the former instance.

Therefore, it is my opinion that the State Auditor does not have the authority to examine the books and records relating to the Bonds that are in the possession of the Bank.

If the State Auditor believes that an audit pertaining to the Bonds should be conducted, he can make a recommendation to that effect to the Industrial Commission. The Industrial Commission has the authority to direct that such an audit be conducted by a nongovernment certified public accounting firm. See N.D.C.C. §§ 6-09-02,-04,-29.

Sincerely,

Nicholas J. Spaeth