

LETTER OPINION
73-13

January 9, 1973 (OPINION)

The Honorable A. G. Bunker
Speaker of the House
North Dakota Legislative Assembly
State Capitol
Bismarck, ND 58501

Dear Mr. Bunker:

This is in response to your request for an opinion on Senate Bill 2034 which authorizes the North Dakota Outdoor Recreation Agency to determine those tracts of school land under the jurisdiction of the Board of University and School Lands having exceptional scenic, archaeological, historical, recreational, conservational, or wildlife enhancement value, and to prohibit the sale of these lands unless a court shall find that substantial interests of the schools and the people of the state require such a sale.

Your request did not specify the nature of the inquiry and we are therefore only able to assume the areas of interest that you may have in this bill.

The bill does not specifically so provide, but we have good reason to believe that reference to the North Dakota Outdoor Recreation Agency actually pertains to the agency which was created by Section 53-07-01. If the bill were to make this specific reference, any doubt, of course, would be eliminated.

As to the constitutionality of the Act, Section 156 of the North Dakota Constitution provides as follows:

"Section 156. The superintendent of public instruction, governor, attorney general, secretary of state and state auditor shall constitute a board of commissioners, which shall be denominated the 'board of University and School Lands', and, subject to the provisions of this article and any law that may be passed by the legislative assembly, said board shall have control of the appraisement, sale, rental, and disposal of all school and university lands, and the proceeds from the sale of such lands shall be invested as provided by law." (emphasis supplied).

Under this constitutional provision, the first impression would indicate that the Board of University and School Lands has plenary authority over such lands and that such authority emanates from the Constitution as distinguished from legislative acts, but on closer analysis, it becomes eminently clear that while the Board of University and School Lands has plenary authority over such lands, nevertheless, such authority is subject to legislative action. Section 156 does not prohibit the Legislature from enacting any laws governing the sale, rental and disposal of such lands. This bill does impose limitations and conditions as to the sale of school and

university lands.

It is our opinion that the proposed bill would not be in violation of the North Dakota Constitution and would therefore be constitutional.

Section 3 of the Act provides as follows:

"SECTION 3. WITHHOLDING LAND FROM SALE WHICH HAS BEEN PLACED ON THE RETAIN LIST - EXCEPTION. The board of university and school lands shall withhold from sale, except to a public agency or political subdivision of the state, all lands under its control until the outdoor recreation agency has completed a study to determine which tracts of land have exceptional public value. Upon receipt of the retain list, only those tracts of land on the list shall continue to be withheld from sale, except that such lands may be sold to a public agency or political subdivision of the state." (emphasis supplied)

The question arises what is meant by the term "public agency" as such term is used. Initially it appears that it might be used as a synonym for political subdivision, but upon closer analysis, it suggests that it is to be given a broader concept and meaning. The term "public agency" is not a work of art and is subject to construction. The term was considered by the Iowa Supreme Court in *Dobrovolny v. Reinhardt*, 173 N.W.2d. 837, but there the Court was concerned with a statutory definition and concluded that the county board of education is a public agency. The Michigan court, in *City of Detroit v. State*, 188 N.W.2d. 146, had under consideration the meaning of the term "public agency" and concluded that the term was advisedly used by the Legislature to have a broader concept than state or governmental agency and that such term included quasi-public corporations such as railroads, power companies, etc., and that it also included similar type companies which had authority to acquire by purchase or condemnation any land. The Court seemed to indicate that the taking of the land was not limited to those which were required to take land for public use.

The Court, in *Warwick v. Warwick*, 256 Atl. 2d., 206, in effect said that any body consisting of public officers constituted a public agency. The federal courts had occasion to use the term "public agency", but in each such instances it had reference to the bankruptcy act or to a statutory provision which defined the term. Consequently, such cases have relatively little value in construing the meaning of the term as found in the present bill.

Because the term "public agency" is subject to construction, various results could be reached unless the Legislature were to define or qualify the meaning of the term "public agency".

The title of the Act specifically provides that the sale of the lands in question are prohibited unless a court shall find that a substantial interest of the schools and the people of the state require such a sale, but the body of the act does not contain any such limitation or condition except by inference that any action taken by the North Dakota Outdoor Recreation Agency is automatically subject to review by the courts.

The title of the Act, however, does suggest that there is such provision, but the body of the Act does not contain a provision as to who and under what circumstances a judicial review may be sought to the courts.

It is conceivable that the use of the land may possibly conflict with the Enabling Act. It is difficult to assess the full impact of the bill without any facts. If, by or through classification, the use of the land for the benefit of the schools is denied or diverted, then a conflict would exist with the Enabling Act and Sections 154 and 158 of the North Dakota Constitution.

We are further assuming that any land sold or disposed of would be at market value, otherwise it would be in violation of Section 158 of the North Dakota Constitution.

I trust this answers your inquiry.

Sincerely yours,

ALLEN I. OLSON

Attorney General