

LETTER OPINION
2022-L-02

Commissioner Joseph Heringer
Department of Trust Lands
PO Box 5523
Bismarck, ND 58506-5523

Dear Commissioner Heringer,

Thank you for your letter requesting an opinion on whether the Board of University and School Lands (“Board”) can lease previously unleased lands through a subsequent public auction and whether this subsequent public auction is subject to the requirements of N.D.C.C. § 15-04-10. In my opinion, the Board may lease the lands at a subsequent public auction pursuant to N.D. Constitution Article IX, Section 8 and N.D.C.C. § 15-04-10, and any such public auction must be held at the county seat pursuant to N.D.C.C. § 15-04-10.

ANALYSIS

The Board has wide discretion in managing state-owned lands under its control (“Trust Lands”) for the perpetual benefit of the public school systems. The Enabling Act granted to the State of North Dakota more than three million acres of land.¹ North Dakota's acceptance of the grants was made "under the conditions and limitations" of the Enabling Act² which directs that “proceeds” from these lands “constitute a permanent school fund” to support “the public schools.”³ In accordance with these mandates, the State of North Dakota accepted the grant, thereby consenting and agreeing to hold title to these lands as trustee.⁴ These terms were enacted in law in 1889 as Article IX of the North Dakota Constitution,⁵ which also created the Board.⁶

¹ N.D. Const. Enabling Act, ch. 180, 25 Stat. 676; N.D. Dep’t of Trust Lands, 49th Biennial Report at 2 (1989 - 1991).

² N.D. Const. art. XIII, § 3; *See also State v. Towner Cnty.*, 283 N.W. 63, 65 (1938) (citation omitted).

³ N.D. Const. Enabling Act, § 11, ch. 180, 25 Stat. 676.

⁴ *State ex rel. Bd. of Univ. & Sch. Lands v. McMillan*, 96 N.W. 310, 315 (1903).

⁵ Const. 1889, art. IX, § 153.

⁶ N.D. Const. art. IX, § 3.

Section 8 of Article IX, N.D. Constitution, authorizes the leasing of the Trust Lands:

The legislative assembly shall have authority to provide by law for the leasing of lands granted to the state for educational and charitable purposes; but no such law shall authorize the leasing of said lands for a longer period than five years. *Said lands shall only be leased for pasturage and meadow purposes and at a public auction after notice as heretofore provided in case of sale . . .*⁷

In 1893, the Legislature exacted the statutory requirements for leasing in N.D.C.C. §§ 15-04-09 through 14. Section 15-04-10, N.D.C.C., states:

The commissioner of university and school lands, or such other person appointed by the commissioner, shall conduct the leasing of the lands. *The leasing must be at public auction, to the highest bidder, and must be held at the county seat.* The auction must commence on the day and time specified in the advertisement for the leasing. Notice must be given when the land is offered for lease that all bids are subject to approval by the board.⁸

Section 15-04-14, N.D.C.C., states:

If any of the lands in any county remain unleased after the date advertised for the leasing, the board of university and school lands may make contracts of lease for the lands with the first applicant therefor at not less than the minimum price fixed by the board as provided in this chapter.⁹

In enacting a statute, it is presumed that compliance with the North Dakota Constitution is intended.¹⁰ It is, of course, also presumed that the entire statute is intended to be effective.¹¹ “Whenever possible, we construe statutes in harmony with the constitution to avoid constitutional infirmities.”¹²

⁷ N.D. Const. art IX, § 8 (emphasis added).

⁸ N.D.C.C. § 15-04-10 (emphasis added).

⁹ N.D.C.C. § 15-04-14.

¹⁰ See N.D.C.C. § 1-02-38(1).

¹¹ See N.D.C.C. § 1-02-38(2).

¹² *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 540 (N.D. 1994).

Section 8, art. IX, of the N.D. Constitution and N.D.C.C. § 15-04-10 require that leasing of Trust Lands occur at public auctions. N.D.C.C. § 15-04-14, however, allows the Board to directly contract for lease of the Trust Lands if the land remains unleased after the public auction referred to in N.D.C.C. § 15-04-10. In order to harmonize these provisions, these statutes must be read in the context of the duty assigned to the Board in Article IX of the Constitution.

The Board manages the Trust Lands as well as the trust funds to which they are assigned (“Trust Fund”).¹³ It has a fiduciary duty to manage and safeguard the trust property.¹⁴ The Board “acts . . . on behalf of the state” and as the State’s “trustee.”¹⁵ It holds “full control” over the rental and “management of school lands”¹⁶ A trustee is required to dispose of trust property with the most advantageous terms possible for the benefit of the trust which he represents.¹⁷ The rule is no different in the leasing of property of a trust estate.¹⁸ As trustee, the Board has the authority to use “a high degree of judgment and discretion” in administering “this greatest of all state funds [.]”¹⁹

Section 8 of Article IX of the N.D. Constitution establishes leasing by public auction as the method by which the Board initially leases the Trust Lands. However, after that initial mandatory public auction occurs, the Board, as an exercise of its fiduciary duty to the beneficiaries, must attempt to lease the previously unleased lands in the manner it determines will result in the most advantageous terms to the Trust Fund. While the permissive language of N.D.C.C. § 15-04-14 allows the state to make direct contracts of lease for the previously unleased lands, it does not require it. In a statute, the word “may” does not create a mandatory duty.²⁰ “The word ‘may’ is usually used ‘to imply permissive, optional or discretionary, and not mandatory action or conduct.’”²¹ The Supreme Court has held the word “may” in a statute is “merely permissive, it does not

¹³ See N.D. Const. art. IX, § 3; N.D.C.C. § 15-01-02; N.D.C.C. ch. 15-03.

¹⁴ See N.D.C.C. §§ 15-03-04.2, 15-06-32.1, 15-07-02, 15-07-10, 15-09-04; N.D.A.G. 95-L-35, N.D.A.G. 88-23; *Lang v. Bank of N.D.*, 453 N.W.2d 118, 121 (N.D. 1990); *State ex rel. Sathre v. Bd. of Univ. & Sch. Lands*, 262 N.W. 60, 69 (1935).

¹⁵ *Fuller v. Bd. of Univ. & Sch. Lands*, 129 N.W. 1029, 1031 (1911).

¹⁶ *Id.*; See also N.D.C.C. § 15-01-02(1).

¹⁷ See *State ex rel. Ebke v. Bd. of Educ. Lands & Funds*, 47 N.W.2d 520, 523 (1951).

¹⁸ *Id.*

¹⁹ *Fuller*, 129 N.W. at 1032.

²⁰ See *City of Devils Lake v. Corrigan*, 589 N.W.2d 579 (N.D. 1999).

²¹ *State v. Glaser*, 858 N.W.2d 920, 924 (N.D. 2015) (citing *City of Devils Lake v. Corrigan*, 589 N.W.2d 579 (N.D. 1999)).

require action, and it operates simply to confer discretion.”²² Because N.D.C.C. § 15-04-14 states that the Board “may make contracts of lease for the lands,” the Board is merely given the option to directly contract for leases; it is not mandated by the statute. The discretion to select the manner of leasing previously unleased lands has been given to the Board.

Section 15-04-14, N.D.C.C., harmonizes with Section 8 of Article IX of the N.D. Constitution because it allows the Board to exercise its fiduciary duty to obtain the optimum result for the benefit of the Trust Fund. Section 8 of Article IX states that “[Trust Lands] shall only be leased . . . at a public auction . . .” however, the Board is initially attempting to lease the Trust Lands at a public auction pursuant to N.D.C.C. § 15-04-10. Section 15-04-14, N.D.C.C., merely serves to fill in those situations where the Board is left with unleased lands after a public auction. Section 15-04-14, N.D.C.C., is able to be harmonized with Section 8 of Article IX of the N.D. Constitution and N.D.C.C. § 15-04-10, and the Board has the authority to lease previously unleased Trust Lands at either a subsequent public auction or by directly making contracts for lease. As an exercise of its fiduciary responsibility, the Board may opt to conduct an additional legally compliant public auction.

Having determined that the Board may, within its discretion, conduct a subsequent public auction, I turn my attention to the question of whether that subsequent auction is required to be held at the county seat. While Article IX of the N.D. Constitution provides for the leasing of the Trust Lands at a public auction,²³ and specifies the notice requirements for the public auction,²⁴ it does not specify the location of the public auction for the purpose of leasing.²⁵ Section 3 of Article IX of the N.D. Constitution vests the authority to expand on the procedures set forth in the Constitution for the Board’s “appraisement, sale, rental and disposal” of the Trust Lands with the legislative assembly.²⁶

²² *State v. Glaser*, 858 N.W.2d 920, 924 (N.D. 2015) (citing *City of Devils Lake v. Corrigan*, 589 N.W.2d 579 (N.D. 1991) and *Matter of Adoption of K.S.H.*, 442 N.W.2d 417, 420 (N.D. 1989)).

²³ N. D. Const. art. IX, § 8.

²⁴ *Id.*

²⁵ N.D. Const. art IX, § 6, however, specifies that public auctions for the sale of Trust Lands must occur at the county seat of the county in which the land to be sold is situated.

²⁶ N.D. Const. art IX, § 3.

Section 15-04-10, N.D.C.C., states “[t]he leasing must be at public auction, to the highest bidder, and must be held at the county seat.” “Usually, when the plain meaning of a statute is apparent, it is unwise and unnecessary to delve further.”²⁷ “Must’ has the same meaning as ‘shall,’ which imposes a mandatory duty.”²⁸ In this statute, it is clear that if Trust Lands are leased at a public auction, the public auction must be held at the county seat of the county in which the segment of land is situated.

It is my opinion that the Board has the legal authority to lease previously unleased Trust Lands at a public auction and that the public auction must be held at the county seat of the county in which the respective tract of land is situated.

Sincerely,

Drew H. Wrigley
Attorney General

AMH/JW

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 question presented is decided by the courts.²⁹

²⁷ N.D.A.G. 2014-L-15.

²⁸ N.D.A.G. 2005-L-44 (citing *Greenwood v. Moore*, 545 N.W.2d 790, 795 (N.D. 1996) and *Solen Public School Dist. v. Heisler*, 381 N.W.2d 201, 203 (N.D. 1986)).

²⁹ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).