

**LETTER OPINION  
2003-L-47**

October 31, 2003

Mr. Larry Isaak  
Chancellor  
North Dakota University System  
600 E Boulevard Ave Dept 215  
Bismarck, ND 58505-0230

Dear Mr. Isaak:

Thank you for your letter asking my opinion concerning the authority of the University of North Dakota (UND) and the North Dakota State Board of Higher Education (Board) to transfer real property devised to UND under a decedent's will to the University of North Dakota Foundation (Foundation).

You advise the will devises real property to UND. You also advise there is a question concerning whether the decedent may have intended that the property go to the Foundation because the decedent had a 40-year history of making donations to the Foundation.

The Foundation is a nonprofit 501(c)(3) corporation organized and operated solely for the benefit of UND. You stated transferring the property to the Foundation will benefit UND because the Foundation has the staff and resources to manage real property and other investments to maximize investment return. Further, you state that UND, the Board and the Foundation are interested in transferring the property to the Foundation to maximize the potential return on the bequest. You ask whether the property devised to UND may be distributed directly to the Foundation pursuant to an agreement between UND and the Foundation under N.D.C.C. § 30.1-20-12 relating to private agreements among successors of a decedent.

The decedent's last will and testament devised real property owned in Cass and Richland Counties "to the University of North Dakota, Grand Forks, North Dakota." Article II, Last Will and Testament. Upon the death of the testator, the real property vested in the state of North Dakota and is held in trust for the benefit of UND. N.D.C.C. §§ 30.1-12-01 and 1-08-02. Section 30.1-20-12, N.D.C.C., allows "successors [to] agree among themselves

to alter the interests, shares, or amounts to which they are entitled under the will of the decedent.” A devisee is a successor designated in a will to receive property disposed of by a will. N.D.C.C. § 30.1-01-06(11), (12). In this case, it appears UND is the devisee of the real property in question. Because the Foundation is not a successor, that is, one entitled to receive property under the will in question, N.D.C.C. § 30.1-20-12, relating to agreements among successors to reallocate property received from a decedent, is not applicable. It may be possible, however, in a formal proceeding under N.D.C.C. ch. 30.1-22 for all interested persons having beneficial interests and the personal representative to obtain court approval of an agreement that the property be distributed to the Foundation, pursuant to N.D.C.C. § 30.1-22-01.<sup>1</sup>

You also ask whether UND and the Board may transfer the property to the Foundation under an agreement spelling out how the income or proceeds of development or sale by the Foundation will be used. As you noted in your letter, the Board is authorized to receive bequests<sup>2</sup> to any institution of higher education under its control. N.D.C.C. § 15-10-12. The Board has control and administration of the University of North Dakota at Grand Forks. N.D. Const. art. VIII, § 6; N.D.C.C. § 15-10-01. Bequests of real property to UND are “[s]ubject to the limitations of section 15-10-12.1 [N.D.C.C.]” N.D.C.C. § 15-10-12. Under N.D.C.C. § 15-10-12.1 the Board may sell real property or buildings which an institution of higher learning has received by gift or bequest. The Board is to prescribe conditions for the sale of property which must “include requiring an appraisal and public auction or advertisement for bids, unless the gift instrument requires a different process.” *Id.* You suggest the will “requires a different process” because the testator intended that the Foundation receive the property. There is no language in the will governing disposition of the real property devised to UND. Thus, the will does not require it be sold under “a different process” than provided by N.D.C.C. § 15-10-12.1. The language authorizing the

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<sup>1</sup> Section 30.1-22-01, N.D.C.C., provides:

A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any governing instrument, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

<sup>2</sup> Bequest is the act of giving by will or a gift by will. The American Heritage Dictionary 172 (2d coll. ed. 1991). Words not defined in the code are to be understood in their ordinary sense. N.D.C.C. § 1-02-02.

Board to sell property under a process set out in the gift instrument cannot be used to construe an alleged ambiguity in a will.

You also suggest that the Board would not approve a “sale” of the property, but instead would transfer title to the Foundation under an agreement requiring the income or proceeds from development or sale of the property to benefit UND. The argument appears to be that a “transfer of title” is not a “sale” subject to the limitations of N.D.C.C. § 15-10-12.1. Transfer is “an act of the parties . . . by which title to property is conveyed.” N.D.C.C. § 47-09-01. A transfer may be made by a sale or a gift. Sale is defined as the “transfer of property or title for a price.” Black’s Law Dictionary 1337 (7th ed. 1999). The proposal by the Board, to transfer the title in exchange for consideration (the income or proceeds of development or sale of the property to benefit UND) would constitute a “sale” of the property. Furthermore, a transfer may not be made to the Foundation for ultimate sale to avoid the requirements of N.D.C.C. § 15-10-12.1 of a sale by public auction or advertisement for bids. The Board may not do indirectly, that which it can’t do directly. Langenes v. Bullinger, 328 N.W.2d 241, 246 (N.D. 1982).

Should the Board desire to sell the property, it may only do so under authority given to it by the constitution or by the Legislature. See Sacchini v. Dickinson State College, 338 N.W.2d 81, 84 (N.D. 1983) (powers of the Board of Education are found in the North Dakota Constitution and North Dakota Century Code). The authority to sell real property bequeathed to an institution of higher education was given to the Board by the 1971 enactment of section 15-10-12.1 (1971 N.D. Sess. Laws ch. 164, § 2).<sup>3</sup> The legislative history indicates the Board’s authority to sell donated land was carefully circumscribed. Indeed, the requirement for appraisal and sale by advertisement for bids was inserted to guard against the transfer by the Board for less than full value. See Hearing on S.B. 2486 Before the House Comm. on Education, 1971 N.D. Leg. (Feb. 24). Representative Raymond testified, regarding the amendments authorizing the Board to sell real property only upon appraisal and advertisement for bids, that “there should be ample protection in this bill so that land cannot and will not be given away for a substandard price.” Id. See also 2001 N.D. Sess. Laws ch. 160, §1 (authorizing the Board to sell land at public auction in addition to advertisement for bids). Thus, a transfer of the real property to the Foundation is not possible without complying with N.D.C.C. § 15-10-12 and 15-10-12.1.<sup>4</sup>

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<sup>3</sup> Prior to 1971, the Board of University and School Lands had the authority to sell land bequeathed to a university. N.D. Const. art. IX, § 3; N.D.C.C. § 15-01-02(1)(c).

<sup>4</sup> Section 54-01-05.2, N.D.C.C., is another law that governs the sale of state-owned land. It requires, among other things, property to be sold at a public auction after notice of the sale is published for three weeks. N.D.C.C. § 54-01-05.2. Arguably, when the Legislature gave the Board the authority to sell land under N.D.C.C. § 15-10-12.1, it meant for that statute, rather than N.D.C.C. § 54-01-05.2, to apply to the sale of lands by the Board. N.D.C.C. § 1-02-07 (when a general statute conflicts with a specific

You also ask whether N.D. Const. art. VIII, § 6 gives the Board authority to transfer the property to the Foundation notwithstanding the limitations of section 15-10-12.1 or other statutes. That constitutional provision created the Board in 1938 "for the control and administration of [UND]." N.D. Const. art VIII, § 6. N.D. Const. art VIII, § 6 provided that the Board was to "assume all the powers and perform all the duties now conferred by law upon the board of administration in connection with [UND and the other institutions of higher education listed in subsection 1]". N.D. Const. art. VIII, §6(6)(a). In 1938 the Board of University and School Lands had authority regarding "control of the selecting, appraisement, rental, sale, disposal and management of all school and public lands." C.L. 1913 § 285. The Board of Administration, on the other hand, had virtually the same powers and duties regarding UND and the other institutions of higher education in 1938 enumerated in N.D. Const. art. VIII, § 6(6)(b).<sup>5</sup> A review of the powers granted reveals that they are limited to administration and management of the operation of the schools. Subsection (6)(b) gives the Board authority to prescribe course curriculum, delegate administration to employees, organize the work "of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions." N.D. Const. art. VIII, § 6(6)(b). See also N.D.C.C. § 15-10-17 (listing additional powers of the Board). None of the powers authorized in N.D. Const. art. VIII, §6 concern the disposition of real property. In re Township 143 North, Range 55 West, Cass County, 183 N.W.2d 520, 529 (N.D. 1971) (advising mention of one thing in a statute implies exclusion of another); Divide County v. Baird, 212 N.W. 236, 242 (N.D. 1926) (stating when law prescribes one mode of exercising an express power it implies an inhibition of exercising it in any other way).<sup>6</sup> See also King v. Bankerd, 492 A.2d 608 (Md. 1985) (holding that language in a power of attorney giving the agent full power to do each and every thing the principal could do is limited to powers related to those enumerated or listed in the power of attorney). Accord, Restatement (Second) of Agency § 34, comment (h), & § 37, comment (a) (1958). Thus,

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statute, the specific statute controls). Just last session, however, the Legislature authorized the Board to convey a piece of land to Devils Lake, North Dakota, and specifically provided that N.D.C.C. § 54-01-05.2 did not apply to the transfer. 2003 N.D. Sess. Laws ch. 134, § 1. This implies that the Legislature did so because it thought such sales were subject to N.D.C.C. § 54-01-05.2. Because I conclude that the Board cannot transfer the land in question as proposed, it is not necessary to address this issue.

<sup>5</sup> The Board of Administration had succeeded to similar powers and duties of the Board of Regents and the Board of Trustees of UND. C.L. 1913 § 283b5 (1925 Supp.) (Board of Administration powers); C.L. 1913 § 364a7 (1925 Supp.) (Board of Regents powers); C.L. 1913 §§ 1542, 1545 (Board of Trustees of UND powers).

<sup>6</sup> Principles of statutory construction are applicable to constitutional provisions. McCarney v. Meier, 286 N.W.2d 780, 783 (N.D. 1979).

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N.D. Const. art. VIII, § 6, concerning control and administration of certain state educational institutions, does not authorize the Board to dispose of real or personal property given or bequeathed to those institutions.

Sincerely,

Wayne Stenehjem  
Attorney General

tam/vkk