**LETTER OPINION**
**2010-L-05**

March 17, 2010

Ms. Pam Sharp
Director
Office of Management and Budget
600 E Boulevard Ave Dept 110
Bismarck, ND 58505-0400

Dear Ms. Sharp:

Thank you for your letter asking whether the requirement of the contingent appropriation to Dickinson State University for Stoxen Library was satisfied. As noted in your letter, the issue has arisen because an amount of money was erroneously included in the calculation of actual general fund revenue. The appropriation was authorized for the Stoxen Library if the State's general fund was at a certain level on December 31, 2009. This criterion was met however it was later determined that the amount of revenue in the general fund on December 31, 2009, was incorrect due to the erroneous deposit. For the reasons stated below, it is my opinion that the criterion within the contingent appropriation to Dickinson State University was not satisfied.

ANALYSIS

During the 2009 legislative session, the Legislative Assembly appropriated[1] $8,800,000 to Dickinson State University in order to renovate and construct Stoxen Library.[2] The funding was only available, however, "if actual general fund revenues for the period from July 1, 2009, through December 31, 2009, exceed estimated general fund revenues for that period by at least $25,000,000, as determined by the office of management and budget, based on the legislative estimates made at the close of the 2009 legislative session."[3] As explained in your letter, revenues entered into the statewide accounting system as of December 31, 2009, totaled $33.8 million higher than estimated for the relevant time period. It was later determined that over $12 million had erroneously been deposited into the general fund. The erroneous deposit was subsequently corrected in January, causing the general fund revenue for the period from July 1, 2009, through December 31, 2009, to be less than $25 million for that period. The answer to your question depends, therefore, upon whether the legislative

[1] See N.D.A.G. 88-5, defining appropriation (citing State v. Holmes, 123 N.W. 884, 886-87 (N.D.1909).
[2] 2009 N.D. Sess. Laws ch. 31, § 6.
[3] Id.

requirement that actual general fund revenues for the last half of 2009 exceed the budget estimate for that period by at least $25 million could be satisfied by including the erroneous deposit.

Legislatures frequently enact laws that will become effective only upon the occurrence of a contingent event.[4] The North Dakota Legislature has done so in different contexts.[5] In relation to appropriations, the Supreme Court of Florida specifically held that:

> [a]ppropriations may constitutionally be made contingent upon matters or events reasonably related to the subject of the appropriation, but may not be made to depend upon entirely unrelated events. For example, an appropriation to a university might be contingent upon the registration of a minimum number of students who could benefit from the appropriation or contingent upon the state revenues reaching a certain level.[6]

However, in order for a statutory contingency to be satisfied and the statute made effective, the event upon which the contingency is predicated must actually have occurred. For example, where a state law authorized a county to impose a tourist development tax if a tourist development council had prepared and submitted a plan, that tax could not be imposed where the tourist development council had not developed or submitted the required plan but had instead rejected the county's own plan.[7] Similarly, where a state law permitted a county to adopt an ordinance regulating underground gasoline storage tanks contingent on approval from a state agency, the local ordinance was not enforceable where the state agency had conditionally approved the ordinance subject to certain amendments being adopted by the county.[8] Further, when a statute containing a contingency is passed and the contingency has not yet been met, subsequent statutes that assume the former statute to be effective are themselves ineffective if the contingency has not actually taken place.[9] It is my opinion that

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[4] Eisele v. Morton Park Dist., 258 N.E.2d 127, 129-30 (Ill. App. Ct. 1970); State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M.1974), Rogers v. Desiderio, 655 N.E.2d 930 (Ill. App. Ct. 1995).

[5] For example, in the event that N.D.C.C. § 28-32-18(1) is declared unconstitutional by the North Dakota Supreme Court, a substitute statute is to then to become effective pursuant to 2001 N.D. Sess. Laws ch. 293, § 36.

[6] In re Advisory Opinion to the Governor, 239 So.2d 1, 9 (Fla. 1970).

[7] Freni v. Collier County, 588 So.2d 291, 293-94 (Fla. App. 2d. Dist. 1991).

[8] Lewis Oil Co., Inc. v. Alachua County, 496 So.2d 184, 187 (Fla. App. 1st Dist. 1986).

[9] "A law which, by its own terms, is to have no effect until the happening of a future contingent event, cannot be made effective before the event happens by any Acts or series of Supplements passed upon the assumption the event has happened, and that the law is in force. All such Acts, instead of possessing any curative powers, merely multiply errors." State ex rel. Mayor of Baltimore v. Kirkley, 29 Md. 85, 109 (Md. App. 1869). (The city of Baltimore had passed an ordinance that depended upon a change in state law, but the State Legislature passed a law which did not conform completely to the terms of the ordinance, making the ordinance ineffective.). See also Gibson v. State, 104 A.2d 800, 805 (Md. App. 1954).

when a law contains a requirement that a contingency must have occurred before the law is effective, that contingency must have actually and legally occurred in order for the law to be effective.

The erroneous deposit into the general fund was not effective as it related to the computation necessary to determine whether the contingency was satisfied. In a different context, this office previously determined that, although the constitution requires an appropriation before public moneys may be withdrawn from the general fund, money that was erroneously deposited into the general fund may be refunded without an appropriation because moneys not properly placed in the general fund are not a part of that fund.[10] Accordingly, it is my further opinion that the erroneous deposit made to the general fund was never a part of the general fund, and since that money was never a part of the general fund, it may not be considered toward satisfying the contingent appropriation for Stoxen Library.

Therefore, it is my opinion that the contingent appropriation of funds to Dickinson State University for the renovation and construction of Stoxen Library has not been satisfied because the erroneous deposit of funds into the general fund may not be counted toward meeting that contingency.

Sincerely,

Wayne Stenehjem
Attorney General

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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.[11]

[10] N.D.A.G. 98-L-142. Specifically, county funds erroneously deposited into the general fund were not "public moneys" as used in N.D. Const. art. X, § 12. In that context, the phrase "public moneys" was used in specific reference to money belonging to the State; the money belonging to the counties was still public money in the general sense that the counties are also public entities.

[11] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).