

**LETTER OPINION
2011-L-05**

April 12, 2011

Mr. John W. Geissinger
Retirement & Investment Office
PO Box 7100
Bismarck, ND 58507-7100

Dear Mr. Geissinger:

Thank you for your letter raising questions about the administration of the North Dakota legacy fund. The legacy fund was created under House Concurrent Resolution No. 3054 which was passed by the people in the November 2010 general election as Measure No. 1.¹ Under N.D. Const. art. X, § 26, the State Investment Board (Board) is charged with the duty of investing the principal of the North Dakota legacy fund. There is, however, no explicit provision in the constitution authorizing the Board to pay any of the costs related to this duty. You ask whether the Board may charge its investment consulting costs and administrative costs, including overhead, against the legacy fund, as it may for other funds under its control. You also ask whether the legacy fund is subject to the Board's management and asset allocation decision-making authority.

Based on the following, it is my opinion that the Board has the implied authority to charge its costs, both investment consulting and administrative costs, including overhead, if the costs are incurred as a result of the Board investing the legacy fund. Further, it is my opinion that by necessity, the legacy fund is subject to the Board's management and asset allocation decision-making authority.

ANALYSIS

Article X, section 26 of the Constitution, which creates the North Dakota legacy fund, provides, in part:

Thirty percent of total revenue derived from taxes on oil and gas production or extraction must be transferred by the state treasurer to a special fund in the state treasury known as the legacy fund. . . . The principal and earnings of the legacy fund may not be expended until after June 30, 2017, . . . The

¹ HCR 3054, creating the legacy fund, appears as N.D. Const. art. X, § 26. This provision of the constitution becomes effective after June 30, 2011. Id.

state investment board shall invest the principal of the North Dakota legacy fund. The state treasurer shall transfer earnings of the North Dakota legacy fund accruing after June 30, 2017, to the state general fund at the end of each biennium.

(Emphasis added.) Although the Board is charged with the duty of investing the principal of the North Dakota legacy fund, N.D. Const. art. X, § 26 provides no explicit means of covering any costs of the Board associated with this function.

The North Dakota Supreme Court has provided the following guidance for interpreting constitutional provisions:

The sole object sought in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and of the people who adopted it, and all rules of construction are subservient to and intended to effectuate such objects. Primarily such intention and purpose are to be found in and deduced from the language of the Constitution itself but, if the language is ambiguous or the answer doubtful, then [sic] the field of inquiry is widened and the rules applicable to the construction of statutes are to be resorted to, and the court may look to the history of the times and examine the state of being existing when the question was framed and adopted by the people in order to ascertain the prior law, the mischief, and the remedy.²

As you indicate, N.D. Const. art. X, § 26 makes no provision for paying any of the Board's costs incurred for investing or administering the legacy fund.

Generally, the Board is required by statute to charge its investment consulting and administrative costs to the funds it invests.³ The Legislature has enumerated a number of such investment consulting costs subject to recoupment including "investment counseling fees, trustee fees, custodial fees, performance measurement fees, expenses associated with money manager searches, expenses associated with onsite audits and reviews of investment managers, and asset allocation expenses, incurred by the state investment board."⁴ This provision does not explicitly apply to the legacy fund, however, because the legacy fund is not included in the statutorily designated list of funds subject to Board management.⁵

² Newman v. Hjelle, 133 N.W.2d 549, 551 (N.D. 1965).

³ See N.D.C.C. § 21-10-06.2 (requiring the State Investment Board to recoup its costs). The law specifically provides that the "amounts necessary to pay for investment costs . . . are hereby appropriated and must be paid directly out of the funds listed in section 21-10-06 by the fund incurring the expense." Id. See N.D.C.C. § 54-52.5-03.

⁴ N.D.C.C. § 21-10-06.2.

⁵ N.D.C.C. § 21-10-06.

Although N.D. Const. art. X, § 26 made no explicit provision for payment of any costs, that does not necessarily end the inquiry. As previously stated, if a statute or a constitutional provision⁶ is ambiguous or of doubtful meaning, the field of inquiry is widened and courts may consider, among other things, the object sought to be attained and the legislative history.⁷ “In fact, a wider field of inquiry for information is proper where needed in construing constitutional provisions than legislative enactments.”⁸ On the other hand, if the wording of a statute is clear and unambiguous, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit.⁹

“A statute is ambiguous when it is subject to different, but rational, meanings.”¹⁰ “However, statutes that are clear and unambiguous when read separately may contain a latent ambiguity when read together and applied to a particular set of facts.”¹¹ Statutes which contain a latent ambiguity when applied to a particular situation make it appropriate to consider the statute’s meaning in light of extrinsic aids,¹² which may include the object sought to be attained by the statute and the consequences of a particular construction of the statute, among other things.¹³

The two pertinent provisions of N.D. Const. art. X, § 26 are “[t]he principal and earnings of the legacy fund may not be expended until after June 30, 2017” and “[t]he state investment board shall invest the principal of the North Dakota legacy fund.”¹⁴ Read separately, these provisions seem clear and unambiguous. Read together, however, in the context of how funds are to be invested and how the costs of investing a fund are to be covered, a latent ambiguity becomes apparent.

⁶ See State ex rel. Link v. Olson, 286 N.W.2d 262, 269 (N.D. 1979).

⁷ N.D.C.C. § 1-02-39; Newman, 133 N.W.2d at 551.

⁸ Link, 286 N.W.2d at 269.

⁹ N.D.C.C. § 1-02-05.

¹⁰ Kroh v. Am. Family Ins., 487 N.W.2d 306, 307 (N.D. 1992).

¹¹ Kroh, 487 N.W.2d at 308. See also NL Indus., Inc. v. N.D. State Tax Comm’r, 498 N.W.2d 141, 146 (N.D. 1993) (“Because of the statute’s latent ambiguity, we believe that the Legislature implicitly delegated to the Commissioner the duty of formulating a method of treating net operating losses by interpreting the income tax statutes in an attempt to fulfill the Legislature’s ambiguously expressed intent.”); St. Paul Mercury Ins. Co. v. Andrews, 321 N.W.2d 483, 485 (N.D. 1982) (although insurance statute is not patently ambiguous and no extrinsic evidence should be necessary to construe it, nevertheless, if insurance industry custom, other insurance law, or attending circumstances disclose a latent ambiguity, court will examine statute in light of canons set out in N.D.C.C. § 1-02-39).

¹² State v. Higgins, 680 N.W.2d 645, 649 (N.D. 2004); see also 2005-L-16.

¹³ N.D.C.C. § 1-02-39.

¹⁴ N.D. Const. art. X, § 26.

The word “invest” is not defined in N.D. Const. art. X, § 26, but its usage within the section does not imply something different than the ordinary¹⁵ definition for the word which could mean both the “laying out of money in a way intended to secure income or profit,” and also the expenditure of funds to “purchase securities . . . or to place money or property in business ventures or real estate . . . so that it may produce revenue. . . .”¹⁶ There are many ways money may be “invested,” most if not all of which require some type of expenditure, cost, or acquisition. Properly investing any large fund, including the legacy fund, necessarily involves incurring certain costs, as the Legislature has set out in N.D.C.C. § 21-10-06.2.

Additionally, the constitutional directive for the *Board* to invest the legacy fund is unambiguous. Although the Board has the ability to invest funds on its own and has invested directly in certain funds, it has hired a director and investment advisors to invest most funds on its behalf. Under N.D.C.C. § 21-10-02, the Board is authorized to hire an investment director, advisory service, or both who have the power “to make purchases, sales, exchanges, investments, and reinvestments relating to the funds under the management of the board. . . .”¹⁷ Even when the Board itself invests in a fund without utilizing an advisory service or private investment consultant, investment and administrative costs are incurred by the manager of the fund and charged back to the Board. The legacy fund, like all other funds managed by the Board, can only be properly and responsibly invested if the prudent investor rule or similar statutorily authorized options are followed.¹⁸ Such action by the Board necessarily triggers investment consulting costs of the type identified by the Legislature in section 21-10-06.2.

Similarly, as with investment consulting costs, administrative costs are proportionally allocated by a continuing appropriation under N.D.C.C. §§ 21-10-05 and 54-52.5-03, to be paid out of each fund under the Board’s control. The provisions relating to administrative costs, like those relating to investment consulting costs, do not explicitly apply to the

¹⁵ “Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.” N.D.C.C. § 1-02-02.

¹⁶ Black’s Law Dictionary 825 (6th ed. 1990). The Board’s investment guidelines are largely established by N.D.C.C. §§ 21-10-02 and 21-10-02.1, which contemplate a myriad of legal investment possibilities.

¹⁷ N.D.C.C. § 21-10-05.

¹⁸ See N.D.C.C. § 21-10-07:

Legal investments. The state investment board shall apply the prudent investor rule in investing for funds under its supervision. The “prudent investor rule” means that in making investments the fiduciaries shall exercise the judgment and care, under the circumstances then prevailing, that an institutional investor of ordinary prudence, discretion, and intelligence exercises in the management of large investments entrusted to it, not in regard to speculation but in regard to the permanent disposition of funds, considering probable safety of capital as well as probable income.

legacy fund because the legacy fund is not included in the statutorily designated list of funds subject to Board management.¹⁹ Administrative costs, including overhead, however, will necessarily be incurred by the Board as part of the process or mechanism by which the Board invests the legacy fund.

It is not unprecedented for courts to find implied authority for governmental entities to charge fees to recoup various administrative costs.²⁰ As one court noted:

[the] general administration and responsibility for the proper operation of the retirement system . . . fairly implies that the Board has authority to enforce the payment of delinquent submissions. A statute is of little effect if it cannot be enforced. Further, given the overall administrative regulatory scheme . . . it is reasonable to infer that a power to enforce is implicit within the overall regulatory scheme. Therefore, the System had implied authority to enforce, through administrative action, the payment of delinquent submissions. . . . [And since the] Legislature also gave broad authority and discretion to the Board in managing the System . . . the Board had the ability to assess the District both for deductions currently owed and for interest or additional fees on those deductions.²¹

While the framers of the legacy fund required the Board to invest the fund, a latent ambiguity was created when they restricted the expenditure of the legacy fund but failed to explicitly provide for payment of the necessary investment and administrative costs. Thus,

¹⁹ N.D.C.C. § 21-10-06.

²⁰ See, e.g., Maine School Admin. Dist. No. 27 v. Maine Pub. Emps. Ret. Sys., 983 A.2d 391 (Me. 2009) (state retirement system had implied authority to enforce school district's preexisting duty to deduct and submit employee contributions and additional implied authority to assess interest or late fees); AGRA Resources Coop v. Freeborn County Bd. Commr's, 682 N.W.2d 681, 687 (Minn. App. 2004) (county drainage authority board with jurisdiction to make decisions regarding drainage of industrial wastewater had implied authority to assess reasonable volume-based user fees due to complexities of drainage system and its use); Hawes v. Colo. Div. of Ins., 65 P.3d 1008, 1023 (Colo. 2003) (similar to holdings in other states that public utilities commissions have incidental and implied authority to award common fund attorneys' fees, insurance commissioner in administrative proceedings, in which he serves as fiduciary, has implied and incidental authority to award attorneys' fees when intervenors are necessary to effectuate express mandate); Inland Land Appreciation Fund, L.P. v. County of Kane, 800 N.E.2d 1232 (Ill. App. 2003) (county had implied authority to enact subdivision regulation requiring an applicant to reimburse county for fees paid to consultant who reviews plans for county); Twin Lakes Dev. Corp. v. Town of Monroe, 300 A.D.2d 573 (N.Y. App. Div. 2002) (town had implied authority to impose fees, including consultant fees, on applicants for land use approvals as long as reimbursed expenses are reasonable and necessary to accomplish town's legitimate functions).

²¹ Maine, 983 A.2d at 399; Smith v. Spokane County, 948 P.2d 1301 (Wash. App. 1997) (under statute permitting county to create aquifer protection area, county had implied authority to use portion of revenue for administrative and operation expenses).

it is appropriate to consider some of the extrinsic aids in interpreting ambiguous or unclear statutes, including the object sought to be attained, the common law or former statutory provisions, laws upon the same or similar subjects, the legislative history, and the consequences of a particular construction.²²

The express object of N.D. Const. art. X, § 26 was to set aside a fund to be invested like all other funds under the Board's management. To achieve a result that is both reasonable and feasible of execution,²³ N.D. Const. art. X, § 26 must be interpreted to imply that any necessary investment counseling costs and administrative costs, including overhead, be payable from the legacy fund, despite the spending restrictions on the fund until 2017. Although the legislative history is not illuminating,²⁴ the consequences of how N.D. Const. art. X, § 26 could be construed are more determinative. For example, when a law commands a public official to invest public money, there is both a statutory duty to invest the money prudently and an implied duty to make the investment in a reasonable manner.²⁵ These statutory and implied requirements likely would require, with certain investments, the use of professional consultants and advisors who must be paid for their

²² N.D.C.C. § 1-02-39; Newman, 133 N.W.2d at 551.

²³ See N.D.C.C. § 1-02-38(3) and (4); Egbert v. City of Dunseith, 24 N.W.2d 907 (N.D. 1946) ("principles of construction applicable to statutes are also applicable to Constitutions").

²⁴ A review of the legislative history of N.D. Const. art. X, § 26 indicates that although mention was made of the legacy fund being invested with the Board, no discussion exists in the legislative history as to covering the costs of the Board's duties and obligations with regard to the legacy fund. There was some brief discussion in the legislative history regarding whether the Board or the State Treasurer should be managing the legacy fund, with the Treasurer noting that the Board was better equipped to manage the money:

Sen. Hogue: I wonder if we can get the treasurer's thoughts on whether the State Investment Board should be managing the money or if she should be managing this money.

Kelli [sic] Schmidt, State Treasurer: Any time that you have a fund that is a perpetuity that you want to go on and on, that is invested in equities. The state treasurer does not have the skills to be investing.

Sen. Triplett: . . . If you have language in there, it's saying the State Investment Board would be responsible for investing it. Could you give us a clue as to how they would look at that.

Kelli [sic] Schmidt: What this fund would be it would be comingled [sic] withal [sic] the other investments we have with the State Investment Board. At the time when there would be a calling for these funds it would be put back in to the reallocation of the pool.

services. The general rule is that “[p]ublic officers have only those powers expressly granted or necessarily implied by statute, and any act of an officer to be valid must find express authority in the law or be necessarily incidental to a power expressly granted.”²⁶ In addition:

Public officers who have charge of public funds and public money are charged with the duty, as trustees, to disburse and expend the money for the purposes and in the manner prescribed by law. Expenditures by an administrative official are proper only insofar as they are authorized, explicitly, or implicitly, by legislative enactment.²⁷

The duties of a public officer are not restricted to those found strictly in law. It should be noted that:

every specific or permissible act of a public officer need not be expressed in a statute; the authority to do those acts necessary to achieve the power or object expressly granted is implied, because the legislature must have intended to grant the constituent details within the larger commission. The duties of a public office include all those which fairly lie within its scope, and those which are essential to the accomplishment of the main purposes for which the office was created.²⁸

Therefore, while the Board lacks the explicit authority to charge its investment consulting costs and administrative costs to the legacy fund, the Board cannot properly carry out its express powers to invest the principal of the legacy fund unless the reasonable costs related to this action are covered. Further the Board arguably could not follow the prudent investor rule if it were denied the ability to incur reasonable expenses related to responsibly investing said fund.²⁹ “Where public money or property comes into the hands of a public officer by virtue of his or her office, the officer may be considered a trustee, with the funds officially received being considered trust funds, or a bailee, or an insurer with all applicable duties and responsibilities of such funds or property.”³⁰ Neither the Legislature

²⁶ 63C Am. Jur. 2d Public Officers and Employees § 226 (2d ed. 2009).

²⁷ Id. § 257.

²⁸ Id. § 226.

²⁹ N.D.C.C. § 21-10-07. See also Cont’l Assur. Co. v. Van Cleve Bldg. & Const. Co., 260 S.W.2d 319, 323-24 (St. Louis App. Mo. 1953) (corporate investment department manager has implied authority to do any act in behalf of corporation which is usual and necessary in ordinary course of company’s business interests).

³⁰ 67 C.J.S. Officers § 259 (2002). See also Thaxter v. Fry, 222 A.2d 686, 692 (Me. 1966) (in order for trustee to charge outlays against the trust, express or implied authority within trust instrument must be found); Carlile v. Bradley, 223 S.W.2d 564, 566 (Tex. Civ. App. 1949) (trustees had implied authority to retain attorneys and funds in depository were subject to payment of reasonable attorneys’ fees).

nor the people may refuse to fund a constitutionally mandated function³¹ such as the mandate in N.D. Const. art. X, § 26 for the Board to invest the constitutional legacy fund. Moreover, “expenditures necessary to carry [a] constitutional mandate into effect are authorized by law even though no specific legislative appropriation has been made for the purpose.”³²

Consequently, it is my opinion that while the Board lacks the explicit authority to charge the legacy fund for its investment consulting costs and administrative costs, including overhead, such authority is necessarily implied in order for it to responsibly carry out its constitutional mandate to invest the legacy fund.

You also asked whether the legacy fund is subject to the Board’s management and asset allocation decision-making authority. You note that N.D. Const. art. X, § 26 does not create a governing body for the legacy fund. Unlike the constitutional legacy fund, many other funds invested by the Board do have a governing body.³³ Given that the legacy fund has no separate governing body other than the Board, it is logical to assume the framers of N.D. Const. art. X, § 26 contemplated that the Board take on any management responsibilities and asset allocation decision-making. Based upon the foregoing and the fact that the Board is the only entity overseeing the legacy fund, it is my opinion that, by necessity, the legacy fund is subject to the Board’s management and asset allocation decision-making authority.

Sincerely,

Wayne Stenehjem
Attorney General

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.³⁴

³¹ State ex rel. Walker v. Link, 232 N.W.2d 823, 826 (N.D. 1975); N.D. Council of School Admin. v. Sinner, 458 N.W.2d 280, 287 (N.D. 1990) (VandeWalle, concur. spec.).

³² State v. Hagerty, 580 N.W.2d 139, 145 (N.D. 1998) (quoting State ex rel. Byrne v. Baker, 262 N.W. 183, 184 (1934)).

³³ N.D.C.C. § 21-10-02.1(1).

³⁴ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).