N.D.A.G. Letter to Yockim (Feb. 27, 1990)

February 27, 1990

Honorable James Yockim
State Senator
1123 Second Avenue East
Williston, ND 58801

Dear Jim:

Thank you for your December 29, 1989, letter in which you inquire whether it would be lawful for the executive branch to withhold special assessment deficiency grants and oil impact grants.

The 1989 Session Laws provide for grants to mitigate the impact of unpaid special assessments in cities and counties affected by oil and gas development. 1989 N.D. Sess. Laws ch. 61, § 1. This law says the Board of University and School Lands "may" make the grants. Id. For at least two reasons the board is not obligated to expend any of the money appropriated for the grants.

The word "may" is an important textual consideration for deciding whether this law is discretionary or mandatory. Statutory words have ordinary meanings, unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. "The word 'may' is, when used in its ordinary meaning, permissive rather than compulsory." Harding v. City of Dickinson, 33 N.W.2d 626, 632 (N.D. 1948). See also Solen Pub. Sch. Dist. No. 3 v. Heisler, 381 N.W.2d 201, 203 (N.D. 1986); Murie v. Cavalier Co., 278 N.W. 243, 248 (N.D. 1938) ("may" '"usually is employed as implying permissive or discretionary, and not mandatory, action or conduct"').

A California court considered a question similar to yours. Crowley v. Bd. of Supervisors, 200 P.2d 107 (Cal. Ct. App. 1949), concerned a county peace officers' retirement law. One of the statutes establishing funding for the pension system said the county board of supervisors "may" use appropriated money to provide the system with additional sums to reduce a deficit. Id. at 108-109. After a deficit occurred in the system the board of supervisors was asked to remove it. The board refused and the court rejected the argument that "may" imposed a mandatory duty to expend the money. Id. at 111. See also Housing Auth. of the City & County of San Francisco v. United States Dept. of Housing & Urban Dev., 340 F. Supp. 654 (D.C. Cal. 1972).

It is true, however, that where necessary to carry out legislative intent, it is permissible to construe the word "may" as mandatory. See § 1-02-02; Solen Pub. Sch. Dist. No. 3, 381 N.W.2d at 203; In the Interest of D.S., 263 N.W.2d 114, 119-20 (N.D. 1978). The legislative history of 1989 N.D. Sess. Laws ch. 61 does not indicate that the legislature intended the word "may" to have a meaning other than its ordinary, permissive meaning.

The history indicates just the opposite. Four fiscal notes were filed by the Energy Development Impact Office with regard to Senate Bill No. 2309, the bill that led to enactment of 1989 N.D. Sess. Laws ch. 61. The first three notes specifically state that the Board of University and School Lands has "discretion" to expend the appropriation. The fiscal note dated March 17, 1989, states: "The language says that the Board 'may' rather than 'must' grant the money." Furthermore, the March 17, 1989, bill summary prepared by the Legislative Council states that the bill merely "allows" grants to be made by the board. There was even testimony before House and Senate committees explaining that the bill gave the board "complete discretion" in administering the program. Hearings on H. 2309 Before the Sen. Comm. on Political Subdivisions, 51st N.D. Leg., (Feb. 2, 1989) (testimony of J. Luptak, Director of the Energy Development Impact Office); Hearings on H. 2309 Before the Sen. Comm. on Appropriations, 51st N.D. Leg., (February 13, 1989) (testimony of J. Luptak, Director of the Energy Development Impact Office); Hearings on H. 2309 Before the House Comm. on Finance and Taxation, 51st N.D. Leg., (March 7, 1989) (Testimony of J. Luptak, Director of the Energy Development Impact Office).

The second reason for my conclusion that the board is not required to distribute special assessment deficiency grants is based on the rule of Am. Fed. of State, County and Mun. Employees v. Olson, 338 N.W.2d 97 (N.D. 1983). This decision interpreted a 1981 law that appropriated money "for the purpose of providing additional compensation to employees of the various agencies. . . named herein." 1981 N.D. Sess. Laws ch. 50. Because of declining revenues the executive branch did not spend the appropriation. The union sued, contending that to carry out legislative intent the executive must spend the appropriation. The court said an appropriation is "the setting apart of a definite sum of money for a specific purpose in such a way that public officials may use the amount appropriated, and no more than the amount for that purpose." Id. at 103. (emphasis added). Thus, the legislature's appropriation for an eight percent salary increase "did not constitute a mandate that state employees receive that or any salary increase." Id. There is no substantive difference between the appropriation law in this decision and the appropriation for special assessment deficiency grants in 1989 N.D. Sess. Laws ch. 61.

In summary, a decision by the Board of University and School Lands to impound the special assessment deficiency grants would be lawful.

Your second inquiry concerns oil impact grants. The appropriation for this program is at 1989 N.D. Sess. Laws ch. 47, §§ 1, 2. If this appropriation bill was the only legislative comment on the oil impact program, the rule of Am. Fed. of State, County and Mun. Employees v. Olson would allow the executive branch to withhold the entire appropriation. However, there is also a statutory directive in N.D.C.C. ch. 57-62 addressing expenditure of the money to consider.

Oil impact grants are made by the Energy Development Impact Office, a division of the Board of University and School Lands. N.D.C.C. §§ 57-62-04, 05. The manner in which the grants are to be distributed is set forth in N.D.C.C. § 57-62-05, that provides:

> The energy development impact director shall:

1. Develop a plan for the assistance, through financial grants for services and facilities, of counties, cities, school districts, and other political subdivisions in coal development and oil and gas development impact areas.

2. Establish procedures and provide proper forms to political subdivisions for use in making application for funds for impact assistance as provided in this chapter.

3. Make grants to counties, cities, school districts, and other taxing districts as provided in this chapter and within the appropriation made for such purposes. In determining the amount of impact grants for which political subdivisions are eligible, the amount of revenue to which such political subdivisions will be entitled from the taxes upon the real property of coal and oil and gas development plants and from other tax or fund distribution formulas provided by law shall be considered.

Here the legislature used the word "shall" in instructing the Energy Development Impact Office to "make grants. . . within the appropriation." As "may" is permissive, "shall" is mandatory. Solen Pub. Sch. Dist. No. 3 v. Heisler, 381 N.W.2d 201, 203 (N.D. 1988). I cannot find anything in the legislative history of N.D.C.C. ch. 57-62 to indicate that the legislature's use of "shall" in N.D.C.C. § 57-62-05(3) has anything but a mandatory meaning. Thus, unlike the special assessment deficiency grants the legislature has not given the executive branch discretion to impound the entire oil impact grant appropriation. In the absence of a statute expressly authorizing the executive branch to withhold funds or reduce spending under an appropriation, the other possible source of such authority is the inherent power of the executive branch to administer appropriations.

The legislative, executive, and judicial branches are co-equal branches of government and each is supreme in its own sphere. State ex rel. Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. 1587). It is fundamental to the separation of powers doctrine that the legislature sets state policy, Verry v. Trenbeath, 148 N.W.2d 567, 570 (N.D. 1967), and that the legislature is able to accomplish its policies with the power of the purse. It is also fundamental to the separation of powers doctrine that the executive branch administers the law enacted by the legislature. Id. The executive's power to administer laws includes authority to oversee the spending of appropriations. Alexander v. State, 441 S.2d 1329, 1341 (Miss. 1983) ("Once taxes have been levied and appropriation made, the legislative prerogative ends and the executive responsibility begins. . ."); State ex rel. McLeod v. McInnis, 295 S.E.2d 633, 637 (S.C. 1982) ("[A]dministration of appropriations. . . is the function of the executive department"); Anderson v. Lamm, 579 P.2d 620, 623 (Colo. 1978) ("[T]he executive has the authority to administer the funds appropriated by the legislature for programs enacted by the legislature"); In Re Opinion of the Justices to the Senate, 376 N.E.2d 1217, 1222 (Mass. 1978) ("[T]he activity of spending money is

essentially an executive task"); State ex rel. Schneider v. Bennett, 547 P.2d 786, 797 (Kan. 1976) (state finance council overseeing use of budget appropriations held to be an unconstitutional encroachment on powers of the executive); In re Opinion of the Justices, 19 N.E.2d 807, 815 (Mass. 1939) ("It is clear that, however minutely appropriations are itemized, some scope is left for the exercise of judgment and discretion by executive or administrative officers or boards in the expenditure of money within the limits of the APPROPRIATION").

This power to administer appropriations is not absolute. If it were, the executive could usurp the legislative prerogative and contravene objectives sought to be accomplished by the legislature. Courts of other jurisdictions have held that the executive branch must spend appropriations for the legislatively mandated purpose and, with some exceptions, must spend the amount appropriated. One line of such decisions is the federal impoundment cases of the early 1970s. These arose after President Nixon, for reasons of economic policy, ordered the impoundment of numerous appropriated funds. The courts consistently rejected the administration's argument that the executive has inherent power to reserve part, and in some instances all, of an appropriation. See e.g., Louisiana v. Brinegar, 388 F. Supp. 1319, 1324-25 (D.D.C. 1975); Louisiana v. Weinberger, 369 F. Supp. 856, 864 (D.C. Louis. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1243-44 (D.D.C. 1973).

State courts have followed the reasoning of the impoundment decisions. See, e.g., Colorado Gen. Assembly v. Lamm, 700 P.2d 508-521 (Colo. 1985) ("[W]hatever inherent authority to administer the executive budget may exist in the office of the chief executive, such authority may not normally be invoked to contradict major legislative budgeting determinations"); W. Side Org. Health Serv's Corp. v. Thompson, 391 N.E.2d 392, 299, 402 (Ill. Ct. App.), rev'd on other ground 404 N.E.2d 208 (Ill. 1980) ("The concept of misuse of public funds surely includes the illegal withholding of funds appropriated. . . To imply that the executive possesses inherent powers which supersede the legislative function of appropriating public funds, is to disregard the separation of powers doctrine"); County of Oneida v. Berle, 404 N.E.2d 133, 136 (N.Y. Ct. App. 1980) ("Nor would the implication of executive power to impound funds be consistent with our constitutional form of government"); Opinion of the Justices to Senate, 376 N.E.2d 1217 (Mass. 1978) (while the Governor may not circumvent the legislative process by withholding funds, the Governor may exercise executive judgment and discretion and spend less than appropriated so long as the achievement of underlying legislative goals are not compromised).

Although the executive branch lacks inherent power to impound an appropriation, it is, as noted above, an executive function to oversee expenditure of the appropriation. Therefore, the executive has some discretion in deciding such matters as the rate at which an appropriation is spent. This is particularly important for responsible government. The executive needs a degree of flexibility to cope with circumstances that change between the time of legislative enactment and actual spending. See Univ. of Connecticut Chapter AAUP v. Governor, 512 A.2d 152, 158 (Conn. 1986).

There is even statutory support for the proposition that the executive has discretion in deciding when to expend the oil impact grants. N.D.C.C. § 54-44.1-11 states that thirty days after the end of a biennium all unexpended appropriations are cancelled. The statute provides some specific exceptions to this rule. While none of these apply to your inquiry, another exception does exist. The appropriation for the oil impact grant program is at 1989 N.D. Sess. Laws ch. 47. Section 4 or this law says that N.D.C.C. § 54-44.1-11 "shall not apply to appropriations made for oil impact grants." Thus, the legislature recognized the possibility that the entire appropriation for the grants would not be spent during this biennium, an implicit recognition of the executive's authority to control disbursement of oil impact grants.

In summary, the executive branch may not impound the appropriation for the oil impact grant program.[1] The executive branch, however, does have some discretion in administering the appropriation and is not required to expend the whole amount appropriated during any particular biennium.

Sincerely,

Nicholas J. Spaeth

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[1] This opinion is based on the conclusion that the executive branch lacks inherent authority to impound the oil impact grant funds. This opinion does not involve a situation requiring the reduction of agencies' budgets under N.D.C.C. §§ 54-44.1-12 or 54-44.1-13.1.