

**LETTER OPINION**  
**97-L-96**

July 2, 1997

Honorable Rosemarie Myrdal  
Lieutenant Governor  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Lieutenant Governor Myrdal:

Thank you for your letter on behalf of the Legislative Audit and Fiscal Review Committee requesting an opinion concerning whether the issuance of bonds by the University of North Dakota Aerospace Foundation and a related lease entered into by the University of North Dakota (UND) are subject to the debt limitation provisions of Article X, Section 13 of the North Dakota Constitution. The Committee's motion suggests a concern that the bond issue does not comply with constitutional debt limitations.

Your question involves some difficult issues which have not been easy to resolve. I understand and have given careful consideration to the justifiable concern on the part of the Legislature regarding the commitment of public funds beyond the current biennium. This area appears ripe for legislative consideration.

Article X, Section 13 of the North Dakota Constitution establishes a limit on the general obligation indebtedness that may be incurred by the state and conditions under which such debt may be incurred. The Supreme Court of North Dakota has determined that the terms constitutional "debt" or "indebtedness" as used in the North Dakota Constitution do not apply to obligations that are to be paid out of current revenues. See, e.g., Schieber v. City of Mohall, 268 N.W. 445, 449 (N.D. 1936) (the term "debt" in the state constitution is a general obligation for which there is a pledge to pay in the future; unless the obligation is to be satisfied out of current revenue); Jones v. Brightwood Ind. Sch. Dist. No. 1, 247 N.W. 884, 887 (N.D. 1933) ("the term 'indebtedness' as used in section 183 [now set forth as N.D. Const. art. X, § 15] means the amount of debts less currently collectible taxes and other funds"). When there is no general obligation of the taxing power of an entity, the debt limit does not apply. See Schieber v City of Mohall, 268 N.W. 445, 447 (N.D. 1936). ("'[D]ebt' and 'indebtedness' as used in Section 183 of the Constitution . . . [now Art. X, § 15], refer to pecuniary obligations imposed by contract, except the obligations to be satisfied out of

current revenue.") A lease with a nonappropriation clause also does not involve the debt limit because the nonappropriation clause authorizes the government entity to cancel the lease if the Legislature does not appropriate sufficient funds to make the lease payments. See Red River Human Services Found. v. North Dakota Dep't of Human Services, 477 N.W.2d 225, 227-28 (N.D. 1991). When a lease-purchase agreement specifically says that it does not constitute a general obligation of the government, that the government's taxing powers are not pledged for payment of the lease payments, and that the government is only liable for lease payments for the current fiscal year (or period) for which it has appropriated funds, the agreement does not create debt as contemplated by the constitution. See Marks v City of Mandan, 296 N.W. 39, 47 (N.D. 1941) ("Payment of the obligations having been provided without resort to general taxation, they are not such obligations as are contemplated by [the constitution.]"). The duty owed to the bondholders when a bond issue is a revenue obligation includes a duty to exercise due diligence to collect sufficient revenues to pay the lease payments; however, that duty does not give rise to a debt in the constitutional sense. Id.

Although the cases discussing the debt limit involved political subdivisions and not the state, the conclusion pertaining to what constitutes "debt" for political subdivisions under Article X, Sections 15 and 17 is equally applicable to the state under Article X, Section 13. See State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 695 (N.D. 1984); State ex rel. Syvertson v. Jones, 23 N.W.2d 54 (N.D. 1946). Thus, a pledge by the state to pay an obligation out of current revenues which is not a general obligation of the state and which contains a nonappropriation clause does not constitute state debt proscribed by the constitution.

On December 9, 1993, the North Dakota Board of Higher Education adopted a resolution approving the issuance of bonds on its behalf. According to information supplied by UND officials, refinancing the 1988 and 1992 leases will result in savings of \$459,570 (present value) over the term of the bonds. The savings realized over the term of the bonds will enable UND to postpone or reduce future student fee increases. According to the Official Statement furnished to prospective bond purchasers, bonds in the amount of \$9,170,000 were issued in 1993 by the UND Aerospace Foundation (Foundation), which is a nonprofit corporation established for the purpose of providing support for UND's aerospace program. The bond proceeds were used to refinance two outstanding leases entered into by UND as the Lessee and the Foundation as the Lessor for various equipment,

including a 1988 lease of aircraft and flight simulators used for pilot training and a 1992 lease of telephone equipment, including switches, cabling and related equipment. After the bonds were issued, the Foundation and UND executed a new lease, pursuant to which UND agreed to make semi-annual payments to the Foundation. Under the terms of the lease, upon payment of all amounts due, title to the equipment will be conveyed to UND. Lease Agreement between the UND Aerospace Foundation and the University of North Dakota § 6.3 (December 1, 1993). The Foundation also executed a Trust Indenture, pursuant to which the Foundation assigned to the trustee the Foundation's interest in the equipment and lease payments. Trust Indenture p. 2 (December 1, 1993).

The bonds are limited obligations of the Foundation, payable solely from the lease revenues. The Official Statement declares that "[n]either the obligation of UND to pay such Rents nor the obligation of the [Foundation] to pay the Bonds will constitute a debt of the State of North Dakota or any agency or political subdivision of the State of North Dakota within the meaning of any constitutional or statutory provision." See Official Statement, p. 2, \$9,170,000 UND Aerospace Foundation Lease Revenue Bonds Series 1993 (December 15, 1993). The revenue sources for the telecommunications equipment are student telephone charges and if appropriated, some general funds and for the aircraft equipment, student fees.

UND's agreement to make the lease payments also includes a nonappropriation clause, which provides that UND's obligation for future payments is subject to future appropriations. See Lease Agreement between the UND Aerospace Foundation and the University of North Dakota, §§ 3.11 and 3.1(1) (December 1, 1993). The Official Statement and the Lease entered into by UND indicate that the lease payments are payable only from current revenues. The property, taxes, or other funds of the state are not pledged to repay the bonds and therefore the Legislature is not legally obligated to appropriate any funds to make the lease payments. If appropriations in a future biennium are insufficient, the Lease is subject to termination and UND is not obligated to make additional payments. Id. Thus the Lease only obligates UND if there are revenues from the project (student fees) or if the Legislature makes an appropriation to pay the lease. The Lease does not otherwise legally obligate UND, the Legislature, or the State in the future.

The bondholders purchased the bonds pursuant to the terms set forth in the bond documents and the Official Statement which provide that UND's obligation to make the lease payments is subject to biennial

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appropriation by the Legislature, and that UND's obligation to make the lease payments does not constitute a debt within the meaning of any constitutional or statutory debt limitation provision. See Official Statement, \$9,170,000 UND Aerospace Foundation Lease Revenue Bonds Series 1993 cover page, pp. 1, 2, 3, 10, and 11 (December 15, 1993).

It is my opinion that the obligations assumed by UND are not general obligation "debt" or "indebtedness" as those terms are used in the constitution; therefore, the issuance of the bonds is not subject to the constitutional debt limitation contained in Article X, Section 13. The assignment of the payments by the Foundation to the Trustee does not alter this conclusion, as that assignment does not change UND's obligations under the Lease.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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