

Testimony to the
Government Finance Committee

by
Murray G. Sagsveen, Chief of Staff, North Dakota University System
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Chairman Delzer and members of the Government Finance Committee, I am Murray G. Sagsveen, Chief of Staff and Director of Legal Services for the North Dakota University System.

It is my understanding there are questions about compliance with legislative intent related to the purchase of the REAC building. Accordingly, I will focus on this issue.

For the purpose of this testimony, I will summarize the chronology of events in Enclosure 1.

President Kelley contacted Chancellor Shirvani in December 2012 State Board of Higher Education (SBHE) approval to purchase the REAC building. The issue was added to the agenda of the January 17 SBHE meeting, when the SBHE unanimously approved the following motion:

UND request to seek legislative authorization to purchase the Research Enterprise and Commercialization building (REAC1) on the UND campus per NDDCC 54-27-12, and to enter into a financing arrangement for that purpose; further authorize the Chancellor to approve the purchase terms and financing arrangement.

After the SBHE meeting, North Dakota University System (NDUS) staff contacted the Senate Appropriations Committee about including authorization language in SB 2003.

In February, Alice Brekke, UND Vice President for Finance and Operations, testified before the Senate Appropriations Committee. She began by stating: “we are seeking legislative authority to enter into a financing arrangement with the intent of purchasing and operating REAC1.”

Upon the recommendation of the Committee, Senate Bill 2003 was amended to include language about the REAC building. The language was later amended upon the recommendation of the conference committee (as shown below).

SECTION ~~40~~ 23. UNIVERSITY OF NORTH DAKOTA - RESEARCH ENTERPRISE AND COMMERCIALIZATION BUILDING PURCHASE - BUDGET SECTION REPORT. During the ~~biennium period~~ beginning ~~July 1, 2013,~~ with the effective date of this Act and ending June 30, 2015, the state board of higher education may enter a purchase and financing

agreement or agreements with a private entity and do all things necessary and proper to authorize the purchase of the research enterprise and commercialization building on the campus of the university of North Dakota using donations, gifts, or other funds. The state board of higher education shall provide a report to the budget section if the research enterprise and commercialization building is purchased as provided under this section.

The enclosed chronology clearly shows that the legislators knew UND would be buying the REAC building, but no appropriation would be included in SB 2003 for that purpose.

Two months after the Governor signed SB 2003, President Kelley explained UND's plans to finance the purchase of the REAC building, and Chancellor Skogen responded with a letter approving the plan.

UND then took the following steps:

1. Retained an appraiser to verify the value of the building and personal property/fixtures.
2. Retained independent counsel to represent UND in the negotiation and purchase of the building.
3. Sought financing proposals from a number of financial institutions and selected the best proposal.
4. Signed (State Board of Higher Education dba the University of North Dakota) a purchase agreement in September 2013 for the appraised value.

Therefore, it appears that the SBHE, acting through UND, fully complied with the express legislative intent concerning the purchase of the REAC building.

Thank you for the opportunity to explain these issues. I will answer any questions that the Committee may have.

Enclosure 1

Chronology of Legislative Events Related to the REAC Building

SBHE Action in January 2013

In a December 10, 2012, email to Chancellor Shirvani, President Kelley stated:

UND is requesting approval to seek legislative authorization to purchase the REAC-1 building on the UND campus and to enter into a financing arrangement for that purpose. UND is working to complete a draft narrative which I will provide to you as soon as it is completed.

President Kelley's executive assistant sent the narrative to Laura Glatt on December 20. The first paragraph of the narrative stated:

Request approval to seek North Dakota Legislative Assembly authorization to purchase the Research Enterprise and Commercialization building (REAC-1) on the UND campus, and to enter into a financing arrangement for that purpose. The building is currently owned by the UND Research Foundation and is sited on land owned by UND (ground lease in place).

The UND request was addressed at the January 17, 2013, SBHE meeting. The minutes reflect (at pp. 6-7):

It was moved by Diederich, seconded by Shart to approve the following Financial and Facility Consent Agenda items: * * *

- UND request to seek legislative authorization to purchase the Research Enterprise and Commercialization building (REAC1) on the UND campus per NDDCC 54-27-12, and to enter into a financing arrangement for that purpose; further authorize the Chancellor to approve the purchase terms and financing arrangement.

* * *

Shaft, Reichert, Diederich, Hjelmstad, Hull, Morton, Neset, and Espesgard voted aye. The motion carried unanimously.

Legislative Action in 2013

Concurrently, Laura Glatt drafted a document titled "Proposed Amendments to SB2003 – Proposed by the NDUS, January 17, 2013," which included the following paragraph:

Authorize UND, per NDCC 54-27-12, to purchase the Research Enterprise and Commercialization building (REAC1) and enter into a financing arrangement for that purpose.

On February 7, Alice Brekke testified before the Senate Appropriations Committee. The opening paragraphs stated:

I am Alice Brekke, and I am testifying today in my capacity as the Vice President for Finance and Operations at the University of North Dakota. I have been asked to deliver testimony on the Research Enterprise and Commercialization building (known as REAC1) on the UND campus.

Today, we are seeking legislative authority to enter into a financing arrangement with the intent of purchasing and operating REAC1.

The minutes of that hearing state, in part:

Chairman Holmberg: Alice when we had SB 2003 and the Chancellor's testimony, he mentioned a list of things happening. One was a request for the UND to purchase what is referred to as the react building on UND. However when we had our hearing on higher education the board had not taken action on that and we felt it was a little premature for us to act on something that the board had not asked us to act on.

Alice Brekke, Vice President for Finance and Operations UND, seeking legislative authority to enter into a financing arrangement with the intent of purchasing and operating REAC1....The building currently is owned by the UND Research Foundation. This is a request for authority not funding.

After the board took action on January 17, I did provide an electronic copy to Brady [Larson] of the full text of what went to the board and what the board of higher education actually approved.

Chairman Holmberg: This will go to the subcommittee...

The February 13 minutes of the Senate Appropriations Committee reflect the following dialogue between Senator Holmberg and Senator Grindberg:

Chairman Holmberg: Continuing on page 5 the REAC building is not utilized to its full potential. It has had some financial problems. They are asking us to authorize UND to purchase that building and it is not using state money. They have to fund it themselves. They don't have an appraisal. It is on state land but it is owned by the foundation that is defunct.

Vice Chairman Grindberg: I am going to support this request. This is owned by the research foundation. We are basically allowing the university to pay for this and then the alumni foundation will no longer be the guarantor for the loan.

On February 21, Laura Glatt sent an email to Brady Larson, which stated:

We recently discussed what kind of legislative authority is needed regarding the potential purchase of the UND REAC building. You were uncertain whether a specific dollar authorization was required or not. While I am not able to address the required legislative action, I did check with UND about whether they have a designated dollar amount, in the event that specific dollar appropriation is required by the legislature. They do not. Furthermore, they are reluctant (and rightfully so) to put forth an amount, as it may pre-empt the negotiation process.

I am wondering if it would be appropriate, for the time being, to simply add a section of legislative intent recognizing/authorizing the transaction, including possible financing arrangements; and, if deemed necessary, that a specific dollar appropriation be added later, near the end of the session, if that is deemed necessary. UND may be in a better position to provide a figure later in the session.

On the same day, Brady Larson replied to Laura: "We'll put a section in the SB2003 amendments regarding the project."

The first engrossment of SB2003 included a new section concerning the REAC building:

SECTION 10. UNIVERSITY OF NORTH DAKOTA - RESEARCH ENTERPRISE AND COMMERCIALIZATION BUILDING PURCHASE - BUDGET SECTION REPORT. During the biennium beginning July 1, 2013, and ending June 30, 2015, the state board of higher education may enter a purchase and financing agreement or agreements with a private entity and do all things necessary and proper to authorize the purchase of the research enterprise and commercialization building on the campus of the university of North Dakota using donations, gifts, or other funds. The state board of higher education shall provide a report to the budget section if the research enterprise and commercialization building is purchased as provided under this section.

The amendment was reported to the Senate on February 25 (SJ 564), and the Senate approved the amendment on February 26 (SJ 603). During the discussion of the proposed amendment on February 26, Senator Ray Holmberg stated:

Section 10 has to do with what is called the REAC building. It is a building on the campus of UND that is not owned by UND but was built with a foundation, the UND Research Foundation and the building has not lived up to what everyone had hoped and expected. When it was built, there

was a human cry around the country for level 3 research labs. There were a few labs so North Dakota through Centers of Excellence money and other funding constructed the REAC building. Unfortunately, I believe there were close to 500 and some other similar buildings being built around the country at the same time. Then the economy kind of slumped and the building has just not lived up to its potential. What they are asking for in Section 10 is to allow the university to purchase it not using state funds and then to recover that funding through rentals so it becomes a university property. They asked for that permission and we gave it in this amendment.

However, the House deleted Section 10. The April 5 minutes of the House Appropriations Education and Environment Division include the following:

Chairman Skarphol....Brady, can you tell us where that language is in the bill?

Brady – Legislative Council: In the second engrossment it is section 10.

Chairman Skarphol: Do it authorize the purchase?

Brady: The language allows UND to enter into a purchase and financing agreement to allow the institution to purchase the React Building.

* * *

Chairman Skarphol: Brady, is there money associated with it?

Brady: There is no money associated with it; it just authorizes UND to purchase the building using private funds or local funds. There is no general fund appropriation associated with this section.

The summary in the House Journal (at p. HJ1617) states: “Removes Section 10 of the bill which authorized the University of North Dakota to enter a financing and purchase agreement to purchase the research enterprise and commercialization building located on its campus.”

The conference committee agreed to the Senate’s action. The May 3 minutes include the following:

Section #23, the House had removed the language regarding the UND REACT building purchase, that one is being restored into the bill, and you will notice that we are changing the phrase “during the biennium beginning July 1 with the period beginning with the effective date of this act” we have put in an emergency clause on this Section in the event that UND would like to proceed with that purchase immediately.

* * *

Brady Larson: There was a difference between the House and Senate version of the bill in relation to the UND REACT building. The Senate had added language to allow UND to enter into a financing and purchasing agreement. The House removed that language.

Representative Skarphol. I move we put it back in. 2nd by Senator Krebsbach.

Chairman Holmberg all in favor aye. It carried.

The now section 23 stated (SJ 2081):

~~SECTION 23.~~ UNIVERSITY OF NORTH DAKOTA - RESEARCH ENTERPRISE AND COMMERCIALIZATION BUILDING PURCHASE - BUDGET SECTION REPORT. During the ~~biennium period~~ beginning ~~July 1, 2013,~~ with the effective date of this Act and ending June 30, 2015, the state board of higher education may enter a purchase and financing agreement or agreements with a private entity and do all things necessary and proper to authorize the purchase of the research enterprise and commercialization building on the campus of the university of North Dakota using donations, gifts, or other funds. The state board of higher education shall provide a report to the budget section if the research enterprise and commercialization building is purchased as provided under this section.

This final version was adopted by both the Senate and House.

Chancellor's Approval in June 2013

On June 27, UND President Robert Kelley verbally explained that UND proposed to issue an RFP for financing UND's purchase of the REAC building.

On June 28, Acting Interim Chancellor Larry Skogen sent a letter to President Kelley, which stated: "I approve the purchase terms and financing agreement for the Research Enterprise and Commercialization building (REAC1) as discussed with Dr. Robert Kelley on June 27, 2013."

UND's Financing Arrangements

On December 31, 2012, the long-term liabilities of the UND Research Foundation totaled \$9,612,945.43. A majority of this amount (\$8,485,930 was owed to Bremer Bank).

On July 2, UND issues a request for "proposals from Grand Forks financial institutions for a loan in the amount of approximately \$9,800,000 to finance the

acquisition of the Research Enterprise and Commercialization building on the campus of UND...from the University of North Dakota Research Foundation.” The RFP was sent to fourteen financial institutions.

Four financial institutions submitted proposals to UND. UND then conducted an internal review, which involved Assistant Vice President of Finance Peggy Lucke and Vice President for Finance and Operations Alice Brekke. They then sent all information to Jon Arntson, UND’s bond counsel, who conducted an independent review. The group concluded that Bremer was the right choice. Bremer was selected based on—

- 10 year payment term with a balloon on 10/1/23
- Amortized using 25 years
- No prepayment penalty after 8/1/18
- Low additional fees
- The flexibility to reposition the load after a period of time

Transfer of Ownership

UND retained Steven Wall Appraisal Services, Inc., Chanhassen, MN, to appraise the REAC building and related property. In a report dated November 19, 2012, the appraiser valued the real estate at \$8,580,000 and the personal property/fixtures at \$1,226,000 for a total valuation of \$9,806,000.

UND retained independent counsel, the Fredrikson & Byron law firm, to represent UND in the purchase of the REAC building. On July 12, an attorney in that firm sent a letter to the UND Research Foundation, which stated that UND “is prepared to proceed with the purchase of the University of North Dakota Research Foundation’s...building, including all furniture, fixtures, and other personal property. The University is prepared to pay \$9,800,000.”

On July 29, an attorney for the Serkland Law Firm, which had been retained by the Foundation, replied stating:

The Foundation is willing to accept the University’s offer to sell the Foundation’s building, including all furniture, fixtures, and personal property, for the total purchase price of \$9,800,000. The sale by the Foundation is contingent upon verification and review of the November 19, 2012 appraisal report by an independent appraiser. Since the prior appraisal was requested by the University, the Foundation believes it needs to verify that appraised value before finally agreeing to the offered price. *

* *

The sale will also be contingent upon receiving approval from the North Dakota Attorney General’s office.

UND contacted Steven Wall Appraisal Services again in September 2013, asking whether the value of the property had changed. In a September 3 letter to Alice

Brekke, Vice President for Finance & Operations, UND, Wall replied: “as of the date of this letter, September 3, 2013, the value of the Real Estate remains at \$8,580,000 and the value of the Personal Property and the Trade Fixtures remains at \$1,226,000, for a total of \$9,806,000.”

On September 13, Assistant Attorney General Parrell Grossman sent an email to the Foundation’s attorney, which stated: “The Attorney General has reviewed the proposed transaction and hereby waives the 45-day waiting period pursuant to NDCC 10-33-122. The Attorney General has no objection to the sale of UNDRF’s REAC1 building to the University of North Dakota.”

On September 16, 2013, the State Board of Higher Education dba the University of North Dakota purchased the REAC building and related personal property from the University of North Dakota Research Foundation for \$9.8 million.

Budget Section

The SBHE has not yet submitted a report to the Budget Section concerning the purchase of the REAC building.