

**LETTER OPINION
2005-L-05**

January 28, 2005

Mr. Timothy A. Priebe
Dickinson City Attorney
Mackoff Kellogg Law Firm
PO Box 1097
Dickinson, ND 58602-1097

Dear Mr. Priebe:

Thank you for your letter asking whether a proposed facility located on the campus of Dickinson State University would be exempt from ad valorem taxes under N.D.C.C. ch. 57-02. For the reasons indicated below, it is my opinion that any building for the described proposed project will be exempt from ad valorem taxes if it is used at least in part for academic or research purposes by students and faculty of the University, as provided by N.D.C.C. § 57-02-08(34). The exemption provided by N.D.C.C. § 57-02-26(3) would not be applicable because that section requires the property to be used for both athletic and educational purposes.

ANALYSIS

Your letter sets forth the following facts for consideration:

The City of Dickinson has been approached by Dickinson Investments, LLC and the Dickinson State University Foundation regarding a proposed project, to be located on the campus of Dickinson State University. The property is owned by the State Board of Higher Education, and has been leased to the Dickinson State University Foundation under a ground lease dated April 16, 2004. The Dickinson State University Foundation intends to sublease the property to Dickinson Investors, LLC who will develop a senior living facility on that property.

Dickinson Investors, LLC will serve as the financial vehicle for the Dickinson State University Foundation to develop and operate the project for a period of six to ten years. The Dickinson State University foundation

[sic] will acquire all interests of Dickinson Investors, LLC in the project by year ten.

From additional information you have provided, it is my understanding that the senior living facility will include classrooms and the facility will provide internships and mentoring opportunities for students at the University.

A 1989 opinion from this office provides:

Real property located in North Dakota and owned by the United States, the state of North Dakota, or its political subdivisions is exempt from ad valorem taxation. N.D. Const. art. X, § 5; N.D.C.C. § 57-02-08(1), (2), (3). However, this does not mean that a leasehold interest of a nonexempt person in real property owned by a governmental entity is exempt from ad valorem taxation.

Possessory interests are defined as real property for purposes of ad valorem taxation as follows:

57-02-04. "Real property" defined. Real property for the purposes of taxation, includes:

1. The land itself . . . and all rights and privileges thereto belonging to or in anywise appertaining
2. All structures and buildings . . . and all rights and privileges thereto belonging or in anywise appertaining

All property in this state is subject to taxation unless expressly exempted by law. N.D.C.C. § 57-02-03. The taxation of a possessory interest in certain property was addressed by a 1988 Attorney General's opinion. That opinion stated the following:

A possessory interest in government owned real property held by a nonexempt person is therefore subject to taxation on the value of the possessory interest, regardless of the characterization of the lease under which it is held because no exemption is provided by law. See, Otter Tail Power Co. v. Degnan, 252 N.W. 619 (N.D. 1934); Lower Yellowstone Irrigation District No. 2 v. Nelson, 2 N.W.2d 180 (N.D. 1941); and United States v. Fresno County, 429 U.S. 452 (1977).

Thus, merely because a piece of property is owned by the state or a political subdivision does not mean that it is exempt from taxation. If the land is leased to a nonexempt person, the possessory interest in the land may be taxed. However, even if the land is leased to a nonexempt person, that person's possessory interest may be exempt due to the property's use.

Section 57-02-08(34), N.D.C.C., provides the following exemption from ad valorem taxation:

Any building located on land owned by the state if the building is used at least in part for academic or research purposes by students and faculty of a state institution of higher education.

(Emphasis added).

If the local assessing authorities acting as the finders of fact determine that any building in the proposed project is used at least in part for academic or research purposes by students and faculty of the University, it is my opinion that a possessory interest in that building would be exempt from ad valorem taxation under N.D.C.C. § 57-02-08(34). It is my further opinion that exemption provision would not include a possessory interest in land owned by the University because the language of the statute is limited to "any building."¹ See N.D.C.C. § 57-02-08(34).

You also questioned whether N.D.C.C. § 57-02-26(3) would exempt the proposed project from taxation. However, as you point out in your letter, that provision requires the land to be used for both "athletic and educational" purposes in order to be exempt.

¹ A more inclusive ad valorem taxation exemption provision, which may provide an exemption for the possessory interest in the land as well, is contained in N.D.C.C. § 57-02-08(42). That subsection exempts from ad valorem taxation "all property, including any possessory interest therein, leased to a private entity pursuant to section [54-01-27], which property is operated by, or providing services to, the state or its citizens." (Emphasis added.) The text of the statute refers to 54-01-05.6 which is an error as that section does not exist. The correct reference should be to 54-01-27.

Section 54-01-27, N.D.C.C., authorizes the state, or any agency or institution of the state, to lease any real or personal property belonging to the state, or any agency or institution of the state, if certain conditions are met. Among other things, these agreements must be approved by the Industrial Commission. If the lease agreement is being made under this section, you may want to explore whether you would be entitled to an additional exemption regarding the possessory interest in the land.

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N.D.C.C. § 57-02-26(3). Accordingly, from the description you have provided that section would not exempt the proposed project from taxation.

Sincerely,

Wayne Stenehjem
Attorney General

rww/vkk

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