LETTER OPINION
2012-L-02

March 2, 2012

Mr. Lance Gaebe
Commissioner
North Dakota State Land Department
PO Box 5523
Bismarck, ND 58506-5523

Dear Mr. Gaebe:

Thank you for your letter requesting my opinion on whether real property located in the city of Bismarck, owned by the Common Schools Trust, can be included in a special assessment district and specially assessed by the City for the installation of a water line.[1] For the reasons indicated below, it is my opinion that the real property owned by the Common Schools Trust cannot be included in a special assessment district and specially assessed by the city of Bismarck for the installation of a water line unless the Board of University and School Lands agrees that the real property is benefited to the extent of the amount of the assessments.

ANALYSIS

The real property owned by the Common Schools Trust is part of the land granted by the United States government to the State of North Dakota for the support of the common schools.[2] North Dakota accepted the land grant "under the conditions and limitations" set out in the Enabling Act,[3] and the Act directs that "proceeds" from these lands "constitute permanent funds" to support "the public schools."[4] Similarly, the North Dakota Constitution provides that "[a]ll proceeds of the public lands that have been . . . granted by the United States for the support of the common schools . . . must be and remain a perpetual trust

[1] The real property is within section 36, Township 139 North, Range 80 West, in Burleigh County, and within the Bismarck city limits. The water main will run along the south end of, but not on, the real property owned by the Common Schools Trust.
[2] See N.D. Organic Law, § 14, N.D. Enabling Act, § 10, and N.D. Const. art. IX. You also indicate that N.D. Const. art. IX, § 8, restricts the use of this property to "pasturage and meadow purposes," and that the State Land Department has leased this land for grazing for an annual rent of $7,400. See N.D. Const. art. IX, § 8 and N.D.C.C. § 15-04-01.
[3] N.D. Const. art. XIII, § 3.
[4] N.D. Enabling Act, § 11.

fund for the maintenance of the common schools of the state."[5] The Board of University and School Lands ("Land Board") controls these state lands and the Common Schools Trust Fund,[6] and has a fiduciary duty to manage and safeguard the trust property.[7] The Board "acts . . . on behalf of the state" and as the state's "trustee."[8] It holds "full control" over the "management of school lands."[9] As trustee, it has the authority to use "a high degree of judgment and discretion" in administering "this greatest of all state funds."[10] In some instances, the Board's discretionary decisions can amount to "a quasi judicial determination."[11]

A North Dakota Constitutional provision provides "property of the state . . . , to the extent immunity from taxation has not been waived by an act of the legislative assembly, and property used exclusively for schools . . . shall be exempt from taxation."[12] The North Dakota Supreme Court has concluded that this provision regarding taxation does not relate to special assessments.[13] Thus, special assessment of public property does not violate this North Dakota Constitutional provision that limits the taxation of state property.

In 1902, the North Dakota Supreme Court[14] considered arguments made by owners of real property that was specially assessed for the construction of a drain. Among other things, the owners argued that their lands were assessed for the benefits to a school section that was unjustly omitted from the assessment district. There was no state law authorizing school lands to be subject to special assessments to construct a drain. Even though the school land was "concededly . . . benefitted" by the drain,[15] the North Dakota

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[5] N.D. Const. art. IX, § 1. See also N.D. Const. art. IX, § 2 (trust fund proceeds "must be faithfully used . . . for the benefit of the common schools . . . and no part of the fund must ever be diverted . . . or used for any purpose other than the maintenance of common schools"); Moses v. Baker, 299 N.W. 315, 316 (N.D. 1941) ("The permanent school fund is a trust fund. It must be preserved intact. If there is any loss, the State is required to make it good."); State ex rel. Bd. of Univ. & Sch. Lands v. McMillan, 96 N.W. 310, 314 (N.D. 1903) (Enabling Act's land grant "was in trust," with "the state as trustee to maintain the permanency of the funds," to use them "'only'" to support schools).

[6] See N.D. Const. art. IX, § 3, N.D.C.C. § 15-01-02, and N.D.C.C. ch. 15-03.

[7] See N.D.C.C. §§ 15-03-04.2, 15-06-32.1, 15-07-02, 15-07-10, and 15-09-04; N.D.A.G. 88-23 and N.D.A.G. 95-L-35; and Lang v. Bank of N.D., 453 N.W.2d 118 (N.D. 1990).

[8] Fuller v. Bd. of Univ. & Sch. Lands, 129 N.W. 1029, 1031 (N.D. 1911).

[9] Id.; see also N.D.C.C. § 15-01-02(1).

[10] Fuller, 129 N.W. at 1032.

[11] Id.

[12] N.D. Const. art. X, § 5.

[13] See Gallaher v. City of Fargo, 64 N.W.2d 444, 449 (N.D. 1954) (citing Rolph v. City of Fargo, 76 N.W. 242 (N.D. 1898). See also Soliah v. Cormack, 117 N.W. 125 (N.D. 1908) and N.D.A.G. 59-191.

[14] Erickson v. Cass County, 92 N.W. 841 (N.D. 1902).

[15] Id. at 848.

Supreme Court determined that the school land was not assessable because it was part of the lands granted by the United States to the State of North Dakota to be held in trust for school purposes.[16] In reaching its conclusion, the North Dakota Supreme Court relied on an 1890 Indiana court case indicating that school lands were held as a sacred trust under the Indiana constitution, and are "'beyond the power of even the legislature of the state to make any provision by which the principal of the funds arising from such lands shall be diminished.'"[17]

When both of those court cases were decided, neither the North Dakota Supreme Court in 1902, nor the Indiana Supreme Court in 1890, were faced with a state law which provided that special assessments could be applied to school trust property. After the 1890 case was decided, the Indiana Legislature passed a law authorizing school property to be subject to special assessments. In 1914, the Indiana Supreme Court determined that the school trust property would be subject to special assessments despite the fact that school lands were held as a sacred trust under the constitution.[18] Similar to the Indiana court, the North Dakota Supreme Court, in 1935, considered a state law passed during the depression that authorized the Land Board, when it was in the best interests of the trust, to "reduce, scale down, or throw off the interest that may be due upon any land contract or

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[16] Erickson, 92 N.W. 841, 848 (N.D. 1902). In situations such as in the Erickson case, where the North Dakota Legislature has not specifically provided that state property will be subject to a certain entity's special assessments, the North Dakota Supreme Court and the North Dakota Attorney General have determined that the state property is not subject to that entity's special assessments. See, for example, Erickson v. Cass County, 92 N.W. 841 (N.D. 1902) (original grant lands owned by the Land Board were not subject to special assessments for the construction of a drain by a board of drain commissioners), N.D.A.G. 61-22 (original grant lands owned by the Land Board were not subject to special assessments for the construction of a drain by a water resource district under N.D.C.C. ch. 61-21), N.D.A.G. Letter to Johnson III (Sept. 19, 1991) (state property owned by the N.D. Game and Fish Department was not subject to special assessments for the construction and maintenance of a drain by a water resource district under N.D.C.C. ch. 61-21), and N.D.A.G. 58-262 (state school land was not subject to special assessments for the construction and maintenance of irrigation facilities by a board of flood irrigation under N.D.C.C. ch. 61-12).

[17] Erickson, 92 N.W. 841, 848 (N.D. 1902) (quoting Edgerton v. School Tp., 26 N.E. 156 (Ind. 1890)).

[18] See School Town of Windfall City v. Somerville, 104 N.E. 859 (Ind. 1914).

real estate mortgage, or rentals," and determined that it did not violate the constitutional provisions regarding the trust.[19]

There are now provisions in North Dakota state law where the Legislature has specified that state property may be subject to special assessments by certain entities.[20] Regarding special assessments by cities, N.D.C.C. § 40-23-22 provides:

> Real estate within municipalities of this state owned by the state of North Dakota, other than for highway right-of-way purposes, may be subjected to special assessments for special improvements when benefited by such improvement and the state agency or department having control thereof is hereby authorized to expend public funds in payment of such special assessments.[21]

This law was passed in the 1959 Legislative Session,[22] and allows state property to be subject to a city's special assessments when benefited by the improvement.

In 1959, soon after N.D.C.C. § 40-23-22 was passed, the Attorney General was asked whether special assessments levied by the city of Fargo could be paid by the North Dakota Agricultural College to the city of Fargo for a water main needed to furnish the school with fire protection and water for consumption.[23] The Attorney General considered the Erickson case and determined that the trust lands could not be taken by tax deed proceedings for the enforcement of a special assessment, but that the special assessment would be allowed if "first the land itself is not disposed of or its value impaired, and second the legislature consents to use of funds under its control to pay for the state's share of the improvement benefits."[24]

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[19] See State ex rel. Sathre v. Bd. of Univ. and Sch. Lands of N.D., 262 N.W. 60 (N.D. 1935). Also, other state laws have been passed that authorize payments from trust funds when trust property is benefited. See, for example, N.D.C.C. § 15-04-23 (the Land Board shall pay a fee to the county in which the state retains original grant lands, for county road and bridge purposes), N.D.C.C. ch. 57-02.3 (the Land Board may use rental income from original grant lands to make payments in lieu of ad valorem taxes to political subdivisions), and N.D.A.G. 90-24 (the Legislative Assembly may require the Land Board to use rental income from original grant lands to make in lieu of tax payments to political subdivisions, provided the payments fund services beneficial to original grant lands).

[20] See, for example, N.D.C.C. §§ 61-05-01(2), 61-05-06, 61-09-01, 61-09-03, and 61-09-15 (regarding special assessments by irrigation districts), N.D.C.C. § 61-35-61 (regarding special assessments by water districts), and N.D.C.C. § 40-23-22 (regarding special assessments by cities).

[21] N.D.C.C. § 40-23-22.

[22] See 1959 N.D. Sess. Laws ch. 380, § 1.

[23] See N.D.A.G. 59-191.

[24] N.D.A.G. 59-191.

The conclusion that the land itself could not be disposed of or its value impaired is consistent with the Land Board's fiduciary duty to manage and safeguard the trust property.[25] Because of this fiduciary duty, the Land Board would have the authority to determine whether the specific land to be specially assessed by a city under N.D.C.C. § 40-23-22 would be benefitted to the extent of the amount of the assessments.[26] Also, the Legislature would need to appropriate the funds necessary to pay the special assessments.[27]

In conclusion, it is my opinion that the real property owned by the Common Schools Trust cannot be included in a special assessment district and specially assessed by the city of Bismarck for the installation of a water line unless the Land Board agrees that the real property is benefited to the extent of the amount of the assessments. Also, consistent with the 1959 opinion of this office, it is my further opinion that these trust lands cannot be taken by tax deed proceedings for the enforcement of a special assessment.

Sincerely,

Wayne Stenehjem
Attorney General

las/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.[28]

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[25] See n.7.

[26] Cf. State ex rel. Upper Scioto Drainage & Conservancy Dist. v. Tracy, 181 N.E. 811 (Ohio 1932).

[27] Although N.D.C.C. § 40-23-22 provides that a state agency is "authorized to expend public funds in payment of . . . [city] special assessments," the North Dakota Supreme Court has held that this language does not constitute an appropriation; thus, to pay for any special assessments, the state agency would need to get an appropriation from the Legislature. See City of Fargo, Cass County v. State, 260 N.W.2d 333, 338-40 (N.D. 1977). See also N.D.A.G. Letter to Eiken (Oct. 17, 1986) and N.D.A.G. 59-191. The Land Board currently has a continuing appropriation to pay expenses for trust lands from the trust fund for which the land is held. See N.D.C.C. § 15-04-24. This may provide sufficient authority to pay special assessments on trust lands.

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