LETTER OPINION
2016-L-03

December 15, 2016

The Honorable David Rust
State Senator
PO Box 1198
Tioga, ND 58852-1198

The Honorable Robert Erbele
State Senator
6512 51st Ave SE
Lehr, ND 58460-9149

Dear Senator Rust and Senator Erbele

Thank you for your letter requesting my opinion on whether fee payments made by the Board of University and School Lands (Board) under N.D.C.C. § 15-04-23 constitute a payment in lieu of tax, and consequently whether such fee payments trigger a leasehold tax exemption for a nonexempt lessee of state lands.

Under N.D.C.C. § 57-02-03, "[a]ll property in this state is subject to taxation unless expressly exempted by law." Possessory interests, such as leasehold interests, are real property for the purposes of ad valorem taxation, or property taxes.[1] Property located in North Dakota and owned by the state, however, is exempt from property taxes unless the Legislature has waived immunity from taxation.[2] North Dakota law also allows a nonexempt person to claim an exemption for a leasehold interest when the state makes payments in lieu of property taxes.[3] The Board makes a payment in lieu of tax payment to

[1] N.D.C.C. § 57-02-04; see N.D.A.G. 2005-L-05.
[2] N.D. Const. art. X, §5; N.D.C.C. § 57-02-08(2) (property belonging to the state is exempt from taxation).
[3] See N.D.C.C. §§ 57-02-08(38) and 57-02-26(1). Although you did not raise this question in your request for my opinion, it appears that the source of a continuing leasehold tax exemption is ambiguous. Although N.D.C.C. § 57-02-08(38) is relatively clear on its face, it duplicates the state's broader exemption from property taxes under N.D. Const. art. X, § 5 and N.D.C.C. § 57-02-08(2). Consequently, section 57-02-08(38) could be construed as containing a latent ambiguity. Furthermore, the 2015 Legislature's removal of an express exemption for a "leasehold interest" in H.B. 1082 raises a question as to whether the Legislature intended to rely upon section 57-02-08(38) as the primary authority for a leasehold tax exemption or upon N.D.C.C. § 57-02-26(1) for such an exemption. Although the latter law addresses state lessee's leasehold interests, it does not specifically provide an expressly stated leasehold tax exemption. Regardless, a review of the legislative history suggests the Legislature wanted to continue a leasehold tax exemption as opposed to eliminate it; any other reading of the law would render the law arguably meaningless.

counties for "property subject to valuation," under N.D.C.C. § 57-02.3-02. Section 57-02.3-01, N.D.C.C., defines "property subject to valuation" as:

> [R]eal property owned by the board of university and school lands or by the state treasurer as trustee for the state of North Dakota, title to which was obtained after January 1, 1980, by foreclosure or deed in lieu of foreclosure of a mortgage given to the Bank of North Dakota, including a mortgage assigned to the state treasurer under section 54-30-02. "Property subject to valuation" also means real property owned by the board of university and school lands or by the state treasurer as trustee for the state of North Dakota, title to which was obtained on or before January 1, 1980, and which is leased to a leaseholder who uses the property for growing hay or crops."[4]

Thus, the Board makes a payment in lieu of tax on all property it obtained after 1980, and property obtained before 1980 that is leased and used for growing hay or crops.

The Board does not make a "payment in lieu of tax" pursuant to N.D.C.C. § 57-02.3-02 on property that is used for pasture or grazing, as these lands are typically original grant lands. The Board pays a fee to counties under N.D.C.C. § 15-04-23 where the state retains original grant lands. The law provides:

> On or before March first of each year, the board of university and school lands shall pay a fee to the board of county commissioners of each county in which the state retains original grant lands if that county has requested payment under this section and included certification of the number of mills levied for county road and bridge purposes. The board of county commissioners shall forward a prorated portion of any fee received under this section to the organized townships in which the original grant lands are located for use in the repair, maintenance, and construction of roads and bridges and shall use the remainder of the fee for the repair, maintenance, and construction of roads and bridges in unorganized townships in which original grant lands are located. The total fees paid under this section may not be in an amount greater than the amount of property taxes that would have been payable if the original grant lands in the county had been subject to property tax levies. There is appropriated annually the amounts necessary to pay all fees under this section. Each payment must be made from the trust fund for which the land is held.[5]

[4] N.D.C.C. § 57-02.3-01.
[5] N.D.C.C. § 15-04-23 (emphasis added).

You indicate in your request that after the Legislature enacted H.B. 1082[6] in 2015, some county officials have interpreted the changes to the law to include issuance of leasehold tax statements to lessees of land for pasture and grazing purposes that were not previously assessed such a tax. You further indicate that counties are actually seeking tax payments from state lessees that lease original grant lands for pasture and grazing, and that you believe the Legislature did not intend to allow counties to assess these state lessees with a leasehold interest tax because the Board pays a fee under N.D.C.C. § 15-04-23, which you suggest is the equivalent of a "payment in lieu of tax."

ANALYSIS

When interpreting a statute, the North Dakota Supreme Court has explained:

> The primary objective in interpreting a statute is to determine the intent of the legislature by first looking at the language of the statute. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined in the code or unless the drafters clearly intended otherwise. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-09.1. If the language of a statute is clear and unambiguous, the letter of the statute cannot "be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. A statute is ambiguous if it is susceptible to different, rational meanings.[7]

The court has explained that even when a statute is clear and unambiguous when read separately, statutes could contain a "latent ambiguity when read together and applied to a

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[6] H.B. 1082, 2015 N.D. Leg., revised the language of these statutes as follows:

57-02-08. Property exempt from taxation.

All property described in this section to the extent herein limited shall be exempt from taxation:

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38. ~~The leasehold interest in property~~ Property owned by the state ~~which has been leased for pasture or grazing purposes~~ upon which payments in lieu of property taxes are made by the state.

57-02-26. Certain property taxable to lessee or equitable owner - Exception.

1. Property held under a lease for a term of years, or under a contract for the purchase thereof, belonging to the United States or to the state or a political subdivision thereof, except such lands ~~as have been leased for pasture or grazing purposes or~~ upon which the state makes payments in lieu of property taxes, or to any religious, scientific, or benevolent society or institution, whether incorporated or unincorporated, or to any railroad corporation whose property is not taxed in the same manner as other property, must be considered, for all purposes of taxation, as the property of the person so holding the same.

[7] Arnegard v. Cayko, 782 N.W.2d 54, 58-59 (N.D. 2010).

particular set of facts."[8] Statutes which contain a latent ambiguity when applied to a particular situation make it appropriate to consider the statute's meaning in light of extrinsic aids, which may include the object sought to be attained by the statute, the legislative history, former statutory provisions, and the consequences of a particular construction.[9]

Whether the Board's payment of a Fee under N.D.C.C. § 15-04-23 constitutes a "payment in lieu of tax."

As stated above, the Legislature has directed the Board to make payments in lieu of taxes on property used for growing hay or crops, but not lands used for pasture lands or lands used for grazing.[10] The latter category of land use is the primary use for original grant lands.[11]

Section 15-04-23, N.D.C.C., authorizes the Board to pay state funds to counties for certain county services that are provided to all residents, but the Legislature has termed the payment a "fee" rather than a "payment in lieu of tax." The word "fee" is generally defined as a "fixed charge" or a "charge [ ] for a service."[12] This office has explained in the past that fees "are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society,' they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses."[13]

A 1990 Attorney General's opinion is helpful for understanding why the Board might have a separate fee structure for original grant lands versus other lands it has obtained, such as lands obtained after 1980.[14] In that opinion the Attorney General concluded the Board could "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."[15] The Opinion further explained:

> Therefore, because the trust is dedicated solely to benefit schools and certain institutions, it is my opinion income from the trust may be used only

[8] Kroh v. Am. Family Ins., 487 N.W.2d 306, 308 (N.D. 1992).
[9] N.D.C.C. § 1-02-39.
[10] N.D.C.C. § 57-02.3-01; but see N.D.A.G. 90-24.
[11] N.D.C.C. § 15-04-01.
[12] Fee Definition, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/fee (last visited Dec. 13, 2016).
[13] N.D.A.G. 94-L-227 (quoting Emerson Coll. v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984). See also N.D.A.G. 2004-L-18; N.D.A.G. 2002-L-48.
[14] See e.g. N.D.C.C. § 57-02.3-01.
[15] N.D.A.G. 90-24.

> for limited purposes. Many uses to which property taxes are put by political subdivisions do benefit original grant lands, as well as all other land within the jurisdiction of the taxing authority. The services of city and rural fire departments protect original grant lands as do services supplied by local law enforcement agencies. Maintaining roads and controlling weeds are examples of other beneficial services funded by taxes. Thus, it is my opinion the Land Board has the authority to make in lieu of tax payments which fund services beneficial to the trust.[16]

Thus, the Board could make a partial payment in lieu of tax payment relative to original grant lands as long as there was a direct benefit to the lands. What is not clear or unambiguous, however, is whether the Legislature intended the Board's payment of the fee for county infrastructure costs to constitute a payment in lieu of tax for the purposes of a leasehold tax exemption; N.D.C.C. §§ 57-02-08(38), 57-02-26, and 15-04-23 arguably contain a latent ambiguity when read together.

At first glance, the ambiguity could be resolved by the Land Commissioner's legislative testimony supporting a 1999 senate bill that was adopted and codified as N.D.C.C. § 15-04-23.[17] The minutes of a March 10 committee hearing provide:

> This is not an in lieu tax payment or anything like that. It [5% of estimated annual net rent on original grant lands] would be to pay for services such as fire, it is clear that the counties provide road service and access to school trust land and that adds value to lands and so as we understand the amendment it would be an attempt to give something back to those counties in payment for those services that they provide.[18]

The failure of an additional bill in 1999, S.B. 2387, lends further support to the argument that fee payments under S.B. 2088 that became N.D.C.C. § 15-04-23 were not considered as "payments in lieu of taxes." Senate Bill 2387 proposed that N.D.C.C. § 57-02.3-01 be amended to require the Board to make payments in lieu of taxes to counties on all property owned or held in trust by the Board.

Although it is not clear from the minutes or the legislative history why the Commissioner differentiated between fees paid under N.D.C.C. § 15-04-23 from payments in lieu of taxes, such a distinction did not affect the leasehold tax exemption as it existed in 1999. In 1999, the leasehold interest in property owned by the state was applied if payments in lieu of taxes were made by the state and if the state property was leased for pasture or grazing

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[16] Id.
[17] S.B. 2088, 1999 N.D. Leg.
[18] Hearing on S.B. 2088 Before the House Comm. On Educ., 1999 N.D. Leg. (Mar. 10).

purpose.[19] Therefore, the 1999 legislative history reflecting the Land Commissioner's opinion about the N.D.C.C. § 15-04-23 fee is not determinative of whether such a fee could be construed as a payment in lieu of tax. The more reliable approach would be to examine whether the Legislature has directed counties to apply the N.D.C.C. § 15-04-23 fee to categories of expenses that are typically funded through a county's general mill levy as opposed to funding a particular service.

In 2007, the Legislature amended N.D.C.C. § 15-04-23 by tying the fee paid by the Board more directly to the amount of property tax used for road and bridge purposes:

> On or before March first of each year, the board of university and school lands shall pay a fee to the board of county commissioners of each county in which the state retains original grant lands if that county has requested payment under this section and included certification of the number of mills levied for county road and bridge purposes. . . . The total fees paid under this section . . . may not be in an amount greater than the amount of property taxes that would have been payable if the original grant lands in the county had been subject to property tax levies.[20]

The minutes from committees that heard the bill reflect the concern that Board funds could only be used for county services that benefit grant lands.[21] By comparison, the Legislature has provided specific authority to state agencies to enter into agreements and pay fees for specific services.[22] Since the Legislature's modification of N.D.C.C. § 15-04-23, which tied the fee calculation directly to the mill levy certified for road and bridge services, the law resembles the requirements for calculating the payment in lieu of tax required under N.D.C.C. ch. 57-02.3, although the latter chapter does not allow the Board to pay for services that benefit lands obtained by the Board. Further similarities between the N.D.C.C. § 15-04-23 fee payment and general property taxes, and an "in lieu of tax" payment, may be drawn because the Legislature has limited the fee to no more than the amount of property taxes that would have been paid had the lands been subject to a property tax levy.[23]

It is my opinion, therefore, that the N.D.C.C. § 15-04-23 fee paid by the Board is in essence a payment in lieu of tax even though the law does not expressly refer to the fee

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[19] N.D.C.C. § 57-02-08(38) (1999).
[20] H.B. 1171, 2007 N.D. Leg.
[21] Hearing on S.B. 1171 Before the House Comm. on Educ., 2007 N.D. Leg. (Jan. 15) (Testimony of Terry Traynor).
[22] See N.D.C.C. § 18-10-10 (A State agency may enter into a contract and pay a reasonable fee to a rural fire protection district for fire protection service or fire protection cooperation.)
[23] N.D.C.C. § 15-04-23.

as such a payment. Consequently, a nonexempt lessee of state property leased for pasture or grazing purposes is exempt from a leasehold interest tax.

Sincerely,

Wayne Stenehjem
Attorney General

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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.[24]

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