

N.D.A.G. Letter to Swanson (Dec. 31, 1990)

December 31, 1990

Mr. Howard D. Swanson
Office of Grand Forks City Attorney
P.O. Box 1950
Grand Forks, ND 58206-1950

Dear Mr. Swanson:

Thank you for your November 21, 1990, letter regarding an application for abatement of property taxes that has been filed by the Grand Forks Elks Club for the 1988 and 1989 tax years. In this application for abatement, the Elks Club contends that its property is subject only to taxation for the cost of fire protection services. N.D.C.C. § 57-02-08(11).

You have set out the following relevant facts in your letter:

The Elks Club in the City of Grand Forks has typically been taxed in part only for fire protection and in part for complete taxation. That portion of the building which was considered to be used for meetings, business and ceremonies of the lodge was taxed only for fire protection purposes. The balance of the property which was considered to be used for the service of food, sale of alcohol, other functions and banquets had been taxed in the normal manner. As of January 1, 1989, the Elks building has essentially been vacant. The building generally remains unused. Some of the fixtures, furnishings, and improvements have been sold or removed. Recent inspections by the Grand Forks City Assessor's Office have indicated that a small portion of the building is used for office purposes (i.e. storage of records, correspondence, etc.). No portion of the building is used for meetings or ceremonies. The building is no longer used for the service or sale of food or alcoholic beverages.

You have then requested my opinion as to whether under these factual circumstances the property of the Elks Club is subject only to taxation for the cost of fire protection services under N.D.C.C. § 57-02-08(11).

N.D.C.C. § 57-02-08(11) provides:

57-02-08. Property exempt from taxation. All property described in this section to the extent herein limited shall be exempt from taxation:

....

11. Property owned by lodges, chapters, commanderies,

consistories, farmers' clubs, commercial clubs, and like organizations, and associations, grand or subordinate, not organized for profit, and used by them for places of meeting and for conducting their business and ceremonies, and all property owned by any fraternity, sorority, or organization of college students if such property is used exclusively for such purposes; provided, further, that any portion of such premises not exclusively used for places of meeting and conducting the business and ceremonies of such organization shall be subject to taxation.

Provided, further, that if any such organization as contemplated by this subsection is licensed for the sale or alcoholic beverages as defined by the statutes of the state of North Dakota, such portion of such premises where such alcoholic beverages are consumed or sold shall be deemed not to be so used exclusively for conduct of its business and meeting if such beverages are sold at a profit.

Provided, further, that if food other than that served at lodge functions and banquets and food sold or consumed in any fraternity or sorority house, is sold at a profit on the premises, that portion of the premises where such food is sold at a profit shall be deemed not to be used exclusively for places of meeting or conducting the business and ceremonies of such organization; provided, that all property described in this subsection shall be subject to taxation for the cost of fire protection services furnished by any municipal corporation in which said property is located.

(Emphasis supplied.) Therefore, ownership and use determine whether a lodge facility is entirely exempt, except for the fire protection levy, or only partly exempt because of the provisions relating to the consumption or sale of alcoholic beverages and the sale of food for profit.

While this two-part test under N.D.C.C. § 57-02-08(11) was the subject of several published opinions of this office, those opinions are not responsive to your inquiry. 1961 N.D. Op. Att'y Gen. 244, 1959 N.D. Op. Att'y Gen. 263, 1955 N.D. Op. Att'y Gen. 124, 1930 N.D. Op. Att'y Gen. 166, 1930 N.D. Op Att'y Gen. 160.

However, this two-part test was the subject of a published opinion which is responsive to your inquiry although it related to various properties addressed under the exemption provisions of N.D.C.C. § 57-02-08(6), (7), (8), and (9). 1970 N.D. Op. Att'y Gen. 394.

Under both subsections 7 and 9 the property must be "intended and ordinarily used" for the exempt purpose. Because of this additional language, it was the opinion of this office

that property subject to these exemptions remained exempt even though it is temporarily not used for those purposes. 1970 N.D. Op. Att'y Gen. 394, 398.

The opinion concluded further that although subsections 6 and 8 do not contain the clarifying language of "intended and ordinarily used" during non-use property would continue to qualify for the exemption under these subsections until put to a different use. However, in reaching this conclusion, it is cautioned that "[t]his matter is not free from doubt because we have no indication from the court as to how any such statutory provision or constitutional provision can be applied to property because of non-use." Id.

It is further understood that this conclusion is consistent with several decisions of the North Dakota Supreme Court that held that while property tax exemptions are to be strictly construed, "words describing the object of a tax exemption will be given a liberal and not a harsh or strained construction to obtain a reasonable result effectuating the legislative intent in providing a tax exemption." Ladish Malting Co. v. Stutsman County, etc., 351 N.W.2d 712, 718 (N.D. 1984); Mills v. Board of County Commissioners, 305 N.W.2d 832, 836 (N.D. 1981); Evangelical Lutheran Good Samaritan Society v. Board of County Commissioners, 219 N.W.2d 900, 905 (N.D. 1974); Lutheran Campus Council v. Board of County Commissioners, Ward County, 174 N.W.2d 362, 365-366 (N.D. 1970).

Therefore, it is my opinion that the property of the Elks Club should be treated under N.D.C.C. § 57-02-08(11) in the same manner as it was treated when it was in full operation until either its ownership or active use is changed. Until one of these events occurs, that portion of the building which was considered to be used for meetings, business and ceremonies of the lodge should be assessed only for fire protection services and the balance of the building which was used for the service of food and sale of alcoholic beverages should be assessed fully.

I hope that this letter is of assistance to you.

Sincerely,

Nicholas J. Spaeth

vkk