OPINION
69-46

January 13, 1969 (OPINION)

Miss Phyllis A. Ratcliffe

City Attorney

Watford City, North Dakota

RE: Cities - Lease of Golf Course - Authority

This is in reply to your letter of date 27 December 1968 with regard to prospective lease of municipal land for a golf course.

Your questions are stated as:

1. Does a City Municipality have the power to lease certain of its real property to a private nonprofit corporation for the purpose of providing Golf Club facilities?

2. If the answer to question number 1 is in the affirmative, would the said lands be considered agricultural lands to the point where a lease could not be extended beyond the ten-year limitation for agricultural lands? The land in question consists of 160 acres some of which would be sublet by the proposed lessee probably for hay. The Gold Course facilities themselves would not require the entire 160 acres proposed to be leased to them."

In reply to your first question we note the provisions of Section 40-05-01, subsection 56, of the North Dakota Century Code providing:

> "POWERS OF ALL MUNICIPALITIES. The governing body of a municipality shall have the power:
>
> * * *
>
> 6. TRANSFER OF PROPERTY. To convey, sell, dispose of, or lease personal and real property of the municipality as provided by this title; * * *."

and the provision of Section 40-11-04 of the North Dakota Century Code providing:

> "ORDINANCE REQUIRED FOR THE TRANSFER OF PROPERTY. Every municipality shall enact an ordinance providing a uniform method and procedure for the conveyance, sale, lease, or disposal of personal and real property of the municipality."

We are enclosing herewith Xerox copy of an opinion and a letter of this office with regard to such golf club leases considering aspects of both Chapters 40-49 and 40-55 of the North Dakota Century Code.

Basically our answer to your first question is therefore in the affirmative though there may be other factors that might prevent or

complicate a particular transaction.

We assume your second question refers to the provisions of Section 47-16-02 of the North Dakota Century Code which provides:

> "LIMITATIONS ON LEASES. No lease or grant of agricultural land reserving any rent or service of any kind for a longer period than ten years shall be valid. No lease or grant of any village or city lot reserving any rent or service of any kind for a longer period than ninety-nine years shall be valid."

We note in Anderson v. Blixt, 72 N.W.2d. 799, decided by our Supreme Court in 1955, at page 803, of the N.W.2d. Reporter, the comment:

> "In the jurisdiction where the law restricts the duration of a lease of agricultural land, before a court is justified in declaring it invalid, it must find that the lease is of agricultural land; that the use of the land and for agricultural purposes is not excluded; that rent or service is reserved; and that the term is within the restriction."

If none of the cases we have examined concerning this statute do we find any authority establishing a discretion between agricultural land and hay land. In view of the nature of agriculture pursuits commonly undertaken in this state we would assume that hay land is agricultural land within the meaning of this statute.

Obviously for purposes such as the maintenance of a clubhouse or other structures it seems probable that the lessee would desire a longer term than ten years. Also, it would seem possible that preparation of certain other golf course facilities would necessitate expenditures that would also make it desirable that the premises occupied thereby be retained for a period longer than ten years. As to such premises it would appear that the contemplated use expressed in the lease would exclude agricultural use for the period of such leasing. You give us no information as to current or immediately past usage of the premises. From the information you do give we would assume that the premises are either used or usable for agriculture and that same is in an agricultural area. To the extent the contemplated use under the lease excluded the use of the premises for agricultural purposes such lease would not fall within the prohibition of the statute. To the extent that the lease did not exclude the use of the premises for agricultural purposes it probably would fall within the prohibition of the statute. The fact that a part of the premises would be devoted to a purpose that would exclude the use of that part of the premises from agricultural purposes would not make the entire tract non-agricultural land and therefore exempt from the statutory provisions.

In drawing the lease in question you might consider such cases from other jurisdictions as Ryan et al., v. Sioux Gun Club, 2 N.W.2d. 681, decided by the Supreme Court of South Dakota in 1942. The court tells us at page 682 of the N.W.2d. reporter that the lease (to the gun club) "* * * contains the express provision that the property was leased 'for Club purpose, recreational and social purposes, and not as and for agricultural purposes' * * *." In regard to the raising of alfalfa and pasturing of sheep on the premises the court informs

us further on that same page:

> "* * * With respect to this alfalfa the trial court found as follows: 'In providing for its shooting traps several acres of the ground so in use for shooting purposes were sown to alfalfa in order to keep the ground under proper subjection, and to provide a base for the fall of targets as thrown from said traps. The defendant kept the said alfalfa cut, and on occasions sold the hay, but the proceeds have never exceeded the cost of preparation and care of said ground or resulted in profit to the defendant, and such use of the ground was a mere incident to the lease and the uses and purposes contemplated thereby.' Prior to the sowing of this alfalfa, defendant permitted sheep to be pastured on the grounds. It is apparent from the record that the pasturing of these sheep was simply for the purpose of aiding in the clearing of the ground and preparation of the premises for the purposes for which they were leased. Since the clearing of the land by defendant, it is suitable for cultivation with the possible exception of the accretion land, and so far as the soil is concerned, it is similar to surrounding cultivated land. * * *"

The court concludes on these points (at page 683 of the N.W.2d. Reporter):

> "The lease with which we are here concerned expressly provides the purposes for which the property is leased, and by these express terms 'agricultural purposes' are excluded. It might well be that under the evidence submitted the leased land was agricultural land, in the broad conception of that term, but this fact is not decisive. We believe the reasoning of the New York, Montana, and Michigan courts is sound, and that the statute should be construed so as not to apply to leases of land even though suitable for agriculture, when leased for a purpose other than agriculture, and exclusive of the right of agriculture.
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> "The plaintiffs-appellants further contend that the evidence discloses that the leased premises were in fact used for agricultural purposes. We cannot concur. It is clear from the record that the growing of the alfalfa was not for any agricultural purpose, but for the purpose of properly maintaining the premises for the purpose for which they were leased. The trial court so found and the evidence amply sustains the finding."

We are not familiar with any decision of the North Dakota Supreme Court specifically considering maintenance of golf courses or shooting clubs on land otherwise suitable for agriculture. We do note that our district courts have permitted corporations otherwise forbidden to engage in farming, or holding farm land for a long period of time, to lease farm lands acquired by them incident to their businesses of buying and selling real estate. SEE: page 5 of copy of opinion of date October 28, 1968, enclosed herewith.

We do not claim to be experts in the field of maintenance of golf clubs. It would, however, seem preferable to have lands adjacent to

the fairways grazed by sheep as opposed to overgrown with brush and weeds for the convenience of golfers who might drive a ball beyond the precise limits of the golf course. Likewise, maintenance of the greens might be greatly facilitated by control of the growth of weeds and crops on the immediately surrounding premises. Experts in this field of maintenance of golf courses could probably furnish information as to how much surrounding territory was necessary or essential to the maintenance of a proper golf course. The fact that a neighboring farmer had an agreement with the golf club management to keep down brush and weeds, to maintain suitable cultivation of the soil, to facilitate convenience of the participants in the sport or to otherwise enhance use of the basic premises utilized in the golf course for that purpose, would not necessarily convert the basic lease into an agricultural lease or prevent a court from finding that use of the lands for agricultural purposes is excluded under the terms and operation of such basic lease.

We hope the within and foregoing will be of some assistance to you.

HELGI JOHANNESON

Attorney General