OPINION
70-394

July 31, 1970 (OPINION)

Senator Edwin C. Becker

204 Avenue A West

Bismarck, ND

RE: Taxation - Exemption Parochial Schools Used for Other Purposes

This is in response to your letter in which you state that a number of parochial schools throughout the state are being closed and a number of buildings owned by religious organizations as well as parishes are standing idle and are used only occasionally for religious purposes. The question has arisen whether such property is exempt from taxation. In your opinion these properties would not be taxed unless the same would be used for a profit. You then ask for an opinion to clarify what appears to be a state of confusion.

This question involves the examination of constitutional and statutory provision. Section 176 of the North Dakota Constitution relates to taxation and exemption of property. It provides as follows:

> "Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax. The legislature may by law exempt any or all classes of personal property from taxation and within the meaning of this section, fixtures, buildings and improvements of every character, whatsoever, upon land shall be deemed personal property. The property of the United States and the state, county and municipal corporations and property used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation. Except as restricted by this Article, the legislature may provide for raising revenue and fixing the situs of all property for the purpose of taxation. Provided that all taxes and exemptions in force when this amendment is adopted shall remain in force until otherwise provided by statute." (Emphasis ours)

This section was amended at least twice. Initially it carried a mandate or command to the North Dakota Legislature to exempt certain property but in its present form it is in a sense self-executing. For example, the underscored language clearly provides that the property of the United States and State, etc., are exempt from taxation but exemption in this instance is based upon ownership whereas the language which is doubly underscored bases the exemption upon use. The use must be exclusive before the constitutional exemption applies.

If it were not for the last sentence, Section 176 of the Constitution would be fully self-executing. The last sentence, however, freezes the exemptions and the property subject to tax as they existed upon the adoption of the amended version of Section 176 until the

legislature provides for other methods of taxation of exemptions.

Whether the provisions of section 57-02-08 were modeled to conform with the provisions of Section 176, of whether they existed in the same form prior to the amendment of Section 176 is somewhat immaterial to the question at hand. Specifically as to the provisions of subsections 7 and 9 thereof, same are generally in harmony with Section 176. Subsection 7 provides 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, that is to say:
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> * * *
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> 7. All houses used exclusively for public worship, and lots or parts of lots upon which such buildings are erected, and any dwellings belonging to religious organizations intended and ordinarily used for the residence of the bishop, priest, rector, or other minister in charge of the services of the church, together with the lots upon which the same are situated;"

It should be noted that it is the exclusive use of the property which determines its tax or exempt status. It is further noted that the same subsection incorporates ownership of property as a basis for an exemption by the following language, "* * *and any dwellings belonging to religious organizations intended and ordinarily used for the residence of bishop, priest, rector or other minister* * *".

The first portion of subsection 7 exempts certain properties because of the use. The second section exempts property because of ownership and use. In this respect it is noted that the property may be exempt if it is intended and ordinarily used for certain purposes. The expression "intended and ordinarily used" allows considerable latitude for an exemption. It does not require that the property be in fact continually or exclusively used but if the property is intended and ordinarily used for the purposes set forth in the statute it then qualifies for the exemptions.

The North Dakota Supreme Court in Lutheran Campus Council v. Board of County Commissioners, Cass County, 174 N.W.2d. 362, had occasion to construe the provisions of subsection 7. The property in question was used by a minister of the Lutheran Faith as a place for religious group meetings, counseling of students and faculty members and as a study, an office and a conference facility and also as a residence for the minister himself and his family.

The court, after recognizing the rule of law that anyone seeking an exemption has the burden of establishing the exempt status and that the exemptions are strictly construed, held that the properties in question were exempt under the provisions of subsections 7 and 9. It should be noted that a special concurring opinion held that the property was exempt but only by reason of subsection 7.

By comparison the North Dakota Supreme Court in the case of The Society for Crippled Children and Adults v. Louise Murphy, 94 N.D.2d.

343, held that even though the property was owned by a charitable institution but was used only for the purposes of providing a residence to the executive director of the charitable institution, did not qualify such property for a tax exemption under the provisions of section 57-02-08(8). Subsection 8 concerns itself with property owned by institutions of public charity whereas subsections 7 and 9 pertain to property used for public worship or owned for religious corporations or organizations. The decision turned on the use of the property. The fact that the property was used for a home or residence for the executive director as compensation for his services was the controlling factor. Your question does not relate to similar legal problems. The case is referred to only illustrate the reasoning process employing in construing the provisions of subsection 8 which to some degree are similar to subsections 7 and 9.

It would appear from the facts given that the property in question can qualify as having tax-exempt status if it can be established that the property in question belongs to a religious organization and is intended and is ordinarily used for the residence of the bishop, priest, rector or other minister in charge of the services of the church. To qualify as being intended to be used it is not necessary to establish that it is in fact in constant use. It would appear to be sufficient to establish that the property when used is used for such purpose but when not used for such purposes it is not being used for any other purposes. For example, we are aware that there are certain properties which are stored such as candles, sacramental wine, etc., until they are actually used, but nevertheless such property while in actual storage is not being subject to a tax. The same rationale should apply here.

Subsection 9 of section 57-02-08 provides as follows:

> "All real property, not exceeding two acres in extent, owned by any religious corporation or organization, upon which there is a building used for the religious services of such organization, or upon which there is a dwelling with usual outbuildings, intended or ordinarily used for the residence of the bishop, priest, rector, or other minister in charge of such services, shall be deemed to be property used exclusively for religious services, and exempt from taxation, whether such real property consists of one tract or more. All taxes assessed or levied on any such property, while the same was so used for religious purposes, are void and of no effect, and must be canceled. All personal property of any religious corporation or organization used for religious purposes is exempt from taxation;"

It should be noted that the exemption is based upon both ownership and use and sets forth certain property and the use which will be deemed exclusively used for religious services and as such qualifies for an exempt status. To some degree it repeats some of the criteria set forth in subsection 7. At the same time it limits the property to two acres. It embraces both concepts of ownership and use whereas subsection 7 places emphasis on use as pertaining to house of public worship and ownership and of dwellings for ministers, priests, rectors, bishops and etc.

We would again observe that subsection 9, as well as subsection 7, uses the language "intended and ordinarily used" which signifies that the properties must not be continuously used for certain purposes but only that it is intended to be used and is ordinarily used for such religious purposes.

We have made a reasonable effort to find out why the provisions of subsection 7 and 9 are placed in separate provisions but were unable to find the answer to this question. There is a great similarity between these two sections even though a distinction exists.

In direct response to your question it is our opinion that house of public worship belonging to a religious organization where such property is intended and ordinarily was used for public worship qualifies as tax-exempt property even though it is temporarily or for the time being not used for such purposes. If the property in question is used for other purposes it will no longer qualify as tax-exempt property under subsection 7 and 9 of section 57-02-08 and if an effort were made to exempt such property the basis for exempting same would have to be found under some other provision of law.

As to the parochial schools, same may qualify as being exempt under the provisions of subsection 6 or subsection 8 if such buildings comprising a parochial school were in fact used for institutions of learning or housing students without making profit. The question of nonuse has never been considered by the North Dakota Supreme Court. Both Section 176 of the North Dakota Constitution and subsection 6 and 8 provide for an exemption depending on the use of the property. It would appear that if the property was in fact used as a school or for housing students attending school and never used for any other purposes or for profit the use to which such property was put would continue to prevail until such time as such property will be put to a different use or will be used for profit. This 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 nonuse.

While it is not necessarily controlling but it is interesting to note that the North Dakota Supreme Court had under consideration the question of whether or not school property had been abandoned under certain conditions in the case of Ballantyne v. Nedrose Public School District No. 4, Ward county, 144 N.W.2d. 551. In this instance the school district acquired property with the following clause in the deed: "In the event that should the above-described property be abandoned for school purposes at any future time, then the title to this property is to revert to T. F. Renwald or his heirs."

It was undisputed that the school district discontinued holding classes in the building for approximately 10 years but it continued to use the school for storage of furniture, desks and supplies. The building was also rented out to the Church of Jesus Christ of Latter Day Saints at a monthly rental of $25. The school board, however, continued to use the building as a storage facility for some of its personal property.

The court, in disposing of the questions presented to it, concluded

after referring to a number of cases in other jurisdictions that the facts, as submitted, did not constitute an abandonment of the property for school purposes. The obvious result is that the court in effect said that the property is still being used for school purposes. Some of the questions raised did not have to be resolved because of the conclusions reached by the court. The rationale of this case as to the use of property would have application here. We must further assume that the buildings, particularly the parochial schools, have personal property stored therein, such as desks, books and other property used for conducting classes.

It is our opinion that property belonging to a religious organization which was in fact used for a school and was not used for a profit will continue to qualify as tax-exempt property even though not used as a school until such time as the property is put to a use which no longer enjoys a tax-exempt status. The tax-exempt status rests on the construction of the statutory provisions and not on the construction of the constitutional provisions. However, any doubt with reference to such property can be resolved by the enactment of legislation which would clearly spell out the conditions under which such property will continue to be given a tax-exempt status.

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