

**OPINION
73-17**

October 23, 1973 (OPINION)

Mr. R. E. Lommen
State Land Commissioner
State Capitol
Bismarck, ND 58501

Dear Mr. Lommen:

This is in response to your letter in which you state the following:

"On July 26, 1973, the Board of University and School Lands held its last meeting. At that meeting the Board discussed the current rate of interest charged on farm loans and the possibility that the rate might go higher in the future. Several members did not like locking in the interest rate charged on farm loans at 7 percent or 7 1/2 percent for a period of thirty years. In the course of that discussion the Board discussed the possibility of going to a variable interest rate.

"After some discussion it was decided that an Attorney General's opinion should be obtained to determine whether or not it would be within the powers of the Board of University and School Lands, and legal under the laws of this state, for the Board to establish a variable interest rate on its farm loans in the future. The board has no intention of applying this variable interest rate to farm loans made in the past. The rate would be applied to farm loans made in the future."

The rate of interest and other matters relating thereto are generally set out in Chapter 47-14. However, as to the specific question involved here, this chapter is significant only to the extent that it sets the maximum rate of interest in Section 47-14-09 as amended. It also provides that in certain instances the maximum interest is not applicable.

In addition to this, Section 15-03-09 establishes the minimum rate of interest.

Section 35-03-04 sets forth the prerequisites for recording a mortgage. Amongst other things which must be stated in the mortgage is the rate of interest. This is a requirement which must be satisfied before a mortgage is eligible to be recorded. It does not necessarily affect the validity of the mortgage.

Section 35-03-05 sets out the form which must substantially be followed. The form as set out need not be followed word for word but the key provisions therein must be contained in a mortgage. Of course, a key provision is the rate of interest.

The rate of interest is as agreed upon by the parties to the contract. It is a matter for negotiation provided the ultimate rate is between the maximum and minimum rate authorized by law. It would

necessarily follow that if the rate of interest agreed upon does not violate any state law, the contract is valid.

A variable rate of interest which is the subject of the inquiry must necessarily have some firm understanding as to what will determine the variable rate from time to time. The variable rate could not be increased or decreased unilaterally from time to time. However, the parties may agree that the rate of interest will fluctuate in accordance with some specific happenings or events. If this is the thought that you had when you mentioned variable interest rates, it is conceivable that such variable rate could be employed.

However, in employing a variable interest rate, considerable thought should be given to those factors which will influence the rate to be charged or which factors will cause the rate to vary. In any event, the varying rate may not exceed either the maximums or minimums established by law. In addition to this, Section 185 of the North Dakota Constitution should also be taken into account. Precaution should be exercised to avoid possible conflicts with Section 185 of the North Dakota Constitution.

47 C.J.S. Interest Section 33 Page 44 states: "The parties may enter into a contract by which the rate of interest to be paid shall change whenever the legal rate changes". This statement recognizes and for that matter accepts the concept that the parties may agree to a changing rate of interest. However, in this instance the rate is determined by the legal rate of the state.

To adopt a variable rate conditioned upon what some other board may do could, in some respects, amount to an abrogation of duties and responsibilities as set out in Section 15-03-09.

As to variable rate on judgments, the North Dakota Supreme Court in Swanson v. Flynn, 31 N.W.2d. 320, held that the change of the legal rate of interest on judgments by the Legislature from time to time will apply to judgments and that it does not violate the Constitution prohibiting the impairment of obligations of contract.

While it is our opinion that the parties can agree to a variable rate of interest, we are reluctant to conclude that such agreement can be made without specifying the criteria, items, happenings, events, etc., which will determine the rate of interest. We believe it is necessary that the parties agree as to what will determine the rate of interest from time to time.

As of this moment, we do not believe that we are in a position to advise what matters should be taken into account in determining how the rate of interest should be modified from time to time but rather we would reserve any conclusions or opinions until we have had an opportunity to examine the proposals involving a variable rate of interest conditioned on certain criteria, happenings, etc.

I trust this answers your inquiry.

Sincerely yours,

ALLEN I. OLSON

Attorney General