

**OPINION
74-532**

March 6, 1974 (OPINION)

Mr. Wayne O. Solberg
City Attorney
P.O. Box 1897
Fargo, ND 58102

Dear Mr. Solberg:

RE: Fargo Parking Authority - Tax Exemption

This is in reply to your letter of February 12, 1975, in which you outlined a proposal whereby the Fargo Parking Authority created pursuant to Chapter 40-61 of the North Dakota Century Code, would purchase certain property for use for parking purposes. The authority proposes to lease the property (or enter into a contract for deed) with a private entity whereby the entity would lease at a sum sufficient to meet the obligations of the bonds and the operating expenses of the parking facility and contain an option to purchase at a nominal price at the expiration of a twenty year period. The lease agreement between the lessee-purchaser and the Authority would provide that the property must be utilized for public parking during the entire term of the lease and that the parking rates would be controlled by the Authority. In view of these facts you state the following question:

"If a parcel of land is acquired by the Fargo Municipal Parking Authority, thereby attaining tax exempt status, will said property retain such tax exempt status if it is leased to a private individual with the condition that it be utilized as public parking with fees regulated by the Parking Authority for a period of 20 years with the option to purchase at the end of the 20-year period at a nominal price?"

The facts as we have outlined them and the conclusions we have reached are based on the facts as outlined in your letter. The copies of the letters enclosed with your letter to this office indicates there is some variance in the facts.

Section 40-61-14 of the North Dakota Century Code, as amended, provides as follows:

"TAX EXEMPTIONS.

1. It is hereby determined that the creation of an authority and the carrying out of its corporate purposes is in all respects for the benefit of the people of the city which has authorized it and its environs, and is a public purpose, and an authority shall be regarded as performing a governmental function in the exercise of the powers conferred upon it by this chapter and shall be required upon it by this chapter and shall be required to pay no ad valorem taxes upon any of the property acquired by it or under its jurisdiction or control or supervision or upon

its activities.

"2. Any bonds or notes issued pursuant to this chapter, together with the income therefrom, as well as the property of an authority, shall be exempt from taxation, except for transfer and estate taxes."

It is clear that the authority, if it acquires the property, would not be subject to tax thereon even though the authority were to lease it, with an option to purchase, to an entity which would operate the parking facility under the direction of the Authority. The status of the leasehold interest insofar as taxation is concerned is not the same. Thus, Section 57-02-04(1) of the North Dakota Century Code provides in part:

"Real property, for the purpose of taxation, includes:

"1. The land itself. . .and all rights and privileges thereto belonging or in anywise appertaining.* * *"

Section 57-20-03(1) of the North Dakota Century Code provides:

"Except as otherwise expressly provided, the following property is subject to taxation:

1. All real and personal property in this state;

* * *."

The North Dakota Supreme Court in Northern Pac. Ry. Co. v. Morton County 32 N.D. 627, 156 N.W. 226 (1915), in construing these provisions stated, page 232 of the NW Reporter:

"The Legislature has furnished the machinery as well as classified the property for taxation and has declared this leasehold right in property to be taxable as real estate, but to the lessees. And this leasehold interest is defined for taxation as real property (quoting above-cited provisions).

"Leasehold interests are not 'expressly excepted,' and are therefore taxable."

Presumably the fact that a leasehold interest in property held by a municipal corporation is subject to taxation unless expressly exempted is the reason for the insertion of Section 40-57-17 in the Municipal Industrial Development Act. This section, as amended, provides in part:

"The leasehold granted by a municipality under this chapter is hereby classified as personal property for a period of five years from the granting of such leasehold and the execution of any instrument evidencing said grant. Upon application by the project lessee to the governing body of the municipality and approval the leasehold and all other personal property used by the lessee in connection with the project and located on the premises of the leasehold shall be exempt from personal property taxation for such five year period.* * *"

After the five year period it would appear the leasehold interest referred to in Section 40-57-17 would be classified as a real property interest.

Perhaps more of significance as an example is the provision in Section 40-60-02(5)(g) of the North Dakota Century Code which provides:

"Any municipality is authorized:

* * *

5. To lease parking facilities, and any part thereof, to any public or private person, firm or corporation, upon such terms as the governing body may determine, provided that:
 - g. The leasehold created by any such lease is classified as personal property, and any such portion of such premises not used solely for public parking of motor vehicles shall be subject to taxation."

See also Subsection f of Subsection 5 of the above-cited Section.

These provisions were enacted at the same legislative session. See Chapters 341 and 342 of the 1967 Session Laws.

While not directly in point, we do note the provisions of Section 57-02-26 of the North Dakota Century Code which provides:

"CERTAIN PROPERTY TAXABLE TO LESSEE OR EQUITABLE OWNER.
Property held under a lease for a term of years, or under a contract for the purchase thereof, belonging to the state, except such state lands as have been leased for pasture or grazing purposes, 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, shall be considered, for all purposes of taxation, as the property of the person so holding the same."

This section does not require the taxation of the leasehold interest but rather provides that the property should be considered as that of the lessee for taxation purposes. The statute does not include political subdivisions of the State, such as cities. However, the intent of the provision does appear similar to the conclusion that a leasehold interest is taxable even though the property itself is not taxable, i.e., the interest of persons or entities which are not exempt from taxation will be subject to taxation. It is conceivable that the value of the leasehold interest for taxation purposes may not be the same value which would be placed upon the property itself were it subject to taxation.

We further note the provisions of Section 57-24-31 of the North Dakota Century Code which provides:

"COLLECTION OF REAL ESTATE TAXES ON LEASEHOLD OR OTHER

POSSESSORY INTERESTS. If any holder of a leasehold or other possessory interest in exempt real property neglects or refuses to pay any real estate taxes legally assessed and levied thereon at such time as now is or may hereafter be required by law for the payment of real property taxes, such leasehold or other possessory interest shall be sold in the manner provided by law for the sale of real property for delinquent taxes. Such taxes shall also constitute a personal charge against the holder of the lease or other possessory interest from and after the day they become due, and all of the provisions of law with respect to the enforcement of collection of personal property taxes shall be applicable."

Enclosed herewith is a copy of an opinion issued to Michel W. Stefonowicz, Divide County State's Attorney, on July 27, 1973, which sets forth in some detail the rationale of taxation of a leasehold interest in property which is exempt because it is owned by a governmental entity. While the exemption provision in this instance is not the same as that discussed in the 1973 opinion, we can find no basis for arriving at a different conclusion. An examination of Section 40-61-14 which governs this situation indicates that it is the Authority which is exempt from paying any taxes "upon any of the property acquired by it or under its jurisdiction or control or supervision." There is no exemption for the property, only the Authority, and no exemption for leasehold interests of other persons or entities in property owned by the Authority.

In summary, it is our opinion that if a parcel of land is acquired by the Fargo Municipal Parking Authority, the Authority will be exempt from paying ad valorem taxes upon such property. It is our further opinion that if the property is leased to a private individual with the condition that it be utilized as public parking with fees regulated by the Authority for a period of twenty years with the option to purchase at the end of the twenty year period at a nominal price the leasehold or other interest of the private individual in the property will be subject to taxation.

Sincerely yours,

ALLEN I. OLSON

Attorney General