

**OPINION  
78-127**

April 27, 1978 (OPINION)

Mr. John A. Zuger  
Attorney for the City  
of Bismarck  
P. O. Box 1695  
Bismarck, ND 58501

Dear Mr. Zuger:

You have informed me by letter that two hospitals in Bismarck, The Bismarck Hospital and St. Alexius Hospital, have acquired real property for the offstreet parking of motor vehicles. Both hospitals are exempt from real property taxation pursuant to the provisions of Section 176 of the North Dakota Constitution and Subsection 8 of Section 57-02-08 N.D.C.C. You have asked for an opinion concerning the question of whether these offstreet parking lots will be subject to real property taxation.

Specifically, you have asked three questions in regard to this subject, each presenting a different factual circumstance. An independent response to each question follows:

This first question you raised is:

"Will this property be subject to taxation if no fee is charged for parking and the lot is open to hospital and employees only?"

The following is the pertinent language of Section 176 of the North Dakota Constitution which provides that property used for charitable purposes shall be exempt from taxation

". . . property used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation . . . ."

In recognition of this constitutional provision, the North Dakota legislature enacted Subsection 8 of Section 57-02-08 N.D.C.C. Presently this subsection provides:

"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:

\* \* \*

8. All buildings and contents thereof belonging to institutions of public charity, including public hospitals and nursing homes licensed pursuant to section 23-16-01 under the control of religious or charitable institutions, used wholly or in part for public charity, together with the land actually occupied by such institutions not leased or otherwise used with a view to profit, and all moneys and

credits appropriated solely to sustaining and belonging exclusively to such institutions; and this includes any dormitory, dwelling, or residential type structure, together with necessary land on which such structure is located, owned by a religious or charitable organization recognized as tax exempt under section 501(c)(3) of the United States Internal Revenue Code which is occupied by members of said organization who are subject to a religious vow of poverty and devote and donate substantially all of their time to the religious or charitable activities of the owner;"

While the North Dakota Supreme Court has not had the opportunity to consider the taxable status of hospital parking lots in view of these provisions, the court, on several occasions, has rendered opinions which affect the application of these provisions. Thus, the Court has set certain standards which must be met before the exemption can be granted.

The Syllabus by the Court in *YMCA of North Dakota State University v. Board of County Commissioners*, 198 N.W.2d. 241 (N.D. 1972) at p. 242 holds that while the burden of establishing the tax exempt status of property is upon the one who claims such exemption, the property will qualify for exemption under these provisions if its use results in a benefit directly connected with the public charitable activities of the institution claiming the exemption. Thus, the use, rather than the ownership, determines whether the property is exempt from taxation.

Several other State Supreme Courts have had the question of the property taxation status of hospital parking lots before them. Although the constitutional and statutory provisions may differ somewhat in language from those of North Dakota, in those decisions where hospital parking lots were found to be exempt, the rationale of the Court was similar to that expressed in the YMCA case, *supra*. That is to say, if a parking lot owned by a hospital is to be exempt from property taxation, it must be used and reasonably required for the purposes for which the institution was organized. In that regard, those courts recognized that to properly operate a modern urban hospital, adequate parking facilities for staff, patients and visitors is imperative. *Ellis Hospital v. Fredette*, 27 App. Div. 2d. 390, 279 N.Y.S. 2d. 925 (N.Y. 1967); *Bowers v. Akron City Hospital*, 243 N.E.2d. 95 (Oh. 1968); *University Circle Development Foundation v. Perk*, 200 N.E.2d. 213 (Oh. 1964).

Therefore, in answer to your first question, it is my opinion that the property in question would be exempt from property taxation.

The second question you raised is:

"Will the property be taxable if it is open to the general public with a fee charged for parking or open to the general public without any fee being charged for parking, i.e., persons other than the visitors to the hospital and employees of the hospital?"

The North Dakota Supreme Court has considered the effect of fees

charged for the use of property owned by charitable institutions and in *Evangelical Lutheran Good Samaritan Society v. Board of City Commissioners*, 291 N.W.2d. 900 (N.D. 1974), at p. 908, set forth the following standard by holding:

"Accordingly, in the instant case, we believe that the Devils Lake Home is not being 'used with a view to profit' as that phrase is used in subsection 8 of Section 57-02-08, N.D.C.C., because the profit that is earned by the Home is directly and entirely related to the Home's charitable use; and because such profit inures to no private individual but, instead, is reinvested into the Home for upkeep and expansion."

In the *Ellis Hospital* decision, *supra*, the Court found that the fact that a profit was realized from the parking lot operation did not affect the tax exemption inasmuch as the motivation for the operation of the parking lot was not for pecuniary profit but rather toward providing necessary facilities.

Similarly, in *Bowers v. Akron City Hospital*, *supra*, the Court found that the fees charged for parking had no effect upon the property tax exemption when the fees were, in fact, collected for the purpose of discouraging the general public from using the facilities if they had no connection with the hospital and the fees collected were used solely for regulatory and parking development purposes.

Thus, in the instant case, the mere fact that a fee is to be charged is not, in of itself, a factor which is significant enough to disqualify the property from an exempt status.

The fact that the parking lot is open for use by the general public is another matter. As stated before, the *YMCA* decision, *supra*, held that property owned by a charitable organization must be used in achieving its benevolent purposes to be exempt from taxation. If it is a commercial enterprise and a fee is charged for public parking, the fact that the income from such property is used for charitable purposes is immaterial.

Each of these questions must be factually decided on a case by case basis. *YMCA*, *supra*, at p. 244. The fact that the parking lot is open for use by the public may in whole or in part subject the property to taxation.

In an Opinion dated October 10, 1955, and in an Opinion dated April 29, 1974, this office held that where property owned by an exempt organization is used partly for exempt purposes and partly for purposes which are not exempt, the property should be assessed and taxed on a prorata basis which reflects the proportion of exempt use to that use which is not exempt.

Thus, in answer to your second question, it is my opinion that if less than all of the subject property is used for achieving the charitable purpose of the exemption claimant, then a portion of the property would be subject to property taxation. If none of the subject property is used for directly achieving the charitable purpose of the exemption claimant, then all of the property would be subject to property taxation.

The third question you raised is:

"If part of the property is leased out to a private clinic, operating for profit, who will use it for their use and patients, will the property be taxable?"

It is apparent that the part of the property leased to a private clinic would not have a use which directly assists the exemption claimant in achieving the claimant's charitable purposes. Thus, that portion of the property under the lease would be subject to assessment and taxation on a prorata basis as set forth in my answer to your second question.

Sincerely,

ALLEN I. OLSON

Attorney General