

October 23, 1959 (OPINION)

MUNICIPAL GOVERNMENT

RE: Improvements by Special Assessment Method - Improvement District - Inclusion and Assessment of Grounds of State Institution of Higher Learning

This is in reply to your letter of October 13, 1959, in regard to the possibility of annexing the remainder of the grounds of the North Dakota Agricultural College to the city of Fargo, creating a special improvement district including such grounds, building a new and necessary water main furnishing to the school, water needed for consumption and fire protection and specially assessing said grounds for the proportionate share of the cost of said special improvement project.

The general question of specially assessing state property as such for special improvement projects is covered at 63 C.J.S. 1067 Municipal Corporations Section 1332c stating in part as follows:

"In the absence of a constitutional provision to the contrary, the legislature has power to make property of a state situated within a municipality liable to special assessments for benefits accruing from local improvements, and the exercise of this power is not repugnant to a constitutional provision that public property used for public purposes shall be exempt from taxation. The power to subject the property of the state to assessments of this character does not exist in the absence of statutes conferring it, and the power must be conferred either expressly or by necessary implication. . . ."

To the same effect SEE: 44 C.J. 523, section 2881; 48 Am. Jur. page 641, section 87, 90 A.L.R. 1143. McQuillin Municipal Corporations, section 3873 (3rd ed.).

You call our attention specifically to the provision of section 176 of the North Dakota Constitution providing insofar as here applicable that:

". . . . The property of the United States and of the state, county and municipal corporations and property used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation. . . ."

In Gallagher v. City of Fargo, 64 N.W.2d. 444 at 449 we find the statement that:

". . . . In Rolph v. City of Fargo, 1898, 7 N.D. 640, 76 N.W. 242, 245, 42 L.R.A. 646, this Court held that Article XI of the Constitution covering revenue and taxation, which includes Section 176, refers to revenue measures of the State of North Dakota and not to special assessments. . . . This principle has been reaffirmed by this Court in many subsequent cases. . . ."

On this basis it would be our opinion that said section 176 of the Constitution would not be a hindrance to the proposed assessment.

Subsection 2 of section 57-0208 of the North Dakota Revised Code of 1943 exempts land owned by the state from general taxation. You also call our attention to section 40-2307 of the North Dakota Revised Code of 1943 exempting property belonging to the United States from special assessments but not specifically exempting schools from same. (Note deletion of this provision exempting property belonging to the United States in 1957 amendment of said section). However, we note the provision of chapter 380 of the 1959 Session Laws providing insofar as here applicable:

"Section 1. STATE PROPERTY SUBJECT TO SPECIAL ASSESSMENTS. Real estate within municipalities of this state owned by the state of North Dakota other than for highway right-of-way purposes, may be subjected to special assessments for special improvements when benefited by such improvement and the state agency or department having control thereof is hereby authorized to expend public funds in payment of such special assessments." ***[Now N.D.C.C. § 40-23-22.]***

You call our attention to the decision of the Supreme Court of this state in Erickson v. Cass County et al 11 N.D. 494 and we note in particular the statement therein on pages 506 and 507 as follows:

"Neither does the fact that school section no. 16, Wiser Township, which lies adjacent to the drain in question, and concededly is benefited by it, was not assessed, furnish any legal ground for complaint. Being school land, it was not assessable, under sections 153, 158 and 163 of the state constitution. This tract is a portion of the land granted by the United States to the state in trust for school purposes. The provisions of the grant and its acceptance forbid the imposition of assessments. In Edgerton v. School Tp. (Ind. Sup.) 26 N.E. Rep. 156, the court, in considering this question in a case where a drainage assessment was sought to be imposed, said: 'It will thus be seen that these lands came to us as a sacred trust, to be applied exclusively to school purposes, and that the people, by their fundamental law, have placed it beyond the power of even the legislature of the state to make any provision by which the principal of the funds arising from such lands shall be diminished. The state has no power to tax such lands, for, if it were permitted to do so, it could tax them out of existence, and divert them to the use of the state in the payment of ordinary expenses, and assessments should be made against such lands only as are subject to taxation.' See also, City of Chicago v. People 80 Ill. 384; People v. Trustees of Schools of Tp. 19 (ILL.) 7 N.E. Rep. 262."

It is our thought that the same basic principles as are applied in that decision would apply to the instant situation. Thus section 159 of the North Dakota Constitution provides:

"All land, money or other property donated, granted or received from the United States or any other source for a university, school of mines, reform school, agricultural college, deaf and dumb asylum, normal school or other educational or charitable institution or purpose, and the proceeds of all such lands and other property so received from any source, shall be and remain perpetual funds, the interest and income of which, together with the rents of all such lands as may remain unsold shall be inviolably appropriated and applied to the specific objects of the original grants or gifts. The principal of every such fund may be increased but shall never be diminished, and the interest and income only shall be used. Every such fund shall be deemed a trust fund held by the state, and the state shall make good all losses thereof."

Thus it would appear that through the terms of said section 159 the disposition of the lands covered by said section 159 would be governed by section 158 (cited in Erickson v. Cass County (supra), the provisions of the latter portion of said section 159 are substantially similar to those of section 153 (cited by Erickson v. Cass County (supra) and of course the provisions of section 163 of the Constitution would apply to both the lands governed by section 153 and the lands governed by section 159. As to the application of said section 159 to lands (other than those granted by the United States) to the state for agricultural college purposes SEE: State ex rel Francis v. Murphy 54 N.D. 529, 210 N.W. 53.

It would therefore be our opinion that the lands here concerned could not be taken by tax deed proceedings for the enforcement of a special assessment pursuant to Section 40-2501 of the 1957 Supplement to the North Dakota Revised Code of 1943, however, it would appear that the legislature has recognized that situations would arise where property would be exempt from such tax deed proceedings, but nevertheless specially assessable, and has provided a remedy for such situations. SEE: Section 40-2308 of the 1957 Supplement to the North Dakota Revised Code of 1943. (We do not mean to suggest or imply that this statute constitutes a consent by the state to suit against it on such assessments where the state itself is occupying the property.)

Thus while it seems doubtful that the state could forfeit the lands here concerned by reason of tax deed proceedings, to enforce special assessments, we see no reason why the legislature of this state could not consent to pay for specially assessed benefits of improvement projects affecting its lands and institutions. We note several instances where it has apparently done so. Thus in chapter 48 of the 1959 Session Laws, the appropriation for State Institutions of Higher Learning we note under the heading State University item No. 7, "Special Assessments. . . \$20,500.00, and under the heading State Teachers College, Dickinson, Plant Improvements item No. 1 City Assessments. . . \$22,723.00." SEE: Also other appropriation acts and appropriations for institutions of higher learning for previous years.

In conclusion we might state that it is therefore our opinion that the contemplated project is legally feasible assuming that first the land itself is not disposed of or its value impaired,

and second the legislature consents to use of funds under its control to pay for the state's share of the improvement benefits.

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