

Date Issued: February 17, 1981 (AGO 81-14)

Requested by: Representative Verdine D. Rice

- QUESTION PRESENTED -

Whether existing provisions of law provide the same exemption from property taxation as would be provided by House Bill No. 1349 now being considered by the Forty-seventh Legislative Assembly of North Dakota.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that if House Bill No. 1349 is enacted by the Legislature and becomes law it will exempt some property from taxation that is not now exempt under existing provisions of law.

- ANALYSIS -

House Bill 1349 would add a new subsection to section 57-02-08 of the North Dakota Century Code that would exempt the following property from property taxation:

All rights and privileges in or appertaining to real property occupied by an individual, including his family, if any, as his place of residence if that real property is owned by the United States, this state, or a political subdivision or other unit of local government of this state, and if that individual is an employee of the owner of the real property and is required to reside in the residence as a condition of his employment.

Under present North Dakota law, privately held rights and privileges in government-owned real property are required by section 57-02-03, N.D.C.C., and subsection 1 of section 57-02-04, N.D.C.C., to be taxed unless exempted from taxation by some provision of law. Otter Tail Power Company v. Degnan, 252 N.W. 619 (N.D. 1934), and Lower Yellowstone Irrigation District Number Two v. Nelson, 2 N.W.2d. 180 (N.D. 1941). This, of course, does not mean that the governmental body that owns the land or improvements is subject to taxation; but it does mean that to the extent that privately held rights and privileges in that government-owned property have taxable value they are subject to taxation unless expressly exempted by law.

The above-cited North Dakota Supreme Court cases did not involve the question of whether a governmental employee had a taxable interest in government-supplied housing in which the employee was required to live as a condition of his employment. The cases do, however, establish the principle that privately held rights and privileges in government-owned property are subject to property taxation if they have value to the person holding them and if they are not expressly exempted by some provision of law. Such rights and privileges are sometimes referred to as "possessory interests," as in the case discussed in the following paragraph in which the value to federal employees of their

possessory interest in federally owned housing supplied to them was held to be taxable under California law.

In United States v. County of Fresno, 429 U.S. 452, 97 S. Ct. 699 (1977), the United States Supreme Court upheld a California law under which federal employees were required to pay an "annual use or property tax on possessory interests" they held in federally owned houses that they were required to live in so that they would be nearer to the place where they performed their duties and so that they would be better able to perform their duties. Each of the employees who challenged the tax lived with his family in a federally supplied house and his occupancy of the house was viewed by the federal government as partial compensation for his services. The government made a deduction from his salary check for each pay period in which he occupied the house. He could be required to move from the house at any time. The federal officials could enter the house for inspection purposes with or without notice to the employee occupying it and they could use part or all of it for official purposes in an emergency.

Based on the principles set out in the above-cited North Dakota Supreme Court cases and the United States Supreme Court case, it seems quite clear that an employee of a governmental body who is required as a condition of his employment to live in housing supplied to him by his employer may have valuable rights and privileges in the housing that are subject to taxation to him under North Dakota property tax laws, at least if he occupies the housing with his family and his occupancy of the housing constitutes partial compensation for his services to his employer or if he pays any rent for the housing.

It is apparent, however, that there can be a great variety of arrangements that might exist between a government employer and its employees in such cases. If, for example, the governmental body owns housing that one of its employees is required to live in as a condition of his employment but his occupancy of the housing is not regarded as partial compensation for his services to his employer and he pays no rent to his employer, the question of whether the employee has rights and privileges in the housing that are taxable to him under the definition of real property in subsection 1 of section 57-02-04, N.D.C.C., becomes less clear and will depend upon the various facts and circumstances relating to his occupancy of the housing, including whether his family, if any, lives with him.

The statutory provisions in section 57-02-08, N.D.C.C., that exempt property from taxation do not provide any specific exemption for the value of privately held "rights and privileges" in governmentally owned real property. No other statute has been found that specifically provides such an exemption.

A government employee who is required as a condition of his employment to live in housing that is owned and supplied to him by his employer is therefore taxable under present law on the value of his rights and privileges in the housing unless he can establish that his occupancy of the housing does not result in his having any rights or privileges that have taxable value to him. In order for him to be able to establish that, he presumably would have to prove that his occupancy of the housing does not constitute a personal use

by him but, instead, constitutes a use of the property exclusively for a public, or governmental purpose.

House Bill 1349 would exempt government employees from property taxation in those instances where they would have valuable rights and privileges in housing owned and supplied to them by their employer and in which they were required to live as a condition of their employment. This would be the effect of House Bill 1349 whether or not they were required to pay housing rent to their employer or the housing were regarded as partial compensation to them for their services to their employer. Therefore, if House Bill 1349 becomes law, it will provide an exemption from property taxation that is not now provided in existing law.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts or the applicable provisions of law are amended or repealed.

ROBERT O. WEFALD  
Attorney General

Prepared by: Kenneth M. Jakes  
Assistant Attorney General