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Digest of Attorney General's Opinions

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DIGEST OF ATTORNEY GENERAL'S OPINIONS

WATERCOURSES — REMOVAL OF OBSTRUCTION — LIABILITIES FOR DAMAGES

November 12, 1966

CHIEF ENGINEER, STATE WATER COMMISSION

May a water management district, at the upper end of a watershed, maintain the natural watercourses and drainways without incurring liability for any damages suffered by other voter management districts or landowners situated at the lower end of the watershed?

Section 61-01-07 makes it unlawful to willfully obstruct any ditch, drain or watercourse. To be a watercourse, there must be a distinct and natural channel from flow of natural causes. The criteria are found in § 61-01-06. A landowner is liable for damages for negligently obstructing a watercourse and causing flood waters to be impounded on another's land. *Henderson v. Hines*, 48 N.D. 152, 183 N.W.531 (1921). However, Section 61-16-11 (6) gives a water management district the power to maintain and control the water levels and flow of waters in conservation and flood control projects. Thus, after securing a legal right to enter upon the land, a water management district may restore a natural watercourse or drainway to its original depth and width without being liable for damages suffered by another district or landowner downstream.

TAXATION — DELINQUENT PERSONAL PROPERTY — DEDUCTIONS FOR COLLECTIONS

November 22, 1966

H. L. THORDAL, STATE EXAMINER

Whether the board of county commissioners may order the sheriff to deduct ten per cent from personal property taxes collected, delinquent and non-delinquent, and allow such ten percent as county expense for collecting.

Section 57-22-29 controls and allows the board to contract with the sheriff or any other elector to collect personal property taxes

delinquent at least one year. Payment may not exceed ten per cent of such taxes collected.

The condition precedent to such a contract is that the "taxes have been delinquent more than one year [and] remain unpaid and uncanceled." No provision is found to authorize the county to make a deduction for collecting the taxes; nor is there an implication for such from any other provision. Collection, therefore, is limited to the conditions of § 57-22-29 and no allowance may be made for collection of any taxes not one year delinquent.

SECURITIES — LICENSES REQUIRED —
SALE BY SMALL BUSINESS INVESTMENT CORPORATION

December 6, 1966

WALLACE WARNER, SECURITIES COMMISSIONER

Must a corporation organized under Chapter 10-30 comply with Chapter 10-04 before selling securities to the public?

Chapter 10-30 sets forth how a development corporation can be formed and specifically in what investments the corporation may invest its funds. Nevertheless, regulations not specifically covered therein are governed by the statutes relating to standard corporations, Chapters 10-09[10-04?] through 10-23. There is no provision in Chapter 10-30 which exempts the corporation from the provisions of Chapter 10-04.

Regulatory statutes under the police power of the state are strictly construed and any exceptions or exemptions, if they exist, must be found in Chapter 10-04.

No information was given to show what type of securities would be issued to allow them to be placed in an exemption under § 10-04-05 or what the transactions of the corporation would be in order to qualify for an exemption under § 10-04-06. Both § 10-04-05 and § 10-04-06 were amended after Chapter 10-30 was adopted and no specific provision was made to exclude either transactions or securities of a corporation organized under Chapter 10-30. Thus, only those transactions or securities under Chapter 10-30 which come within §§ 10-04-05 and 10-04-06 are exempt. Also, there is no specific language or implied construction in Chapter 10-30 for any exemption to Chapter 10-04.

NON-PROFIT CORPORATIONS—STATE CONTROLLED—STATE LIABILITY

December 12, 1966

GOVERNOR WILLIAM L. GUY

1. Under the proposed purpose and by laws, [establishing a non-profit corporation to assume administrative responsibility for the Job Corps] could the non-profit corporation be construed in any way to be an actual agency of the state government.

The corporation would be formed under Chapter 10-24 and would be a private corporation as distinguished from a governmental or public corporation. The State is prohibited from creating corporations other than public (governmental) corporations by Article 7, § 13 of the North Dakota Constitution. An attempt to create a special type corporation by legislation specifically to operate a Job Corps center might reasonably be deemed to be in conflict with § 69 and § 70 of the North Dakota Constitution.

Thus, there is no provision to permit the state to create a non-profit corporation which would not be a public or governmental corporation. Nor could such a creation by individuals be deemed an agency of the state, if formed according to the appropriate provisions of law. The corporation, out of necessity would have to be either a governmental corporation or a private corporation.

2. Would any provision of the state constitution or the state law govern the expenditure of federal money under the non-profit corporation as suggested.

The prior question forces the conclusion that the state could not successfully enact laws which would control the expenditures or the fiscal administration of the non-profit corporation formed under appropriate laws. The offices of the non-profit corporation would have control subject to the provisions of Chapter 10-24 which apply to all non-profit corporations. Any attempt by the North Dakota Legislature to control the expenditure without application to all similar corporations might be invalid under § 69 and § 70 of the North Dakota Constitution. The state law and the constitution would not govern the expenditure of federal money unless it is applicable to all non-profit corporations.

3. Would the State of North Dakota be responsible in any way for obligations or liabilities that may grow out of the operation of the Job Corps as proposed.

The non-profit corporation must be either private or a public governmental corporation. If it is a private, non-profit corporation, the State would not be responsible for any obligations or liabilities incurred by the corporation. If the non-profit corporation is created by the legislature, it is public or governmental and would be an

arm or agency of the government and the state would be liable.

The Attorney General was not prepared to answer whether the federal government would recognize a non-profit private corporation as qualifying to administer and operate a Job Corps program. If such a corporation can qualify, the expenditures would not be subject to state review, nor would expenditures be submitted to the State Auditing Board. The state would have no more control over such a corporation than the statutes controlling non-profit private corporations now allow.

LICENSES — FARM PRODUCTS DEALERS — REQUIREMENTS

January 3, 1967

COMMISSIONER OF AGRICULTURE AND LABOR, STATE OF NORTH DAKOTA

1. Will one license and bond suffice for a co-partnership, association or corporation doing business as a livestock or wool dealer or must each individual have a separate license and bond?

Since a co-partnership, association or corporation is a single legal entity, § 36-04-07 would require a license for each commodity for the co-partnership, association or corporation.

2. If only one license is required and issued, must those individuals acting as dealers be designated as agents and be licensed and bonded individually?

Section 36-04-03 requires that dealers' agents be registered. Thus individuals who are members of the co-partnership and are dealers must be registered as agents because every member of a partnership is both a principal and an agent. If the individual is acting as an officer of the corporation he is not an agent. Whether an individual is acting as an officer or an agent is a fact question determined in the individual case. An association organized according to law is a legal entity and may appoint agents who must be licensed and registered as required in § 36-04-03 and § 36-04-07. An association without statutory sanction listed as a partnership and each partner acting as a dealer must be registered and licensed as an agent.

3. If a co-partnership, association or corporation designates non-member individuals to do buying, must they be licensed and registered as agents?

They must be licensed and bonded if they are employed by the co-partnership, association or corporation, but such individuals, if self-employed dealers buying livestock for the co-partnership,

association or corporation, must be independently licensed and bonded rather than as agents. This is a fact question. There is no statute requiring the bonding of agents for licensed and bonded "dealers".

4. If an applicant for a livestock dealer's license names two or more individuals doing business under a separate name, is one license, one bond and one fee sufficient to comply with the statute?

It would be presumed that the individuals were acting as partners. Therefore one bond and one license must be secured for the partnership and separate agent's licenses must be purchased for each partner who will deal in livestock.

STATES—SPECIAL FUNDS — INVESTING IN CORPORATE STOCK

January 4, 1967

CHAIRMAN, NORTH DAKOTA STATE EMPLOYEES RETIREMENT BOARD

1. May state employees' retirement funds be invested in corporate (common) stock?

The State Supreme Court observed in *N.W. Bell Telephone Co. v. Wentz*, 103 N.W.2d 245 (1960) that under the state constitutional provisions of § 185 it is conceivable and permissible for the state to loan or give its credit and to subscribe to or become owner of stock.

The prohibition of § 185 of the North Dakota Constitution against the state borrowing or giving its credit and to subscribe to or become owner of capital stock applies to the state per se. *Northwestern Bell Telephone Co. v. Wentz, supra*. As to the State Employees Retirement Fund, the state is engaged in the investing business for its employees which is a lawful business or enterprise. Such funds may be invested in capital stock.

2. Is an investment management contract with the Retirement Board prohibited by the North Dakota Securities Act (Chapter 10-04 N.D.C.C.)?

Neither Chapter 54-52 nor Chapter 10-04 create an exemption for the program. Although the Board is not engaged in the securities business per se, the persons with whom the Board deals and transacts business must comply with the Securities Act. Thus, the entering into an investment per se is not prohibited by Chapter 10-05.

SCHOOLS — TEACHERS' CONTRACTS — DAMAGES FOR BREACH

February 17, 1967

SUPERINTENDENT OF PUBLIC INSTRUCTION

Is it possible to insert a liquidated damages clause in a teacher's contract? This question is prompted by three procedures used by school districts to curtail or prevent the breaking of such contracts.

1. A school board offers a contract with the stipulation that if the teacher does not fulfill the contract it will cost the teacher \$500.

2. If a teacher asks to be relieved of the contractual relation, it will cost him money. Again the figure called to attention is \$500.

3. In this instance, should a teacher ask for a release and such release be granted, that teacher will have to pay the board \$500, or whatever cost is involved in getting a replacement.

The one year suspension of a certificate in § 15-47-28 is primarily a "preventive measure" to discourage breaking a contract. This provision is not exclusive and other covenants may be inserted in the contract.

The first provision for \$500 stipulated damages is a provision for fixed damages and as such raises serious doubts whether such liquidated damages would pass the language of § 9-08-04.

In the second situation the teacher has no legal right to be released from the contract except upon agreement by the school board. This release would amount to another contract and the board is entitled to legal consideration. The board would not be obligated to release the teacher under such a contract upon the teacher's request. If the teacher breaks the contract, the school district would have to prove damages and would not be automatically entitled to \$500.

The same rationale would apply to the third situation except that a provision to pay the cost of securing a replacement would not appear invalid since it sets no amount of liquidated damages but rather such damages would be determined if and when the teacher would ask to be released.

If in situations two and three, these provisions were not written into the contract but conditions levied by the board at the time release is requested, § 9-08-04 would not be invalid. Such payments would then be conditions precedent to the granting of the release.

TAXATION — INCOME TAXES — FILING REQUIREMENTS AND
EXEMPTIONS ALLOWED NON-RESIDENTS

February 21, 1967

EDWIN SJAASTAD, STATE TAX COMMISSIONER

In a factual situation where a nonresident has income from a North Dakota source and his spouse has no income from North Dakota sources:

1. Must the couple file a joint North Dakota income tax return and, if so, must they also report all income from sources outside North Dakota?

Section 57-38-03 imposes a tax only on nonresident individuals who derive income from designated North Dakota sources. The duty to file as stated in § 57-36-31 is required only of those individuals "subject to taxation under the provision of this chapter." Separate returns are required by § 57-39-31 (2) unless the income of each is included in a single joint return, and implies that a spouse without income is not required to file an individual or a single joint return. Since she has no income and has no filing requirement, the spouse would not be required to file a joint return. The husband, however, under § 57-38-31 (7), must file an individual return for North Dakota income and disclose all other out-of-state sources.

2. Must the nonresident prorate his personal exemptions in the ratio that his North Dakota income bears to his total income?

3. If a proration of exemptions is not permitted, is the nonresident taxpayer permitted a \$1,500 personal exemption by reason of his marital status plus a \$600 exemption for each dependent?

4. If the wife has an income from the state of her residence and a joint North Dakota return is not required, would the nonresident husband having North Dakota source income be entitled to the \$1,500 exemption by reason of his marital status?

The personal exemptions in § 57-38-26 are allowable exemptions without proration and, consequently, a nonresident married taxpayer would be entitled to a \$1,500 personal and a \$600 dependent exemption, the latter for dependents other than his spouse. The \$1,500 exemption for the married taxpayer is applicable only if the person is living with his spouse. The husband would be entitled to a \$1,500 personal exemption even if his wife has income from sources within the state of her residence. See § 57-38-06. If this taxpayer is affected by the income allocation provisions of Chapter 57-38, only those deductions, personal or business, as distinguished from personal deductions, are allowed to the extent that they are fair and equitable to North Dakota. It would appear that the

ratio of North Dakota income to total income would be an equitable basis for allocation of deductions, and these deductions may be changed by the Commissioner (§ 57-38-22.1) so long as the ratio is fairly and equitably applied to all individuals.

5. Does the residence of the wife follow the residence of the husband for North Dakota income tax purposes?

Rules for residence are set out in § 54-01-26. Subsection 5 creates a presumption that the residence of the husband is presumptively the residence of the wife; but this is rebuttable. See *Shillerstrom v. Schillerstrom*, 75 N.D. 667, 32 N.W.2d 106 (1948).

6. If the nonresident has North Dakota income of less than \$600 net, if single, or \$1,500 net, if married, and has less than \$5,000 gross income, must the nonresident file a North Dakota income tax return?

There is no provision in the income tax law which sets out specifically the filing requirements of nonresidents. However, § 57-38-06 provides that the provisions of the income tax law which are applicable to the assessment, levy and collection of income taxes from resident individuals and which are not inconsistent with the provisions of Chapter 57-38 govern the levy and collection of income taxes from nonresident individuals; therefore, the duty of individuals to make returns as prescribed by § 57-38-31 is applicable to nonresident individuals.

MUNICIPAL CORPORATIONS — OFFICES — CITY ATTORNEY

February 22, 1967

CITY AUDITOR, LAMOURE, NORTH DAKOTA

1. Whether a municipality must appoint or obtain a City Attorney or if it may elect to hire legal aid as needed. Are the services of the County States Attorney available to municipalities?

Section 40-14-04 states that a city attorney *shall* be appointed. (Emphasis added.) While the word *shall* generally is imperative or mandatory, it may be permissive or directory to carry out legislative intention. Because of the City Attorney's duties imposed by § 40-20-01, the view is held that the legislative intention is to make the appointment mandatory.

The opinion referred to a similar discussion in an opinion dated May 25, 1955 which stated that the official duties of § 40-20-01 of the North Dakota Revised Code of 1943 must be performed by the city attorney or his assistants. Under § 40-20-02, special counsel may be employed when deemed necessary for the best interests of the city.

[The 1943 provisions are identical to those presently in force.]

Section 11-16-01 prescribes the duties of the states attorney and there is no statutory duty imposed to represent or advise the officials of a city.

**TAXATION—AMOUNT OF PAYMENT—DISCOUNT FOR EARLY
PAYMENT OF CURRENT REAL ESTATE TAXES**

April 12, 1967

STATES ATTORNEY, BARNES COUNTY, NORTH DAKOTA

Whether the five per cent discount for early payment of real estate tax, as provided by Section 57-20-09 of the Century Code, is applicable to a taxpayer who has been delinquent in payment of his real estate tax for a number of previous years?

This question refers to farm land and it is assumed that installments of special assessments are not involved. Therefore it is not necessary to consider Section 40-24-16 of the 1967 Supplement to the North Dakota Century Code.

Section 57-20-09 relates to the five percent discount allowed for early payment of real estate taxes, and in part states:

57-20-09. Discount for Early Payment of Tax — The county treasurer shall allow a five percent discount to all taxpayers who shall pay all of the real estate taxes levied on any tract or parcel of real property in any one year in full on or before February fifteenth prior to the date of delinquency.

It would appear that the purpose of the above statute is to encourage taxpayers to promptly pay current real estate taxes. Specific reference is made to the payment of "all real estate taxes levied. . . in any one year." The statute allows the discount on a current year's real estate taxes even though there may be unpaid taxes for prior years.

**CORONERS — POWERS AND DUTIES IN GENERAL
STATE TOXICOLOGIST'S POWERS TO COLLECT BLOOD SPECIMENS
FROM MOTOR VEHICLE FATALITIES AND TO DISCLOSE FINDINGS
OF TESTS ON SUCH SPECIMENS**

April 13, 1967

STATE TOXICOLOGIST, STATE UNIVERSITY STATION,
FARGO, NORTH DAKOTA

1. Whether, under the terms of Section 19 of Senate Bill 44 as

enacted by the 1967 Legislative Assembly, a licensed embalmer is considered qualified to collect blood specimens?

Section 19 of Senate Bill 44 provided that for a two year period beginning July 1, 1967, in cases of death resulting from a motor vehicle accident or other unnatural death occurring in a motor vehicle, the county coroner shall require a blood specimen to be drawn from the body of the decedent within 24 hours by any qualified person prior to embalming. The act specifies "or other qualified person." It is up to the county coroner to require the blood to be drawn. In view of the requirements found in Chapter 43-10 of the North Dakota Century Code, it appears that a licensed embalmer may be considered a "qualified person" within the meaning of the act.

2. Whether any officials, agencies, or individuals may be afforded the individual analytical results in any one case?

Section 19 of Senate Bill 44, states in part that "the state toxicologist shall keep a record of all such examinations to be used for statistical purposes. The results of the examinations referred to in this section shall not be admissible in evidence in any kind of action . . . in any court . . . but shall be used for statistical purposes only". It is noted that this section uses the affirmative statement "only for statistical purposes". The results of the examinations "without identifying the individuals involved, shall be disseminated to interested state and local officials and made public by the state toxicologist." The state toxicologist is not required or authorized to release findings of individual examinations to any persons or agency including law enforcement officials.

3. Whether it is permissible for interested individuals such as peace officers, state's attorneys and coroners to submit two blood samples separately collected from the body of a fatally injured traffic victim; one sample to be analyzed and reported routinely by the laboratory to the requesting agency?

There is no authority for the submission of two blood samples. If any blood sample (one or more) is taken and submitted under the provisions of this Act, it must be used only for the purposes specified in the act. If a blood sample is to be taken and the results used for other purposes, authority must be found elsewhere than in Section 19 of Senate Bill 44.

INFANTS — REGULATIONS OF EMPLOYMENT AND EDUCATION
CIRCUMSTANCES WHERE MINORS MAY WORK NEAR POWER
DRIVEN MACHINERY

June 12, 1967

COMMISSIONER OF LABOR, STATE CAPITOL,
BISMARCK, NORTH DAKOTA

Whether Section 34-07-16 of the North Dakota Century Code prohibits the employment of minors where power driven machinery is being used by others than the minor?

This Section does not prohibit a minor from working in an area where power driven equipment is being used, as long as the minor is not operating the equipment or working in a capacity which requires the adjusting of any belt to any machinery, and he is not working so close to such machinery that his life, health and safety may be endangered.

LICENSES — CONSTITUTIONALITY AND VALIDITY OF ACTS AND
ORDINANCES—RIGHT OF TAX COMMISSIONER TO REVOKE TAX PERMIT

July 28, 1967

DONALD C. HOLAND, STATE SENATOR, 40TH LEGISLATIVE
ASSEMBLY, LISBON, NORTH DAKOTA

Whether it is possible for the tax commissioner to enforce the payment of a penalty by threat of revocation of the tax permit, where the taxpayer believes he has reasonable grounds why the penalty should not be applied and has notified the tax commissioner to this effect, or must the assessed penalty be collected by civil procedure?

The revocation of a tax permit would compel the retailer to cease doing business or, in the alternative, be subjected to criminal prosecution if he continued to do business without the tax permit. The suspension or revocation cannot be summary, but must be only after due process has been afforded to the licensee.

In the absence of clear authority a tax permit may not be revoked because of the failure of the holder of such permit to pay the penalty assessed against him by the tax commissioner. The enforcement and collection of the penalty assessed is to be in the manner provided for in Section 11 and subsection 7 of Section 12 of House Bill 721 as enacted by the 40th Legislative Assembly.

TAXATION—SALES TAXES—REPAIRMAN AS FINAL USER

July 7, 1967

TAX COMMISSIONER, STATE OF NORTH DAKOTA,
STATE CAPITOL, BISMARCK, NORTH DAKOTA

Whether a person engaged in the business of repairing shoes is deemed to be engaged in rendering service, the gross receipts from which are not subject to the sales tax?

Such a repairman is deemed to be the final user or consumer of tangible personal property purchased by him for use in rendering such service, and such sales to him are subject to the sales tax.

TAXATION—SALES AND USE TAX—EXEMPTIONS
FOR OUT-OF-STATE RESIDENTS

July 31, 1967

TAX COMMISSIONER, STATE OF NORTH DAKOTA,
STATE CAPITOL, BISMARCK, NORTH DAKOTA

Whether Section 4, subsection 12, of Chapter 459 of the 1967 Session Laws, which exempts gross receipts from North Dakota sales tax for sales made to Minnesota residents in North Dakota under certain conditions, will continue to be in force after August 1, 1967, which is the date the Minnesota sales tax law goes into effect?

Although there are some items that are not taxable in Minnesota and are taxable in North Dakota, there is nothing in the Act that refers to the exemption from sales tax for certain goods. The Act only exempts residents of a sister state who are in North Dakota specifically for these purchases. It exempts residents of those states which do not have a sales tax. Therefore, Minnesota residents are required to pay North Dakota sales tax on all purchases after August 1, 1967.

TAXATION—SALES AND USE TAX—TAX ON MOTION PICTURE
FILM RENTAL

April 3, 1967

TAX COMMISSIONER, STATE OF NORTH DAKOTA,
STATE CAPITOL, BISMARCK, NORTH DAKOTA

Whether motion picture films distributed to theater owners and

television stations in North Dakota are subject to the North Dakota sales or use tax under the rental provisions of the North Dakota sales and use tax laws enacted by the 1967 Legislature?

The amount paid by theater owners and television stations to the film distributing agencies for use of, or rental of, motion picture films would be subject to the North Dakota sales or use tax law, either under the theory that the payment constitutes rental receipts from the "sale" of tangible personal property, or, if the transaction is construed to be the granting of a license to exhibit tangible personal property, coupled with the necessary transfer of physical possession rather than a rental, the gross receipts derived therefrom would be subject to sales or use tax by reason of a "sale," that is, transfer of possession of tangible personal property.

STATES—CONSTRUCTION, IMPROVEMENT, PROTECTION AND REPAIR OF BUILDINGS AND OTHER WORKS—SUBMISSION OF PLANS TO SUPERINTENDENT OF CONSTRUCTION

June 19, 1967

THE HONORABLE BEN MEIER, SECRETARY OF STATE,
STATE OF NORTH DAKOTA, STATE CAPITOL,
BISMARCK, NORTH DAKOTA

Whether all state agencies are required to submit plans and specifications to the Superintendent of Construction for final approval before the letting of bids?

Section 54-21-17 of the North Dakota Century Code provides for a superintendent of construction and outlines his duties. This statute seems to be permissive rather than mandatory because of the extensive use of the word "may." However, it would be advisable to have prior approval by the state superintendent of construction before the letting of bids on any state building.

LICENSES—ELIGIBILITY FOR LICENSE
SUBSTITUTION OF SPECIALITY RESIDENCY FOR INTERNSHIP
REQUIREMENT IN MEDICAL LICENSING

August 16, 1967

EXECUTIVE SECRETARY AND TREASURER, NORTH
DAKOTA STATE BOARD OF MEDICAL EXAMINERS,
BISMARCK, NORTH DAKOTA

Whether one year of residency in some speciality can be con-

strued to satisfy the internship requirements of Section 43-17-18 (5) of the North Dakota Century Code?

Subsection 5 of Section 43-17-18 of the North Dakota Century Code requires that an applicant for a license to practice medicine in this state should have satisfactorily completed a one year internship in an approved hospital.

The basic definition of internship is the period of medical education and training that ordinarily follows completion of four years of medical school. Residency is that portion of graduate medical education following completion of the internship.

By comparison of the two terms it seems that the term residency not only embraces some of the terms of an internship, but also includes additional training. To be a resident one must have completed his internship.

Therefore, a person, upon completion of his residency, would meet the requirements of Section 43-17-18 (5) of the Code as to internship.

NEWSPAPERS — APPOINTMENT OR DESIGNATION OF OFFICIAL PAPERS — REQUISITES FOR OFFICIAL PAPER OF MUNICIPALITY

September 18, 1967

STATE'S ATTORNEY, STEELE COUNTY

1.) Whether cities with newspapers printed within their boundaries can still post official notices and legal publications in five places within such municipality.

This is not objectionable but cannot substitute for publishing in a proper newspaper. This newspaper is the official newspaper of the municipality (N.D. CENTURY CODE, section 40-01-09) or if none is published within the municipality, the official county newspaper (section 40-01-11).

2.) Whether a city can designate by resolution a newspaper printed within its county, but not the official county newspaper, as the city's official newspaper.

A city cannot do this. If the city does not have an official newspaper within its boundaries it must publish its notices in the official county newspaper.

3.) Whether a city without a newspaper can disregard its official county newspaper and designate a newspaper published nearby, but in a different county, as its official newspaper.

The opinion with regard to this question is the same as in question number two—negative.

**BONDS — STATUTORY PROVISIONS — MUNICIPALITY'S
GRANTING AN OPTION TO PURCHASE**

September 19, 1967

**DIRECTOR, NORTH DAKOTA
ECONOMIC DEVELOPMENT COMMISSION**

With regard to the issuance of revenue bonds under the provisions of the Municipal Industrial Development Act of 1955 as amended (NORTH DAKOTA CENTURY CODE, Chapter 40-57).

1.) Whether a municipality can grant an option to purchase the properties to anyone other than the lessee at the termination of the lease period.

Code section 40-57-03, subsection 9 provides that a governing body has the discretion in determining when and how such property will be disposed of. Thus a municipality may grant an option to purchase the properties to someone other than the lessee at the termination of the lease period provided that it is not in conflict with the lease contract between the municipality and the lessee.

2.) Whether this provision can be written as a covenant to the ordinance or resolution authorizing the sale of the revenue bonds.

Section 40-57-14 as interpreted, does not make it possible to write this provision as a covenant to the ordinance or resolution authorizing the sale of revenue bonds.

3.) Who may serve as fiscal agent for the municipality in the situation outlined above.

Such fiscal agent is presumably the "trustee" as mentioned in Section 40-57-14. Such a person could be a person or corporation capable of holding title to the property (90 C.J.S. 132).

**SALES TAX — LEVY AND ASSESSMENT — APPLICABILITY TO DUES
PAID TO COUNTRY CLUBS AND SIMILAR ORGANIZATIONS**

October 3, 1967

EDWIN SJAASTAD, TAX COMMISSIONER

Whether the North Dakota Sales Tax Law applies to dues, membership fees, or admissions charged by country clubs, game lodges, and similar organizations.

These clubs and other organizations do not generally charge separate fees or dues for taxable and non-taxable items, respectively—even though the privileges provided by them fall into both categories. There has been no North Dakota case law construing

the taxability of these dues and fees but it would appear that these organizations fall within the provisions and definitions of the North Dakota Sales Tax Law.

Retailers engaged in the dual activities of selling taxable and non-taxable goods and services are required to segregate the taxable from the non-taxable items on billings made to the customer. Since these clubs and other organizations can be classified as being within the same group as retailers, they should likewise separate the taxable from the non-taxable items and bill accordingly. If this is not done the entire membership fee, dues, or admission will be subject to the sales tax.

**ARMED SERVICES — VETERANS' BENEFITS — ACTIVE DUTY
REQUIREMENTS FOR EDUCATIONAL ASSISTANCE**

October 3, 1967

COMMISSIONER OF VETERANS AFFAIRS

With regard to Senate Bill 380, Chapter 287 of the 1967 Session Laws, which deals with educational assistance to North Dakota veterans:

1.) Whether the veteran must have served one hundred and eighty days in the armed services after August 5, 1964 in order to be eligible for benefits.

The statute is clear and unambiguous and as such does not lend itself to an interpretation. The veteran must have served on active duty for more than one hundred eighty days and which duty occurred after August 5, 1964, unless he entered and was released from duty for a service connected disability after that date.

2.) Whether computation of benefits should include that period of service which occurred prior to August 5, 1964, if the veteran is eligible for benefits.

If the veteran is eligible he is entitled to one month benefit for each month served on active duty and the amount is not limited to the period served after August 5, 1964. The period of time served prior to that date can be considered in computing the benefits.

**BANKS AND BANKING — LOAN, TRUST, AND INVESTMENT
COMPANIES — LOAN MAKING POWERS OF TRUST COMPANY
QUOTATION OF INTEREST RATES**

October 18, 1967

G. W. ELLWEIN, CHIEF DEPUTY EXAMINER

1.) Whether a trust company can make loans under provisions of section 13-04-01 of the NORTH DAKOTA CENTURY CODE.

A trust company organized under section 6-05 of the Code does not qualify as a bank as defined in section 13-04-01 unless it is also legally authorized and qualified to engage in the business of banking.

2.) Whether banks may quote in communications media a rate of six percent interest under the provisions of section 13-04-01 of the Code Supplement.

If an institution advertises a rate of six percent it is presumed that this means an interest rate of six per cent *per annum*. If in reality a higher interest rate does result, such advertising would be false and misleading. A bank may advertise the rate authorized under section 13-04-01 but it should state the actual charges or rates involved.

**STATES — STATE INSTITUTIONS — STATUTORY PROVISIONS
FOR ASSUMPTION OF GUARDIANSHIP**

October 18, 1967

SUPERINTENDENT, GRAFTON STATE SCHOOL

Whether relatives must be contacted and permission obtained from them in order that an operation be performed on a resident of the Grafton State School.

The applicable North Dakota Century Code section is 25-04-13 as amended by Chapter 214 of the 1967 Session Laws. It appoints the superintendent of the Grafton State School as guardian for all residents who do not have a court appointed guardian or whose parents do not elect to retain their natural guardianship. If the resident is over twenty-one years of age notice must be given to the parents or other responsible relatives. If no affirmative assumption of guardianship is communicated within 90 days after notice, the superintendent will assume guardianship.

As legal guardian the superintendent has the duty, responsibility, and authority to determine whether or not an operation should

be performed, except for such operations as mentioned in Chapter 25-04.1 which require other statutory procedures.

It is recommended that written recommendations of the staff and physician concerned be kept on the resident's file for future reference.

**ROBERT BRADY
DENNIS SCHNEIDER
RONALD MARKOVITS**