

Opinion No. 59-161

October 8, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Major Harold C. Eisenbarth Secretary-Treasurer The State Armory Board Office of the Adjutant General Santa Fe, New Mexico

{*251} This is in response to your recent request for an opinion in regard to the following question:

Is real property owned by the State Armory Board subject to a paving assessment by a municipality for a street paving project adjoining such property?

Our answer to your question is that real property owned by the State Armory Board is not subject to a municipal paving assessment.

There is no question but that property owned by the State Armory Board is property of the State of New Mexico. The board is a statutory creature created by Section 9-7-3, N.M.S.A., 1953 Compilation, with the power to acquire real property in its own right. As such the property of the Board is not subject to taxation. Article VIII, Section 3 of the New Mexico Constitution exempts state property from taxation. See also **State v. Locke**, 29 N.M. 148, 219 P. 790 (1923).

However, the New Mexico Supreme Court in **Lake Arthur Drainage District v. Field, Commissioner of Public Lands**, 27 N.M. 183, 199 P. 112 (1921) held that a specific assessment on property for improvements based upon benefits, the cost of which is assessed against the property, is not a tax in the constitutional sense for which an exemption of state property lies pursuant to Article VIII, Section 3, supra, and, therefore, the state property is subject to payment of such an assessment. To the same effect see **Lake Arthur Drainage District v. Board of Commissioners of Chaves County**, 29 N.M. 219, 222 P. 383 (1923).

Therefore, there is no constitutional prohibition against such an assessment of state property.

However, although such a constitutional prohibition against such an assessment does not exist, the overwhelming majority of cases hold that specific authority must be found in the statutes before special assessments can be made against state property. See 90 A. L. R. 1137, 1143.

The New Mexico Supreme Court in the above cited **Field** case indicated it would apparently agree with this rule when it said at 27 N.M., Page 188:

"it might be that it would be beyond the power of local authorities to make such improvements and assess the cost thereof against the state property without specific statutory authority but this point is not in this case and need not be determined because here there is specific statutory authority for the assessment and collection of same."

We know of no New Mexico statute granting to municipalities such statutory authority to levy a municipal paving assessment against state property. Furthermore it is elementary that in order to institute an action against the state, there must be consent by the state to be sued. We have found no consent in this instance.

In this connection see our Opinion No. 57-238 dated September 24, 1957 in which we held that

the New Mexico Division of Courtesy and Information, owning a Port of Entry building in Clayton, New Mexico was not subject to a paving assessment by the Town of Clayton for a paving project adjoining such building. In this opinion we construed Section 14-41-6, supra, as not constituting authority for the assessment of state property. This section allows the {*252} governing board of any city, town or village to provide for the cost of paving of streets, sewers, or gutters adjoining the land owned by municipalities, the United States of America, the state of New Mexico or any county thereof by levying upon taxable property a continuing special tax sufficient to meet all matured or maturing installments of such assessments. As was pointed out in **Oliver, et al., v. Board of Trustees of the Town of Alamogordo**, 35 N.M. 477, 1 P. 2d 116 (1931), the reason for the enactment of this legislation was that existing laws provided no authority for front footage assessment for public improvements abutting public property. Therefore we conclude that the property owned by the State Armory Board is not, under present state law, subject to a municipal paving assessment.

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