LETTER OPINION
2004-L-38

May 26, 2004

Mr. William E. Kretschmar
Ashley City Attorney
PO Box 97
Ashley, ND 58413-0097

Dear Mr. Kretschmar:

Thank you for your letter asking several questions about the authority of the Ashley City Council to reduce special assessments and about any appeal procedures for persons aggrieved by the failure of the city council to make reductions. It is my opinion that a home rule city that has not enacted ordinances permitting the city council to reduce special assessments based on ability to pay or value of the property assessed is subject to state law, which does not expressly grant authority for the governing body in determining appeals and objections to assessments to reduce assessments based on ability to pay or value of the property. It is further my opinion that property owners may seek court review of the levy and apportionment of special assessments under N.D.C.C. §§ 28-34-01 and 40-26-01 or challenge defects and irregularities in the special assessment proceedings under N.D.C.C. § 40-22-43.

ANALYSIS

As you indicate, the city of Ashley is a home rule city. A home rule city has certain broad powers to control its finances and fiscal affairs. See N.D.A.G. 2000-L-156; N.D.C.C. § 40-05.1-06(2) (a home rule city has the right, inter alia, to "control its finances and fiscal affairs; to appropriate money for its purposes . . . to levy and collect taxes, excises, fees, charges, and special assessments for benefits conferred . . . ."). Further, "[t]he statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters." N.D.C.C. § 40-05.1-06. As noted in N.D.A.G. 2000-L-156:

> "[U]sually city charter provisions supersede state laws in conflict with them only where the subject matter is purely or strictly of municipal concern and only to the extent of the conflict . . . Illustrative of matters regarded as of purely local concern . . . [are] . . . street and other improvements and local or

> special assessments . . . ." 6 Eugene McQuillin, The Law of Municipal Corporations, § 21.29 (3d edition 1998).

Ashley's home rule charter includes the powers to control its finances and fiscal affairs and to levy and collect taxes and special assessments for benefits conferred. See Article III, § 2, City of Ashley Home Rule Charter (1993). While a home rule city may draft ordinances to implement provisions in the charter regarding special assessments,[1] you did not include any such ordinances with your letter nor did you make reference to any. Consequently, I assume for purposes of this letter that the state statutes pertaining to special assessments are applicable to Ashley and will form the basis for the discussion on the questions you raise. See N.D.C.C. § 40-05.1-06.

You first ask whether the city council has the authority at the hearing on the special assessment list to reduce special assessments on certain properties if the council determines the property owner does not have the ability to pay the assessment made or the value of the property assessed is insufficient to warrant the amount of the assessment.

State law provides as follows:

> At the regular or special meeting of the governing body at which the assessment list is to be acted upon, any person aggrieved by the determination of the special assessment commission in regard to any assessment who has appealed therefrom as provided in section 40-23-14 may appear before the governing body and present his reasons why the action of the commission should not be confirmed. The governing body shall hear and determine the appeals and objections and may increase or diminish any of such assessments as it may deem just, except that the aggregate amount of all the assessments returned by the commission shall not be changed and no assessments as adjusted shall exceed the benefits to the parcel of land on which it is assessed as determined by the assessment commission.[2]

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[1] The particular terms of any special assessment ordinance may, but need not, be patterned after the terms in state statute dealing with special assessments; however, such ordinance must be sufficiently detailed so that the public is properly informed of the special assessment scheme. N.D.A.G. 2000-L-156.

[2] Similar language is also in N.D.C.C. § 40-23.1-13 for city governing bodies altering assessments regarding the alternate square foot assessment method by the city auditor under N.D.C.C. ch. 40-23.1. However, your letter makes specific reference to the special assessment commission and, thus, N.D.C.C. § 40-23-15 is the applicable statute.

N.D.C.C. § 40-23-15 (emphasis added).

Section 40-23-15, N.D.C.C., does not specifically mention decreasing an assessment because of either inability to pay or because of the value of the property. It does state that adjustments can be made as the city governing body "may deem just." However, this language is tempered by the subsequent clause that "the aggregate amount of all the assessments returned by the commission shall not be changed and no assessments as adjusted shall exceed the benefits to the parcel of land on which it is assessed as determined by the assessment commission." N.D.C.C. § 40-23-15. This latter provision puts significant restraints on the discretion of the governing body since it may not change the aggregate amount of the assessments nor may it shift assessments to any other parcel if the result is to exceed the benefits to that parcel.

The North Dakota Supreme Court early on noted the problems created by assessing special assessments on those who may not be in a position to pay for them, stating:

> Such improvements are often forced upon persons who are absolutely unable to pay for them, and who really derive no benefit whatever from their construction. Cases, indeed, are numerous where poor men have bought property and builded [sic] homes upon credit, which they would not have bought and could not have afforded to build if it were not for the cheapness of the land. [sic] and who, afterwards and because other persons have desired improvements, often merely for commercial purposes alone and to enhance the value of outlying property, have been confronted with special assessments far in excess of the original cost of the property to them. Many a mortgage has been foreclosed, not because the mortgagor and home-builder would have been unable to pay it standing by itself, but because the added burden of unanticipated special assessments has been more than he could bear.

Robertson Lumber Co. v. City of Grand Forks, 147 N.W. 249, 252 (N.D. 1914). Even though the Court acknowledged the difficulties some property owners may face in paying the assessments, it did not go so far as to recognize a reduction in assessments based on ability to pay; rather, it noted that "[t]his species of taxation has, it is true, now been so generally recognized and sustained by the courts that its validity may not any longer be questioned . . . . Such being the case, we believe that the least the courts can now do is to require that the statutory safeguards be at least reasonably complied with." Id.

In a later case, the North Dakota Supreme Court quoted with approval the following discussion about the relationship of special assessments to the value of the benefited property:

> It certainly does not mean that before such an assessment can be levied and enforced the city must be able to show that by reason of the paving the abutting property has been advanced in market value to the extent of the assessment, or point out in detail the specific way and manner in which the requisite benefits are to be realized in the future. Were such to be the rule, few, if any, schemes of local improvement at the expense of the property immediately affected could ever be accomplished. It is natural for the average property owner to resent the burden thus laid upon him, and he easily persuades himself that the thing for which he is asked to pay is a detriment, rather than a benefit, to his land, and ordinarily it is not difficult for him to find plenty of sympathizing neighbors who will unite in supporting his contention.

Soo Line Railroad Co. v. City of Wilton, 172 N.W.2d 74, 83 (N.D. 1969) (quoting Chicago, R.I. & P. Ry. Co. v. City of Centerville, 153 N.W. 106, 108 (Iowa 1915)).

As a practical matter, if a special assessment against a lot or parcel is too disproportional to the underlying value of the land, the owner may decline to pay the assessment and the city would end up with the lot, which is clearly an undesirable result.[3]

Special assessments are determined by the assessment commission by determining

> the particular lots and parcels of land which, in the opinion of the commission, will be especially benefited by the construction of the work for which the assessment is to be made. The commission shall determine the amount in which each of the lots and parcels of land will be especially benefited by the construction of the work for which such special assessment is to be made, and shall assess against each of such lots and parcels of land such sum, not exceeding the benefits, as shall be necessary to pay its just proportion of the total cost of such work, or of the part thereof which is to be paid by special assessment, including all expenses incurred in making such assessment and publishing necessary notices with reference thereto and the per diem of the commission.

[3] Telephone conversation between a member of my staff and Charles Whitman, Bismarck City Attorney, March 29, 2004.

N.D.C.C. § 40-23-07. Alternatively, special assessments may be determined using the procedures in N.D.C.C. ch. 40-23.1. In the event N.D.C.C. ch. 40-23.1 is utilized, the governing body may hear and determine appeals in a manner substantially similar to that contained in N.D.C.C. § 40-23-15, quoted above. See N.D.C.C. § 40-23.1-13.

The North Dakota Supreme Court has stated that "[w]hile assessments levied against each lot must be limited to a 'just proportion,' . . . the process of quantifying benefits accruing to each lot inevitably rests on the judgment and discretion of the special assessment commission. There simply is no precise formula for quantifying benefits." Haman v. City of Surrey, 418 N.W.2d 605, 608 (N.D. 1988) (citation omitted).

Based on the foregoing, it is my opinion that a home rule city that has not enacted ordinances permitting the city council to reduce special assessments based on ability to pay or value of the property assessed is subject to state law contained in N.D.C.C. § 40-23-15 (or alternatively N.D.C.C. § 40-23.1-13) which does not expressly grant authority for the governing body in determining appeals and objections to assessments to reduce assessments based on ability to pay or value of the property. While the governing body may increase or diminish assessments as it may deem just, those adjustments may not change the aggregate amount of assessments made by the commission, nor may it shift assessments to other property which would exceed the value of the benefits to the other property.

You also asked about the remedies for property owners if assessments are not reduced and the time frames for asserting those remedies. Section 40-26-01, N.D.C.C., provides for court review of the levy and apportionment of special assessments utilizing the procedure provided in N.D.C.C. § 28-34-01. Section 28-34-01, N.D.C.C., provides that a notice of appeal must be filed with the clerk of court within 30 days after the decision of the local governing body. Similarly, an action to challenge defects and irregularities in a proceeding relating to municipal improvements by the special assessment method must be commenced within 30 days of the date of a resolution by a governing board awarding the sale of improvement warrants to finance the improvement. N.D.C.C. § 40-22-43.

Judicial review of cities' decisions on special assessments is limited by the doctrine of separation of powers since the special assessment commission is in essence a legislative tribunal. Serenko v. City of Wilton, 593 N.W.2d 368, 373 (N.D. 1999). Judicial review is limited to assuring that local taxing authorities do not act arbitrarily, capriciously, or unreasonably. Id. Courts do not act as a super grievance board and do not try special assessment cases anew or reweigh the evidence. Id. Courts begin with the presumption that assessments for local improvements are valid, and the burden is on the party challenging the validity of the assessments to demonstrate their invalidity. Id. "Included within the broad discretion accorded to the special assessment commission is the

discretion to choose the method used to determine benefits and apportion costs to individual properties within the improvement district." Id. "It is generally held that an 'assessment may be apportioned according to frontage, area, value of, or estimated benefits to, the property assessed, or according to districts or zones, or on any other reasonable basis that is fair, just, and equitable.'" Id. (internal cite omitted).

Thus, the courts will generally defer to the decision of the local taxing authorities and will uphold the validity of their assessments and actions as long as they do not act arbitrarily, capriciously, or unreasonably.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).