

**LETTER OPINION
2009-L-06**

March 18, 2009

The Honorable Ray Holmberg
The Honorable Mac Schneider
North Dakota Senate
State Capitol
Bismarck, ND 58505

Dear Senators Holmberg and Schneider:

Thank you for your letter requesting my opinion whether a municipality may impose special assessment on the land of a nonprofit cemetery association. I regret that I am unable to give you a definitive answer to this question because this issue is subject to pending litigation and because the law in this area is unsettled.

ANALYSIS

On March 2, 2009, the Grand Forks City Council met and considered a protest by the Grand Forks Cemetery Association against special assessments for the city's permanent flood protection project and associated improvements. The matter under consideration principally involved the question of whether a nonprofit cemetery association was subject to special assessments.¹ The city denied the protest.² The Grand Forks Cemetery Association still may appeal from the city's denial of its special assessment protest under N.D.C.C. chs. 28-34 and 40-26.

"It has been the long-standing practice and policy of this office to not knowingly give an opinion on an issue involved in pending litigation."³ The opinion of the Attorney General is

¹ In The Matter of the Protest Against Special Assessments for Permanent Flood Protection and Associated City Funded Improvements Dists. #14 and #14.2 (Project #4704 And 4704.2) by Grand Forks Cemetery Ass'n, Grand Forks City Council, Findings, Conclusions and Decision Denying Protest (Mar. 2, 2009).

² Id.

³ N.D.A.G. Letter to Flagstad (Nov. 15, 1988).

not binding on the judiciary,⁴ and “it would be impossible to respond in this instance without having very specific knowledge of all facts relevant to the litigation.”⁵ The decision made by the City of Grand Forks is still subject to appeal concerning the issue in your question, and if appealed then the court’s decision would resolve the matter.⁶

Further, as explained below, the law regarding whether cemetery property is subject to special assessment is uncertain. My review of the statutes governing special assessments shows that cemetery property could be subject to special assessment for public improvements which benefit that property. However, the North Dakota Supreme Court has ruled otherwise in a decision that directly relates to the question you presented.⁷

While special assessments for city improvements are treated as taxes for many purposes, and are enforced in much the same way as property taxes, nevertheless, property taxes and special assessments are distinguishable.

A special assessment is a tax in the sense that it is an enforced contribution from the property owner for the public benefit, but not in the sense that it is a burden, as [the property owner] receives an equivalent in the shape of the enhanced value of [the] property, and only property benefited by the improvement may be assessed. . . . Although possessing many points of similarity, special assessments and taxes are inherently different. . . .⁸

“Under the special assessments the payer is merely paying for a special benefit which [has been] received, and it is [the payer’s] property which is pledged for the payment of the obligation.”⁹ Therefore, the fact that cemeteries are constitutionally¹⁰ and statutorily¹¹ exempt from property taxation does not imply that cemetery property is exempt from special assessment for benefits provided to the property from public improvements.

The power to defray expenses of improvements by special assessment is granted to any municipality upon complying with the provisions of N.D.C.C. ch. 40-22.¹² The type of improvements which may be paid for through special assessment includes acquiring necessary land and easements, and construction of the necessary works, for flood

⁴ Id.

⁵ N.D.A.G. Letter to Mehrer (July 5, 1983).

⁶ See N.D.A.G. 99-L-68, see also N.D.A.G. 99-L-52.

⁷ See City of Bismarck v. St. Mary’s Church, 181 N.W.2d 713 (N.D. 1970).

⁸ State v. Furstenau, 129 N.W. 81, 83 (N.D. 1910)

⁹ Schieber v. City of Mohall, 268 N.W. 445, 450 (N.D. 1936).

¹⁰ N.D. Const. art. X, § 5.

¹¹ N.D.C.C. § 57-02-08(5).

¹² N.D.C.C. § 40-22-01.

protection.¹³ After a special assessment district has been created, and the contract and bond for any work required has been executed and approved by the municipality's governing body, the governing body may direct assessments to be made based on the total estimated cost of the work to be levied for payment.¹⁴ A special assessment commission must be created pursuant to chapter 40-23. The commission determines the particular lots and parcels of land which would be specially benefited by the work, determines the amount of benefit to each lot or parcel of land, and assesses an amount not exceeding the benefits against each lot or parcel of land that is necessary to pay its just proportion of the costs of the work.¹⁵ Benefited property belonging to counties, cities, school districts, park districts, and townships, is not exempt from assessment.¹⁶ Subject to certain limitations, state property may also be subject to special assessment.¹⁷ Generally speaking, all real property may be subject to special assessments if it is benefited by the project to which the special assessment relates, except where a specific exception has been enacted by the legislature.

As far back as the North Dakota Revised Code of 1899, the property belonging to cemetery corporations and lots sold to individuals were "exempt from taxation, assessment, lien, attachment, and from levy and sale upon execution."¹⁸ This provision continued in North Dakota law until 1959, when the legislature passed a new nonprofit corporation act which repealed the exemption of cemetery property from taxation and assessment.¹⁹ While present law exempts cemeteries from taxation, there is no statutory exemption from special assessments for cemeteries in North Dakota. If I were to base a legal opinion solely on statutory grounds, I would have to conclude that cemetery property is not exempt from special assessment for public improvements benefiting the cemetery property based on the lack of such exemption in present law and the legislature's repeal of a specific exception which formerly applied to cemetery property.

However, the North Dakota Supreme Court has held that public policy, as expressed in certain other laws, requires that cemetery property be exempt from special assessment.²⁰ In City of Bismarck v. St. Mary's Church, the North Dakota Supreme Court determined that

¹³ N.D.C.C. § 40-22-01(4).

¹⁴ N.D.C.C. § 40-23-05.

¹⁵ N.D.C.C. § 40-23-07.

¹⁶ Id.

¹⁷ See N.D.C.C. §§ 40-23-22 and 40-23-22.1.

¹⁸ N.D. Revised Code of 1899, ch. 17, art. 4, § 3199.

¹⁹ See St. Mary's Church, 181 N.W.2d at 715; see also 1959 N.D. Sess. Laws ch. 111, § 1 (creating section 10-2818, application and construction of act; deferred repeal, which repealed section 10-1011 of the N.D. Revised Code of 1943 which exempted cemetery property from taxation and assessment).

²⁰ St. Mary's Church, 181 N.W.2d at 715-16.

special assessments for street improvements may not be levied upon cemetery property belonging to a nonprofit corporation. The court noted the longstanding exemption from special assessments for cemetery property, holding that, in the Court's view, "the Legislature did not intend to legislate contrary to that policy" when it repealed the specific exemption of cemetery property from taxation and assessment in 1959.²¹ The Court noted that the legislature has also provided criminal sanctions against disruption or injury to a cemetery.²² The Court concluded that it is "inconceivable to us" that the legislature, with this policy against disrupting a cemetery, would also contemplate permitting an intrusion upon cemeteries that would be possible if the property were not exempt from special assessment.²³ The supreme court further cited with approval an 1885 Louisiana case which used a similar analysis,²⁴ and an annotation from American Law Reports.²⁵ The three to two decision of the North Dakota Supreme Court in St. Mary's Church was accompanied by a strong dissent from Chief Justice Teigen, which sympathized with the result reached by the majority but noted that the repeal of the exemption from special assessments for cemetery property demonstrated the legislature's intention to break with previously established public policy, stating that in light of the historical background "I cannot hold that the Legislature had no intention of doing what it so plainly did do."²⁶ Chief Justice Teigen concluded that the "courts are not at liberty to declare a law void as being in violation of public policy because public policy is determined by the Legislature and the only limits upon the legislative power in such determinations are those fixed in the state and Federal constitutions."²⁷

In the years since St. Mary's Church was decided, the legislature has neither enacted a law to preserve the majority opinion in that decision, nor has it enacted a law to reverse or overturn that decision. It might be argued that because of the almost four decades that have passed since the court's decision in St. Mary's Church, the legislature has acquiesced in the court's interpretation and the decision is consistent with legislative intent.²⁸ But as that decision was based upon a perceived public policy instead of a constitutional or statutory provision, it is possible that a good faith argument may be presented to the supreme court, based on statutory law and public policy, for reversal of its decision in St. Mary's Church.

²¹ Id. at 715.

²² Id.

²³ Id. at 715-16.

²⁴ Id. at 716, quoting Metairie Cemetery Asso. v. Board of Assessors, 37 La. Ann. 32 (1885).

²⁵ St. Mary's Church, 181 N.W.2d at 716, citing 71 A.L.R. at 324 (1931).

²⁶ St. Mary's Church, 181 N.W.2d at 717.

²⁷ Id.

²⁸ See State v. Buchholz, 678 N.W.2d 144 (N.D. 2004); see also State v. Am. West Cmty. Promotions, Inc., 645 N.W.2d 196 (N.D. 2002).

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As previously indicated, this issue is subject to appeal to district court, and ultimately to the North Dakota Supreme Court, by which means a decision may resolve the matter.²⁹ Alternatively, because the decision in St. Mary's Church relied upon an interpretation of legislative intent, it may be appropriate for the legislature to consider this decision and enact into law a direct and unequivocal statement of its intent whether cemetery property may be subject to special assessment for public improvements.

Sincerely,

Wayne Stenehjem
Attorney General

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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.³⁰

²⁹ See N.D.A.G. 99-L-68.

³⁰ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).