

LETTER OPINION
96-L-243

December 20, 1996

Mr. John A. Juelson
Hillsboro City Attorney
PO Box 220
Hillsboro, ND 58045-0220

Dear Mr. Juelson:

Thank you for your letter asking whether the city of Hillsboro is obligated to refund to certain property owners any of the surplus remaining in special assessment funds for a street improvement district and a sewer improvement district after the city has paid off the debt obligations financing the improvements and prior to the final maturity of the debt obligations.

You indicated that the city issued two series of improvement bonds in 1984 to finance certain street and sewer improvements. You also indicated that both projects were assessed on the basis that special assessments would be levied through the year 1999 to pay for the improvement bonds. However, because of certain prepayments of special assessments, two refundings of the bonds and interest earnings, the city generated sufficient additional funds together with the 1995 special assessment to redeem the bonds and it ceased certifying special assessments for the improvement districts in the 1995 tax year. The payments received by the city in 1996 based on the 1995 tax year assessments allowed the city to pay off the bonds and resulted in a surplus in both special assessment funds.

Although you indicated that the city has taken certain preliminary actions to refund portions of the surplus to certain of the affected property owners, you also stated that the surplus funds have actually been transferred to the city's general fund in apparent conformity with N.D.C.C. § 40-24-18. That statute provides as follows:

All special assessments and taxes levied and other revenues pledged under the provisions of this title to pay the cost of an improvement shall constitute a fund for the payment of such cost, including all principal of and interest on warrants and other obligations issued by the

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municipality to finance the improvement, and shall be diverted to no other purpose. The city auditor shall hold all moneys received for any such fund as a special fund to be applied to payment for the improvement. Each such fund shall be designated by the name and number of the improvement district in or for which said special assessments, taxes, and revenues are collected. When all principal and interest on warrants and other obligations of the fund have been fully paid, all moneys remaining in a fund may be transferred into the general fund of the municipality.

(Emphasis supplied.) See also 1985 N.D. Op. Att'y Gen. 93 ("Thus, in cases involving refunding improvement bonds, a city may transfer excess special assessment fund moneys to the general fund of the municipality" citing N.D.C.C. § 40-27-05).

"Statutes sometimes provide for the distribution of surplus money in [a] special assessment fund." 14 Eugene McQuillen, Municipal Corporations § 38.337 (3rd rev. ed. 1987). N.D.C.C. § 40-24-18 is such a statute.

Further:

The legislature may authorize refunding of moneys paid for public improvements. Statutes and ordinances in the various jurisdictions provide for a refund or rebate of assessments levied and collected for public improvements, under specified conditions, provided the claim is made within the time prescribed by law; but the whole question is governed by the terms of the statute involved. However, statutes providing for a refund do not confer "vested rights."

14 McQuillen, Municipal Corporations at § 38.336 (3rd rev. ed. 1987); see also 70A Am.Jur.2d Special or Local Assessments §§ 227-230 (1987). N.D.C.C. § 40-24-18 does not explicitly provide for a refund, nor have you referred to any statute which would authorize the city to issue refunds.

You did, however, make reference to an opinion issued by Attorney General Allen I. Olson which indicated that in some circumstances there may be an obligation to refund a portion of certain special assessment levies, particularly where such levies continued after the object of the assessments has been satisfied. See 1976 N.D. Op. Att'y Gen. 19. See also 1979 N.D. Op. Att'y Gen. 289 ("The payments

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to which your letter refers [from assessments erroneously continued to another year] are simply erroneously collected taxes and as such, we do not believe they are subjected to the provisions permitting the transfer of monies remaining in special funds to be transferred to the general fund.").

However, the 1976 opinion also indicates that state constitutional provisions which might compel refunds to property owners in certain circumstances would probably not come into play unless a political subdivision was "continuing to levy for a year or years after the basic object of the tax has already been satisfied." 1976 N.D. Op. Att'y Gen. 19. This opinion also determined that "if sufficient money is collected on a special assessment project in less time than the assessment period, the City must stop levying assessment for the remaining years." Id. Similarly, Attorney General Nicholas J. Spaeth opined that "a special assessment levy must be terminated if the obligation is satisfied by the municipality from other resources." See Letter from Attorney General Nicholas J. Spaeth to John R. Gregg (April 20, 1988).

It does not appear from your letter that the city continued to levy special assessments after the basic object of the tax had been satisfied, i.e., that the city did not continue to certify special assessments for the two improvement districts beyond the tax year in which the city had generated sufficient amounts to pay the refunding improvement bonds in full.

Consequently, it is my opinion that under the facts and circumstances presented here, the city of Hillsboro is not obligated to refund any of the surplus monies contained in the improvement funds after the payment of the refunding improvement bonds. My opinion would be different if the city had continued to levy special assessments beyond the year in which it had generated sufficient funds on hand together with any investment earnings sufficient to pay any applicable debt instruments financing the improvements. See 1976 N.D. Op. Att'y Gen. 19 ("[I]f it can be determined by the City that the money on hand for that Special Assessment Project plus interest earned from investing that money will be sufficient to pay the balance of the Special Assessment Warrants to come due over the next few years, the City must stop levying assessments at that time and pay the warrants as they come due with the money on hand plus the interest to be earned from investing that money.").

Because the city has already properly exercised its discretion to transfer the subject surplus funds to the city general fund, any discussion of refunds is now moot.

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Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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