

LETTER OPINION
98-L-66

May 21, 1998

Mr. Austin G. Engel
New Salem City Attorney
Webster & Engel Law Firm
418 East Rosser
P.O. Box 1338
Bismarck, ND 58502-1338

Dear Mr. Engel:

Thank you for your letter requesting my opinion on whether the city of New Salem has authority to assess certain fees against a property. According to the facts provided this office, on April 17, 1996, the Custer Health District served a Notice and Order on the property owner, giving notice that the sewer line was "a nuisance, source of filth and cause for sickness," and ordering the property owner to abate the nuisance within thirty days. The notice further provided that if the nuisance was not abated, the abatement would be ordered and the costs assessed against the property. The property owner did not abate the nuisance.

On May 20, 1996, the Custer Health District issued a Notice and Order to the city of New Salem to abate the nuisance within thirty days. The city did not know where the sewer line in question was located. Location of the sewer line was required to abate the nuisance. The city engineer provided services to the city to assist it in determining the best manner to locate the sewer line and abate the nuisance. The fee charged the city by the city engineer is \$240.75.

On June 20, 1996, the Custer Health District rescinded its Notice and Order to the city because the health district determined after inspection that the sewer line was working adequately. In August of 1996, the city had Roto-Rooter run a test line with an electronic tracking device through the private sewer line to determine its exact location and to have the results reported to the city and the property owner in a written report. Roto-Rooter's services cost \$150.00.

In February 1997, based on reports from the State Health Department and the State Plumbing Board, the Custer Health District ordered the property owner to abate the nuisance within 72 hours or be subject to removal from the house. After the order was issued, the property owner had the line cleared. From November 1995 to July 1996, the

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city was charged \$570.00 in attorney's fees for legal services relating to the property in question.

You question whether the city of New Salem has authority to assess the attorney's fees, engineer's fees, and the Roto-Rooter's fee against the property.

N.D.C.C. § 23-05-04 provides:

When it is necessary for the protection of the public health to abate or remove any nuisance, source of filth, or cause of sickness found on private property, the local board of health shall cause a notice to be served on the owner or occupant thereof requiring him to remove the same at his own expense within a reasonable time, not to exceed thirty days. If the owner or occupant refuses or neglects to comply with such notice or if the nuisance, source of filth, or cause of sickness exists on the property of nonresident owners or upon property the owners of which cannot be found, the board of health shall cause the nuisance, source of filth, or cause of sickness to be removed or destroyed under its direction, at the expense of the county, city, or township, as the case may be, but such expense must be charged against the lots, pieces, or parcels of land upon which the work was done.

Pursuant to this section, if a property owner refuses or neglects to remove a nuisance, the board of health can cause the nuisance to be removed or destroyed. It is not required that the board of health actually remove or destroy the nuisance; removal or destruction of the nuisance simply needs to be under the direction of the board of health. Removal or destruction of the nuisance is at the expense of the county, city, or township, but such expense must be charged against the property. N.D.C.C. § 23-05-05 mandates that a city's costs of removing or destroying a nuisance be assessed against the property and provides the procedures for assessing the costs.

In the present case, the Custer Health District ordered the city of New Salem to abate the nuisance within thirty days. Although the city took preliminary steps to abate the nuisance, it did not abate the nuisance because the Central Health District rescinded its original order and the property owner abated the nuisance after the Central Health District issued its second order. Although the city did not actually abate the nuisance, it incurred costs by taking steps to abate the nuisance after it received the May 20, 1996, Order from the health district. Because the city was ordered to abate the nuisance after the property owner refused or neglected to comply with

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the order that he abate the nuisance, the city's costs in taking steps to abate the nuisance must be assessed against the property. To hold otherwise would permit a landowner to refuse to abate a nuisance until after the city expends funds preparing to abate the nuisance. Such action could cause the city unnecessary expense while giving the landowner the benefit of the city's preparation, which occurred because the landowner refused to timely abate the nuisance. If, after proper notice and ample time, a landowner fails to abate a nuisance resulting in the city taking appropriate steps to abate the nuisance, the costs incurred by the city must be assessed against the property even if the landowner subsequently abates the nuisance. Accordingly, the City of New Salem must assess against the property in question the costs it incurred in preparing to abate the nuisance.¹

N.D.C.C. § 23-05-05 does not define "costs." The term, therefore, must be understood in its ordinary sense. N.D.C.C. § 01-02-02. As ordinarily understood, the term "costs" means an amount paid or required in payment. The American Heritage Dictionary 329 (2d. coll. ed. 1991). Thus, the costs assessed against the property must be the amount paid or required in payment to remove or destroy the nuisance.

Whether specific fees or costs were paid or required in payment to remove or destroy a nuisance is a factual issue that may not be resolved by this office. When and why the costs were incurred are important factors in determining whether the costs were paid or required in payment to remove or destroy the nuisance. For example, the Roto-Rooter fee occurred in August of 1996, two months after the Custer Health District rescinded its order that the city abate the nuisance. Because the order to abate the nuisance had been rescinded, it is unclear how this cost was incurred to remove or destroy the nuisance. Similarly, some of the attorney's fees in question are for services prior to the May 20, 1996, Order that the city abate the nuisance and after the June 20, 1996, Order rescinding the abatement order. The timing of these services may indicate that, although they were for legal services concerning the property in question, the services were not incurred for purposes of removing or destroying the nuisance.

Costs incurred in obtaining professional advice and assistance in determining how to abate or destroy a nuisance would constitute part of the costs of removing or destroying a nuisance. Legal fees actually incurred to remove or destroy the nuisance can also be

¹ It is assumed for purposes of this opinion that the landowner received proper notice of the nuisance and was afforded the requisite due process.

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assessed against the property. The attorney's fees must relate to services provided regarding the removal or destruction of the nuisance. Legal fees not directly related to removing or destroying the nuisance, such as litigation fees or recovery costs, may not be assessed against the property. See Letter from Attorney General Nicholas Spaeth to Richard Olson (Jan. 7, 1992); State v. General Electric Co., 604 N.Y.S.2d 355, 357, 358 (N.Y. App. Div. 1993); 6A, 7A Eugene McQuillen, Municipal Corporations §§ 24.79, 24.561 (3rd rev. ed. 1997).

In addition to state law, your letter questions the impact of Section 12-604 of the New Salem City Code on this issue. Section 12-604 provides, in part, that "[a]ll costs and expense incidental to the installation and connection of the sewer lines and maintenance thereof to the city main . . . be borne by the applicant or property owner." It further provides that "[t]he property owner shall indemnify the City from any loss or damage that may directly or indirectly be occasioned by the installation or maintenance of the sewer line." Interpretation of the city's ordinance is strictly a city matter. The state law is not involved and cannot be consulted to give an answer regarding interpretation of section 12-604. Accordingly, consistent with the past practice of this office, I cannot offer an opinion regarding application of the city ordinance.²

In conclusion, it is my opinion the city of New Salem must assess against the property in question all costs that were paid or required in payment for its attempts to remove or destroy the nuisance while the city was under order by the Custer Health District to remove or

² See 1994 N.D. Op. Att'y Gen. 15 ("this office generally does not interpret and give legal opinions on city ordinances"); 1993 N.D. Op. Att'y Gen. 71 (opinion not issued on interpretation of city charter because it does not involve state law and does not have state wide significance); Letter from Attorney General Heidi Heitkamp to Ross L. Sundeen (Oct. 23, 1997) (the Office of Attorney General does not interpret local ordinances or charter language); Letter from Attorney General Nicholas Spaeth to W. R. Goulet, Jr. (June 19, 1987) ("Because the question presented involves the interpretation solely of a city ordinance and does not involve the interpretation of North Dakota statutory or constitutional law, I believe it would be inappropriate for the Attorney General to issue any opinion on this question."); Letter from Attorney General Nicholas Spaeth to David E. Nething (Aug. 28, 1986) ("Since the state and its statutes are not involved, I am without sufficient authority to interpret, discuss, or resolve procedural matters involving the city which are governed solely by their own ordinances."); Letter from Attorney General Nicholas Spaeth to Donald J. Kilander (Oct. 8, 1985).

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destroy the nuisance. Which costs were paid in an attempt to remove or destroy the nuisance is a factual issue this office is not authorized to decide.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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