

N.D.A.G. Letter to Wheelihan (March 12, 1986)

March 12, 1986

Mr. David M. Wheelihan
Ellendale City Attorney
59 First Avenue South
P. O. Box 39
Ellendale, ND 58436

Dear Mr. Wheelihan:

Thank you for your letter of February 6, 1986, concerning the ability of a city to act as its own general contractor for a water main project financed through special assessments.

There appears to be little doubt but that a city has the authority to acquire, own, operate, maintain, and improve the needed facilities to insure a supply of water for the needs of the inhabitants of the city. N.D.C.C. §§ 40-05-02(17), 40-05-02(19), 40-05-01(36). Furthermore, North Dakota law provides that cities may defray the expenses of water supply system improvements by special assessments. N.D.C.C. § 40-22-01(1). Although these statutes leave little doubt but that cities may take those steps necessary for the maintenance and operation of a water supply system and to pay for such projects through special assessments, the statutes do not indicate the precise procedure to be followed by the city. In other words, may a city act on its own as the contractor or must it let bids for all tasks to be performed?

In Pinetree Lumber Co. v. City of Fargo, 96 N.W. 357 (N.D. 1903), our North Dakota Supreme Court had the occasion to review the actions of the city of Fargo in making the improvements itself with respect to the paving of streets. Although the statutes in existence in 1903 are different from those currently in effect, the scheme and thrust of the old statutes are similar to the statutes currently found in Title 40.

As for the ability of a city to make improvements itself and to reimburse itself for the costs of same, the court concluded as follows:

The scheme of the statute was to enable the city to make the improvements enumerated in the statute, and to reimburse itself for the costs of the same through special assessments of property abutting upon. . . .the improvements made. 96 N.W. at 360

In addition, an attorney general's opinion issued in 1970 concluded that the contractor's licensure law (N.D.C.C. Ch. 43-07) specifically exempted political subdivisions from its requirements despite the fact that the work performed by the public agency would normally require a contractor's license.

The contractor's law, therefore, contemplates a contract in which a private contractor is performing a contract for a private person or some governmental agency rather than those instances in which the work is performed by the governmental agency. 1970 N.D. Op. Att'y Gen. 79, 80.

In light of the general and broad authority provided to cities to take necessary steps with respect to water supply systems within its limits, the observation of the North Dakota Supreme Court in Pinetree Lumber Co., and the 1970 Attorney General's Opinion, the only logical conclusion to draw is that a city may act as its own general contractor for a water main replacement project which is to be financed by special assessments. Further, the city may act as a contractor without obtaining a contractors license provided for in N.D.C.C. Ch. 43-07.

Sincerely,

Nicholas J. Spaeth

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