

OPINION
64-49 (Sep 1)

September 1, 1964 (OPINION)

Mr. Walter R. Hjelle

Highway Commissioner

RE: Cities and Villages - Special Assessments - Highway Right-of-Way

This is in response to your letter in which you ask for an opinion on the following situation:

The Highway Department purchased for highway right-of-way the east 42 feet of a long and narrow tract of land in Marion Park Second Addition to the City of Bismarck. The tract was 300 feet long, 4.4 feet wide at one end and .21 feet wide at the other end. At the time of the purchase, May 29, 1963, the City of Bismarck had levied special assessments against this entire tract in the total amount of \$3,240.51, and, in addition, there was some interest due on unpaid installments.

You also advise that it appears the special assessments exceed the market value of the entire tract. The State Highway Department has now been billed for a proportionate share of the assessments. The ratio is 42 feet divided by 300 feet applied to the total assessment. You then ask:

1. Is the State Highway Department legally responsible for payment of the installments due and certified to the Burleigh County Treasurer, prior to the date of acquisition of the right-of-way?
2. Is the State Highway Department legally responsible for the payment of any penalty or interest?"

The power to tax lies in the State (people or legislature) subject only to such limitations as may be found in the State or Federal Constitution. (Haggart v. Nichols, 66 N.D. 355.) The legislature has the power to exempt property from taxation. (Eisenzimmer v. Bell, 32 N.W.2d., 891.)

A special assessment, while not a general tax, is in a sense a tax and the authority to levy same is generally found in the taxing power. (Rolph v. City of Fargo, 7 N.D. 640.)

The State may delegate to local government the power to make special assessments. The power of the legislature to exempt property from taxation also applies to special or local assessments. (48 Am. Jur. Section 78, Page 635.)

Governmental property, as a general rule, is not subject to special assessment, except if so made by statute. The authorities are not in complete harmony on this proposition; however, where the property is exempt from special assessments by statute, the doubt is eliminated. (48 Am. Jur. Section 84 and Section 87, Pages 640 and 641.)

The Legislature of North Dakota has spoken on this subject. Under Section 40-23-07 of the North Dakota Century Code, the Legislature specifically permitted benefited property belonging to the political subdivisions to be subjected to a special assessment. The Legislature also exempted certain property under Section 40-23-22, which provides as follows:

"STATE PROPERTY SUBJECT TO SPECIAL ASSESSMENTS. - Real estate within municipalities of this state owned by the State of North Dakota other than for highway right-of-way purposes, may be subjected to special assessments for special improvements when benefited by such improvement and the state agency or department having control thereof is hereby authorized to expend public funds in payment of such special assessments."

It is noted that the property acquired by the State of North Dakota for highway purposes is exempt from special assessment levies. The State Highway Department is an integral part of the State. Property belonging to the Highway Department belongs to the State. The exclusion from taxation of right-of-way for highway purposes is apparently buttressed on the proposition that the property acquired is for a public purpose and use. If the property were subject to sale for delinquent special assessments, it would, in effect, defeat the purpose for which the property was obtained in the first instance. In addition to this, an action against the State would not lie to enforce a lien against such property. (See Annotations of Cases in 90 A.L.R., 1142.) If anything at all, the lien for special assessments, if such exists, is held in abeyance while belonging to the State and if the property is acquired by a private citizen, the lien is revived and may be enforced. (See Annotations of Cases, 95 A.L.R., 920.)

It would seem that, where special assessments may not be levied against state-owned property held by highway right-of-way purposes, in the first instance any levies made prior to the acquisition of property by the State would be ineffective because the lien, if any, could not be enforced against the State.

There is little or no distinction between prohibiting a levy of a special assessment and prohibiting the enforcement of a special assessment levy made.

It would appear that, where a lien exists against any property acquired by the State for highway right-of-way purposes, the purchase money would be applied to satisfy or reduce the lien and the remainder, if any, would be turned over to the record owner.

In direct response to your first question, it is our opinion that the Highway Department is not legally responsible for paying the special assessments due and certified to the County Treasurer prior to the date of the acquisition of the right-of-way. In view of the answer to the first question, there is no need to comment on the second question.

HELGI JOHANNESON

Attorney General