

**OPINION
65-44**

June 10, 1965 (OPINION)

Mr. L. M. Grandy

City Alderman

St. Thomas, North Dakota

RE: Cities and Villages - Special Assessments - Election

This is in reply to your letter of June 5, 1965, relative to a waterworks improvement district. You ask whether such a district may be established without a city wide vote thereon where water is already available from other sources. You note that in floating a bond issue against a water improvement district, up to 20 percent can be levied on all property in the city, including that part not in the district and, in the case of a deficit in the district, all property can be assessed to make up this deficit.

You also ask whether a city can require that the engineering firm drawing up plans and specifications be bonded against faulty plans on workability of designs or lack of proper inspection during work progress.

With regard to your first question, the following statutory provisions would appear applicable:

Section 40-22-01(1) of the North Dakota Century Code provides:

POWER OF MUNICIPALITIES TO DEFRAY EXPENSE OF IMPROVEMENTS BY SPECIAL ASSESSMENTS. - Any municipality, upon complying with the provisions of this chapter, may defray the expense of any or all of the following types of improvements by special assessments:

1. The construction of a water supply system, or a sewerage system, or both, or any part thereof, or any improvement thereto or extension or replacement thereof, including the construction and erection of wells, intakes, pumping stations, settling basins, filtration plants, standpipes, water towers, reservoirs, water mains, sanitary and storm sewer mains and outlets, facilities for the treatment and disposal of sewage and other municipal, industrial and domestic wastes, and all other appurtenances, contrivances and structures used or useful for a complete water supply and sewerage system;* * *."

Section 40-22-08 of the North Dakota Century Code provides:

IMPROVEMENT DISTRICTS TO BE CREATED. - For the purpose of making an improvement project of one of the types specified in section 40-22-01 and defraying the cost thereof by special assessments, a municipality may create water districts, sewer districts, water and sewer districts, street improvement

districts, boulevard improvement districts, flood protection districts, and parking districts, and may extend any such district when necessary. The appropriate special improvement district may be created by ordinance or resolution. The district shall be designated by a name appropriate to the type of improvement for the making of which it is created, and by a number distinguishing it from other improvement districts. Nothing herein, however, shall prevent a municipality from making and financing any improvement and levying special assessments therefor under any alternate procedure set forth in this title."

Section 40-22-09 of the North Dakota Century Code governs the size and form of improvement districts. This section provides in part: "* * * There may be omitted from a water or sewer district, in the discretion of the governing body, properties within the corporate limits which are benefited by the improvement therein but do not abut upon a water or sewer main, without prejudice to the right and power of the municipality subsequently to assess such properties to the extent and in the manner permitted by law."

Sections 40-22-10 through 40-22-14 of the North Dakota Century Code provide for the adoption, approval, etc., of plans, specifications and estimates for the project after the special improvement district has been created. Section 40-22-15 of the North Dakota Century Code provides:

RESOLUTION DECLARING IMPROVEMENTS NECESSARY - EXCEPTION FOR SEWER AND WATER MAINS - CONTENTS OF RESOLUTION. - After the plans, specifications, and estimates for an improvement have been filed and approved, the governing body of the municipality, by resolution, shall declare that it is necessary to make the improvements described therein. Such resolution shall not be required, however, if the improvement consists of the construction or alteration of sewer or water mains, unless it is determined that the cost thereof shall be paid in part as is provided in section 40-22-16. The resolution shall refer intelligibly to the plans, specifications, and estimates, and shall be published once each week for two consecutive weeks in the official newspaper of the municipality."

Section 40-22-16 of the North Dakota Century Code provides in part:

SEWER OR WATER IMPROVEMENTS AND PARKING LOTS IN MUNICIPALITIES MAY BE PAID FOR BY SERVICE CHARGES. - Any municipality, at the option of its governing body, may provide for the payment by general taxation of all the taxable property in the municipality of not more than one-fifth of the cost of any improvement financed by the levying of special assessments other than the opening and widening of streets or the laying of sewer or water connections from the main to the curb line. Any amount which the municipality shall determine to pay by general assessment shall be considered as a part of the debt of the municipality and shall not be valid unless such amount is within the constitutional debt limit of such municipality, computed on the portion of the last equalized value of property to which the mill rate of general property taxes is applied.

No municipality having a board of budget review shall incur such debt or hold any election to increase its limit of indebtedness to carry such debt until after compliance with the provisions of sections 40-41-06 and 40-41-07, the same as for bond issues. * * *."

Sections 40-41-06 and 40-41-07 of the North Dakota Century Code require submission to the board of budget review and a public hearing of the proposed levy prior to its being effective.

The apparent basis for Section 40-24-10, quoted in part above, is that the improvement, while it may not directly benefit all of the property in the municipality, will be of indirect benefit to such property. Presumably this is the reason that the opening and widening of streets and the laying of sewer or water connections from the main to the curb line were specifically excepted from this provision. These improvements would apparently not be of benefit, either directly or indirectly, to the property not included within the improvement district.

Section 40-26-08 of the North Dakota Century Code, as amended, provides that whenever special assessments and all utility revenues and taxes, if any, appropriated and collected for a special improvement which is to be paid for in whole or in part from special assessments are insufficient to pay principal or interest due on the special improvement warrants, the governing body shall levy a tax upon all of the taxable property in the municipality for the payment of the deficiency.

Chapter 40-27 of the North Dakota Century Code, as amended, provides for the issuance of bonds for the purchase of outstanding special assessment warrants of the municipality. Section 40-27-02 provides that such bonds may be issued pursuant to a resolution or ordinance of the governing body of the municipality without submitting the question to the electors of the municipality. We presume the bonds to which you refer are bonds to be issued under the provisions of this chapter.

The principal and interest of such bonds are to be paid for from a special fund. All special assessments collected for the payment of the special assessment warrants purchased are to be deposited in this fund. The governing body is to make a general tax levy on all the property in the municipality which, together with the special assessments collected, is to be sufficient to pay the principal and interest of the bonds when they become due. (See Section 40-27-05.)

We have reviewed above the provisions which would apparently be applicable to the situation outlined in your letter. These procedures do not require a city wide vote in order for the governing body to proceed with the improvement district. As you have noted in your letter the city governing body may provide for not to exceed one-fifth of the cost to be paid by general taxation. Such determination does not require a vote of the electors. The apparent basis for such a statute is that the improvement will be of indirect benefit to the entire municipality.

As you have also noted in your letter, it is possible that, in

certain instances, the city governing body may have to levy a tax for the payment of the special assessment warrants which have been issued, or for the payment of bonds which have been issued to purchase the special assessment warrants. This occurs only if the special assessments collected, and any other revenue which has been pledged to the retirement of the warrants or bonds, is insufficient. The statutes do not require a vote on the issuance of such bonds and, in fact, specifically provide that no vote is required.

The matter of the necessity for the creation of such a district is, in the first instance, within the sound discretion of the governing body. The necessity for the improvement also is within the sound discretion of the governing body and may be halted only in the manner provided by law, i.e., the filing of a sufficient number of protests by the owners of a majority of the area of the property included within the improvement district.

In view of the above quoted statutes, it is our opinion that the city governing body may create a water improvement district without a city wide vote thereon. It is our further opinion that not to exceed 20 percent of the cost of such improvement may be financed by a general tax levy without a vote of the electors of the city, and that a general tax levy must be made if the amount collected through special assessments is insufficient to pay the principal and interest on the special assessment warrants or bonds issued to purchase such warrants. These conclusions are, of course, based upon the proposition the city governing body has regularly pursued its authority under the applicable statutory provisions.

With respect to your second question, we would note the contractor's bond is specifically required by law. (See Section 40-22-30.) While the statutes do not specifically require a bond of the engineer, it is our opinion that the city governing body may, in its discretion, require the engineer preparing the plans for the improvement to post a bond conditioned upon the engineer providing plans which are not faulty and have workable designs, and also which would protect the city against lack of proper inspection by the engineer during work progress.

HELGI JOHANNESON

Attorney General