OPINION
70-59

May 13, 1970(OPINION)

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Attorneys for the City of Surrey
Minot, North Dakota

RE: Cities - Special Improvements for Sewer and Water Protests

This is in reply to your letter with regard to a prospective special improvement project being undertaken by your firm for a North Dakota city.

You inform us that as an adjunct to its original water and sewer system, the City of Surrey has created Water and Sewer Improvement District No. 2, which will consist of the construction of 1,360 feet of sewer main and 1,430 feet of water main, together with five
manholes and two hydrants. This project is to be financed solely by special assessments of the property benefited by the improvement; no part is to be financed by service charges for use of the improvement.

You call our attention to the provisions of section 40-22-15 of the North Dakota Century Code, which 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."

We assume also that your questions as stated hereinafter relate to the provisions of section 40-22-17 of the North Dakota Century Code with regard to protests against such resolution of necessity. Your questions are state as follows:

1. Would the above described improvements be considered as ‘sewer or water mains'? We have taken the position that the manholes and hydrants form an integral part of the water and sewer mains.

2. Does not the above cited statute excuse the city from adopting and publishing a resolution of necessity, holding a protest hearing and considering protests? We have advised the city that we do not believe these acts are necessary."

We do not find North Dakota decisions precisely in point in regard to your specific questions.

We do note rather general textbook statements on the broad question. Thus, at Vol. 5, Pages 903, 904, Section 2229 (2077) McQuillin Municipal Corporations, 2d. Edition, we note the statement:

> "2229 (2077) HEARING ON PROPOSED ASSESSMENT. 'It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some state of the proceeding. That "due process of

law" requires this has been uniformly recognized. But the property owner is not entitled to more than one hearing. * * *"'

and at Vol. 48 Am. Jur., Pages 693, 694, Special or Local Assessments, Section 152, we note the following:

"152. GENERALLY. Whether or not a right to notice, protest, and a hearing exists with respect to the creation of an improvement district or a special or local assessment depends generally on whether the act of creating the district or making the assessment is in the nature of a legislative or judicial proceeding. While this distinction as to the nature of the act of creating the district or making the assessment is generally determinative of whether there is a right to notice, protest, and a hearing, there is nevertheless a conflict of opinion as to the existence of such right under circumstances that are similar. Indeed, the view has been taken that any right of protest in owners of property subject to a special or local assessment exists only if given by statute, charter, or ordinance, for the reason that such assessments are not regarded as burdens, but as an equivalent or compensation for the enhancement of the value of the property from the improvement. If a local assessment is to be according to benefits, or a different rate is to obtain in different parts of the district, the taxpayer is entitled to a hearing.

"The owners of land affected by a public improvement may at all times appear in a proceeding for its construction, and are entitled to be heard, and the court in the exercise of its equitable powers may direct that special notice be given to them in order to permit them to be heard, and they may be specially impleaded upon the application of the commissioners, or upon their own application, or by the court upon its own initiative, but otherwise, the commissioners represent them."

We note no North Dakota cases cited with regard to either of these statements.

In view of the statements of fact included in your letter, it is our opinion that the hydrants and manholes, together with the remainder of the project, constitute "construction or alteration of sewer or water mains" within the meaning of that phrase as used in the above
quoted section 40-22-15.

In view of the statutory provisions heretofore cited and quoted, it is our opinion that there is not statutory or other requirement for adopting or publishing a resolution of necessity, holding protest hearings, or considering protests in this type of project. In view of the due process element considered in the textbook statements considered herein, it probably would be advisable that the persons owning the property to be assessed receive some notice of the project, though this could be by usual published notice of municipal governing body proceedings or similar information. There is, of course, no requirement of personal service of any formalized documentation.

HELGI JOHANNESON
Attorney General