

**OPINION
71-473**

March 11, 1971 (OPINION)

Mr. Idean M. Locken
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RE: Waters - Management Districts - Protests to Improvements

This is in response to your letter of date March 2, 1971, with regard to a flood control project.

You indicate that the local county water management district's board of commissioners which you represent has proposed a flood control project to be financed by special assessments under Section 61-16-22 of the 1969 Supplement to the North Dakota Century Code. You indicate that property which will be benefited and thus liable for special assessments will include a city and six rural land owners.

You call our attention to a part of the following portion of said Section 61-16-22:

"FINANCING OF SPECIAL IMPROVEMENTS - PROCEDURE. * * * If within thirty days after the first publication of such resolution, the owners of property liable to be specially assessed for the proposed improvement shall file written protests with the secretary of the board, protesting against the improvement, the board at the time set for such hearing shall determine the sufficiency thereof. If the board finds the protests to contain the names of the owners of a majority by taxable value of the land subject to assessment for construction of the proposed project, then the protests shall be a bar against proceeding further with such improvements.
* * *"

Your question is state as:

"* * * whether or not each property owner within the City * * * would have the right of protest, or would such right be held solely by the city council of said city?"

We believe the point of your question can be further clarified by considering the provisions of Section 61-16-25 of the North Dakota Century Code as follows:

"ASSESSMENT LISTS. Whenever the board is required to make any special assessments under the provisions of this chapter, the members thereof personally shall inspect any and all lots and parcels of land, which may be subject to such assessments and shall determine from such inspection the particular lots and parcels of land, which in the opinion of the board, will be especially benefited by the construction of the work for which the assessment is made and shall assess the proportion of the total cost of such improvement in accordance with benefits received but not exceeding such benefits, against:

1. Any county, township, city or village in its corporate capacity, which may be benefited directly or indirectly thereby; and
2. Any lot, piece, or parcel of land which is either directly or indirectly benefited by such improvement.

"Property belonging to the government of the United States shall be exempt from such assessment, unless such government shall provide for the payment of any assessment which may be levied against its property for benefits received. Benefited property belonging to counties, cities, villages, school districts, park districts and townships shall not be exempt from such assessment and such public corporations whose property is so assessed shall provide for the payment of such assessments, installments thereof and interest thereon, by the levy of taxes according to law. Any county, township, city or village assessed in its corporate capacity for benefits received shall provide for the payment of such assessments, installments thereof and interest thereon by levy of a general property tax against all the taxable property therein in accordance with law, and no land situated within such public corporation subject to such tax shall be assessed separately by the district board. No tax limitation provided by any statute of this state shall apply to tax levies made by any such public corporation for the purpose of paying any special assessments made in accordance with the provisions of this chapter."

It would thus appear that there are two bases upon which a city can be assessed for benefits in this type of project. First, Subsection 1 of the statute appears to permit assessment of the benefit against the city in its corporate capacity, apparently without regard to any particular portion of its property or any particular portion of the property within its limits. We do note the further modification in this regard that no land situated within such public corporation subject to such tax shall be assessed separately by the district board. Second, provision is made to the effect that benefited property belonging to the city is not exempt from the assessment for benefits and public corporations whose property is so assessed shall provide for the payment of such assessments, installments thereof, and interest thereon, by the levy of taxes according to law.

Your letter does not specifically indicate whether the city concerned is being assessed in its corporate capacity, or whether its property owned directly by the city is being assessed for benefits and thus subjected to the same district tax as property of other landowners.

If this is an instance where property owned directly by the city is being assessed for benefits by the Water Conservation Board, it would appear obvious that the governing body of the city would make the determination of whether or not to protest, in much the same manner as a similar determination would be made by the directors of another corporate landowner, subjected to the assessment for benefits. While the citizens of the city may in some senses of the word be considered "owners" of the city and all of its property, they customarily speak through their governing body and executive officers.

If this is an instance where the city itself is being assessed in its corporate capacity, while same would not so directly relate to the ownership of real property, we would again assume that the determination should properly be made by the governing body of the city.

In either instance, of course, a tax is levied by the city against its property owners to pay the assessment against the city, or against the city's property. However, this tax and the property subjected to this general tax is not the "assessment" or the "property liable to be specially assessed" referred to in section 61-16-22. The "assessment" and the "property liable to be specially assessed" is thus the property of the city itself and the district's assessment against the same.

We hope the within and foregoing will be sufficient for your purposes.

HELGI JOHANNESON

Attorney General