OPINION
74-79

June 27, 1974 (OPINION)

Mr. William J. Johnson
Larimore City Attorney
Northwood, ND 58267

Dear Mr. Johnson:

This is in response to your letter of June 11, 1974, stating that you are the city attorney of a named city in this state and are presently meeting with their special assessment board to set the Special Assessments for a specified improvement.

You inform us that in approximately September of 1968 the City Council passed a resolution creating the specified street improvement district, enclosing a copy of same. You inform us that in September of 1968 the City Council passed a Resolution Declaring the Work Necessary, and same was published in the official newspaper of the city on September 5th and 12th, 1968, also enclosing a copy of same. You inform us that on October 9, 1968, the City Auditor certified that there were no protests to the proposed improvements as listed in the Resolution Declaring the Work Necessary. You also enclose a copy of the city map, showing the layout of the city.

You indicate that the original plans by the State Highway Department did not contemplate any curb and gutter on the east side of Towner Avenue from Fourth Street through Seventh Street, but rather the same was to remain an open ditch. You state that on the 14th of May, 1970, the 37 acre tract east of Towner Avenue between Fourth and Seventh Streets was annexed into the incorporated limits of the city and the proprietor thereof appeared before the City Council and also the North Dakota Highway Department and requested that the area between Fourth Street and Seventh Street on the east side of Towner Avenue be curbed and guttered, and that a storm sewer be put in that area so that there would be no necessity for an open ditch. Therefore, a change order was recommended by the City Council on June 1, 1970, ordering that the east side of Towner Avenue between Fourth Street and Seventh Street be curbed and guttered, and that a storm sewer be put in thereunder with outlets from the curb to take care of water in the area. You state that the State Highway Department approved the change requested by the proprietor and in the summer of 1970, the work was completed. You state that the city recently received the bill for their share of the project and you are now in the process of setting up the special assessments in the matter.

Your question is stated substantially as:

> "Whether or not we can special assess any of the benefits to the Eastview Addition that was annexed to the City * * * on May 14th, 1970."

You indicate that since a change order was made at the request of the "owner" of Eastview Addition after the same was annexed, you feel

that the area should also have to pay their share of the cost of the project, as there is no question that they were definitely benefited. You state that they were no part of the incorporated limits of the City of Larimore, at the time the Resolution Declaring Work Necessary was made. You state that in view of the aforesaid, you would appreciate it if we could furnish you with our opinion on the aforesaid matter as soon as possible as you want to proceed with the assessing of the benefits in the very near future. You state that if we have any further questions or need any further information on this matter, to feel free to contact you.

You add that twenty percent of the city's share will be taxed by general taxation of the entire city, and you were also wondering if you could include Eastview Addition in that part of the assessment.

We assume that you are aware of the provisions of Section 40-22-15 of the 1973 Supplement to the North Dakota Century Code to the general effect that the resolution of necessity is not required (unless cost is to be paid by the service charge method set out in section 40-22-16) "if the improvement consists of the construction or alteration of sewer or water mains", "nor if the governing body determines by resolution that a written petition for the improvement, signed by the owners of a majority of the area of the property included within the district has been received." We assume further that you are aware that "sewer" as used in the statute preceding the present 40-22-16 has been defined by our Supreme Court in Kirkham, Michael and Associates v. City of Minot, 122 N.W.2d. 862 as including both storm sewers and sanitary sewers. You do not inform us as to whether the proprietor's "appearance" before the City Council was so documented as to be susceptible of being resolved to be a "written petition for the improvement, signed by the owners of a majority of the area of the property included within the district."

From the information you do give, we would nevertheless conclude that to the extent the improvement consisted of a storm sewer, that the resolution of necessity would not be required. We would also assume that even in absence of appropriate documentation, that the request itself might be sufficient to create some basis of contractual agreement, or estoppel as to any right to protest as to any part of the improvement other than storm sewer.

We assume also that you are familiar with the provisions of section 40-23-19 commencing with the sentence that: "Any property which was outside the corporate limits of the municipality at the time of contracting for a water or sewer improvement, which is benefited by such improvement and is subsequently annexed to the municipality, may thereafter be assessed therefor subject to the same conditions and by the same procedure as provided in section 40-23-18. * * *" We would assume that you are familiar with the provisions for reassessment where a court has set assessments aside contained in section 40-26-03 of the North Dakota Century Code.

In conclusion we do not feel that there can by any substantial question as to the propriety of specially assessing the annexed territory for the storm sewer improvement. As to improvements other than storm sewer, we note that perhaps procedures used could have been improved, that the language "nor it the governing body

determines by resolution that a written petition for the improvement signed by the owners of a majority of the area of the property included within the district, has been received" was adopted as a part of section 40-22-15 after the "appearance" to which you refer was made, and that there has been the lapse of four years time from the creation of the improvement, to the setting up of the special assessments; however, from the information given, we are not prepared to rule as a matter of law at least in the absence of further evidentiary material that same cannot be specially assessed against Eastview Addition property, particularly in view of the specific provisions of Section 40-23-19 of the North Dakota Century Code.

As to your additional question, there is no exemption provided for in either the present or past versions of section 40-24-10 of the 1973 Supplement to the North Dakota Century Code for property subsequently annexed to the city. On such basis we must conclude that the real estate contained in new additions to the city is subject to the general tax levied under said section 40-24-10.

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

Sincerely,

ALLEN I. OLSON

Attorney General