

**OPINION
75-182**

March 26, 1975 (OPINION)

Mr. Gary A. Holum

Bosard, McCutcheon, Kerian, Schmidt and Holum, Ltd.

Attorneys and Counselors at Law

Heritage Place

Minot, ND 58701

Dear Mr. Holum:

This is in response to your letter of March 18, 1975, wherein you request an opinion of this office relative to possible options involving the assessment of curb and gutter improvements as set forth under Chapter 40-31 of the North Dakota Century Code. You submit the following facts and questions in your letter:

Does the governing body of a city have any options as to the assessment of curb and gutter as set forth under Chapter 40-31 of the North Dakota Century Code?

The City of Minot has created an assessment district for the expense of construction of curb and gutter. This particular district did not include any other construction such as paving or sidewalk. It is my opinion that Chapter 40-31 of the North Dakota Century Code then applies and I have given the opinion that such expense shall be assessed against the lot or parcel of land properly chargeable therewith. It is my opinion that the assessment for such curb and gutter to an inside lot with 70 feet of frontage should be based on the 70 feet of frontage and 120 feet of depth would have in place of 190 feet of curb and gutter and therefore the assessment should be based upon the 190 feet and not a lesser amount.

Chapter 40-31 of the North Dakota Century Code differs from chapter 40-23 insofar as the manner of assessment is concerned. The former indicates that the expense shall be assessed against the lot or parcel of land properly chargeable therewith and sets forth that the curbing costs are an assessment against the lots or parcels of land fronting on or adjoining such curbing whereas Chapter 40-23 the concept of the assessments is based upon the benefit to the property. It therefore appears to me that where curbing and gutter is installed by itself that Chapter 40-31 must be adhered to. Therefore an inside lot with only 70 feet of frontage cannot be charged with any portion of the curbing and gutter that is constructed on the corner lot.

I believe the procedures for the assessment of curb and gutter does vary from city to city. In the past when curb and gutter has been put in as a part of a paving district the entire

assessment for paving and curb and gutter has been based on the benefit concept under Chapter 40-23. In this instance where curbing and gutter has been constructed by itself and the district so created for only curbing and gutter it is my opinion that the city does not have the option of determining benefits and that the costs and expenses of such construction must be against the lots or parcels of land fronting on or adjoining such curbing and gutter.

I am enclosing herewith for your consideration my letter addressed to the finance director of the City of Minot.

I request that you review this matter and either confirm, modify or reverse my opinion as it pertains to the assessment of curbing and gutter under Chapter 40-31 of the North Dakota Century Code.

You have also enclosed with your letter of request a copy of a letter of opinion which you have issued to Mr. Robert A. Schempp, Finance Director, Minot, North Dakota relative to assessment of benefits for curb and gutter improvements. We note that you have therein expressed your opinion and the basis of same together with your reference to Section 40-31-02 of the North Dakota Century Code. The fundamental position of your opinion as expressed in that letter is as follows:

When I speak of front-foot basis of curb and gutter for a corner lot I speak of both sides of the lot that front on a thoroughfare. Therefore, a lot with 70 feet fronting on a street and 120 feet fronting on an avenue would have 190 front feet of curb and gutter.

Chapter 40-31 of the North Dakota Century Code and in particular 40-31-02 states in part that:

The curbing in the city shall be built, repaired, or rebuilt in the manner and within the time prescribed by the governing body. . .at the expense of the lot or parcel of land fronting on or adjoining such curbing. Such expense. . .the assessment therefore,. . .shall be assessed. . .against the lot or parcel of land properly chargeable therewith.

Section 40-31-06 directs you to keep in your office a curbing repair assessment book and you must enter therein curbing costs certified against the lots or parcels of land fronting on or adjoining such curbing.

The governing body must review the assessments, hear the complaints and approve the same as finally adjusted.

I believe this opinion is consistent with those you have received in the past on the assessment of curb and gutter and I believe it is in accord with state statute. I would recommend that the council not change the assessment practices insofar as curbing and gutter are concerned.

Review of the applicable statutes and the provisions therein indicate that you have correctly noted the restrictions and manner of assessment which is provided by the statute. To this extent we find that we are in substantial agreement with your opinion as expressed in your letter of February 27, 1975, addressed to Mr. Robert A. Schempp. We would note that the subject statutes relate to and provide for assessments and the manner of applying same to certain parcels benefited thereby. The same are specific and relate specifically to "curb and gutter", whereas other improvements are not specifically enumerated under other provisions to which attach particular method or manner of assessing the benefits. The subject statutes provide specifically, "against the lots or parcel of land fronting on or adjoining such curbing". (Emphasis supplied)

Accordingly, we are compelled to the conclusion that the manner of assessment of benefits must relate to and apply to those lots and parcels of land "fronting on or adjoining such curbing". We do not believe, however, that this necessarily means "front-foot" basis as described in your letter with the result that the city must as a matter of law, assess benefits solely on a foot basis both as applicable to lot frontage or to side lot frontage. While we might agree that that method may be justifiable, we cannot as a matter of law conclude that such is the only proper method by which such improvement expense may be assessed against the lot or parcel of land fronting on or adjoining such curbing. To this extent we would modify the opinion which you have expressed as to the specific application of the front-foot basis concept of applying the assessment of costs of improvement.

We trust that the foregoing observations and comments will adequately set forth our opinion upon the matters expressed therein and upon which your letter of inquiry is based.

Sincerely,

ALLEN I. OLSON

Attorney General