

**OPINION
76-19**

November 15, 1976 (OPINION)

Mr. Roger D. Schell

Benson and Schell

Attorneys at Law

Benson Building - 616 Main Street

Bottineau, North Dakota 58318

Dear Mr. Schell:

This is in response to your letter requesting our opinion in regard to termination of special assessment levies with relation to payment of the obligations for which they were issued. Your questions are stated as follows:

- "1. If sufficient money is collected on a Special Assessment Project in less time than the assessment period, must the City stop levying assessments for the remaining years?
2. May the interest earned from investing Special Assessment Funds be used for purposes other than paying the Special Assessment Warrants?
3. If it can be determined by the City that the money on hand for that Special Assessment Project plus interest earned from investing that money will be sufficient to pay the balance of the Special Assessment Warrants to come due over the next few years, must the City stop levying assessments at that time and pay the warrants as they come due with the money on hand plus the interest to be earned from investing that money?
4. If assessments warrants are paid in full in less than the assessment period, is the City obligated to refund money to those persons who have prepaid for the total period? Does the City have any obligation towards those persons who have prepaid their assessments for the full period when the assessment warrants are in fact paid off in a lesser period?
5. Does Section 40-24-18 permit excess money to be paid elsewhere other than to the general fund? It appears from the language of the section that a payment to the general fund is not mandatory."

The basic premise for the so-called "special assessment" method of financing improvements in this state is epitomized in the language of that part of Section 40-23-07 of the North Dakota Century Code providing:

" * * * The Commission shall determine the amount in which each of the lots and parcels of land will be especially benefited by the construction of the work for which such special assessment is to be made, and shall assess against each of such lots and parcels of land such sum, not exceeding the benefits, as shall be necessary to pay its just proportion of the total cost of such work, or of the part thereof which is to be paid by special assessment, including all expenses incurred in making such assessment and publishing necessary notices with reference thereto and the per diem of the commission. * * * "

As to the handling of the moneys received from the special assessment levies section 40-24-18 of the 1975 Supplement to the North Dakota Century Code provides:

"40-24-18. SPECIAL IMPROVEMENT MONEYS TO BE KEPT SEPARATE - DESIGNATION AND NUMBERING OF FUNDS - DIVERSION OF MONEYS PROHIBITED. - All special assessments and taxes levied and other revenues pledged under the provisions of this title to pay the cost of an improvement shall constitute a fund for the payment of such cost, including all principal of and interest on warrants and other obligations issued by the municipality to finance the improvement and shall be diverted to no other purpose. The treasurer of the municipality shall hold all moneys received for any such fund as a special fund to be applied to payment for the improvement. Each such fund shall be designated by the name and number of the improvement district in or for which said special assessments, taxes, and revenues are collected. When all principal and interest on warrants and other obligations of the fund have been fully paid, all moneys remaining in a fund may be transferred into the general fund of the municipality."

We should probably mention, that the last sentence thereof was added by the 1975 legislative session.

We should probably mention also, that it is probably apparent from the language of that portion of section 40-23-07 quoted above, that the special assessment levy, is not a general tax upon all of the real property within the city limits but is rather upon a "district" normally within the city limits, and which district may constitute the entire city though normally does not.

In specific response to your first question, if sufficient money is collected on a special assessment project in less time than the assessment period, the City must stop levying assessment for the remaining years. Theoretically, of course, if the heretofore quoted language from section 40-23-07 is followed precisely, the levy would be computed from the beginning on such basis that it would by its initial terms and computation terminate as of the date the final warrant was paid. On the practical level, however, it is not possible to provide such an exact computation. Your letter mentions one of the variables, i.e., the instance where a special assessee pays the full assessment in advance rather than the annual installments as they become due. This right is given the property owner by section 40-24-09 of the North Dakota Century Code. Other variables can enter into the picture from the difference between the

8 percent interest specified in section 40-24-02 and the interest paid on the special assessment warrants, though subsequent to the addition of the language "not exceeding the average net annual interest rate on any warrants or bonds" etc. by the 1971 legislature to this statute, there may currently be less variations in this respect than previously. Other variables can enter the picture, from situations where the special assessments on particular lots are not paid, such lots are sold for taxes etc. These and other variables that can enter the picture can be estimated as of the date of the computations indicated by the quoted language from section 40-23-07, and such estimates can be the subject of public hearings, appeals, etc., but obviously cannot be finally determined until the happening of the event upon which such determination is based.

The new language added to section 40-24-18 as of the 1975 Session does give a practical solution to small overages, where the amount does not justify the paperwork necessary to arrive at a better solution. Where, however, the subject matter becomes that amount that would be raised by continuing to levy for a year or years after the basic object of the tax has already been satisfied, you would necessarily run into insurmountable constitutional barriers. Consider in this respect the present first sentence of section 175 of the North Dakota Constitution:

"No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied. * * * * *

Section 176 of the North Dakota Constitution, requiring "uniformity" of taxes upon the same class of property, would present another barrier, i.e., a general tax, or should we say a tax used for general fund purposes, against only a limited district, in the city, or computed not on value, but on the benefits from a particular improvement already paid for could hardly be considered "uniform".

In specific response to your second question the interest earned from investing Special Assessment Funds can be used only for purposes of paying the Special Assessment Warrants. It is hardly necessary to go into the various statutes authorizing investment of temporary surpluses in various city funds. Recognizing that these funds rather than being funds "owned" by the city as are its uniform taxes, raised for general fund purposes, are computed for the objects specified in the heretofore quoted language from section 40-23-07 and the language of section 40-24-18 to the effect that such funds "shall be diverted to no other purpose", we necessarily conclude that the entire fund raised from the special improvement district, whether directly by special assessments, or indirectly from interest on temporary surpluses therein must be used for the basic objective, i.e., paying the special assessment warrants for which such funds were raised.

In specific response to your third question and based upon the foregoing reasoning, if it can be determined by the City that the money on hand for that Special Assessment Project plus interest earned from investing that money will be sufficient to pay the balance of the Special Assessment Warrants to come due over the next few years, the City must stop levying assessments at that time and pay the warrants as they come due with the money on hand plus the

interest to be earned from investing that money.

In response to your fourth question, as is indicated by the reasoning heretofore set forth, the question of any obligation to make refunds would be dependent upon the degree of discrepancy. We should probably point out that while the person prepaying the assessment pursuant to section 40-24-09 would pay in full or in part the total original share of "cost" estimated as to his property, pursuant to section 40-24-02, he may, dependent upon time of prepayment, escape a considerable interest charge. The statutes aside from the heretofore mentioned 1975 addition to section 40-24-18 do not provide for recomputation of the actual as opposed to estimated costs and payment schedules. We would assume that in the usual instance with a relatively small overage, the costs of computing a fair refund would be greater than the moneys involved in the overage and the 1975 addition to the statutory section presents the logical solution to the problem thus created. In the event of too great an overpayment, it seems entirely possible that a prepayer or a group of preparers might complain about a pro rata share of their special assessment prepayment being used as general taxes and demand refunds. On a practical basis, however, we would conclude that considering the items of cost involved, the fact that estimates of such factors usually do come close to the ultimate result desired, and of course the offsetting result of the prepayer escaping 20 or 40 years interest charges, the practical solution in most cases would be the turning of the overage into the general fund.

In response to your fifth question, we would agree with your conclusion that the language of the section as to a payment to the general fund not being mandatory. As heretofore pointed out, in proper circumstances there may be obligations as to refunds etc. which would leave no moneys remaining in the fund. Assuming, however, a relatively small amount remaining in the fund, the language of the last sentence of the statute would permit transferring same into the general fund to be used in the same manner as other general tax raised funds are utilized. Noting, however, the language in the first sentence of the statute "shall be diverted to no other purpose", we would conclude that the only alternate use of the funds not utilized in paying for and equalizing costs of the project would be such a transfer into the general fund.

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

Sincerely,

ALLEN I. OLSON

Attorney General