

**OPINION
79-289**

February 12, 1979 (OPINION)

Mr. Jerald L. Engelman
City Attorney
City of Mayville
P. O. Box 847
Mayville, North Dakota 58257

Dear Mr. Engelman:

This is in response to your letter of January 24, 1979, wherein you request an opinion relative to erroneous collection of special assessments and possible refund thereof. You submit the following factual situation and questions in your letter:

The City of Mayville has a special assessment which runs for a term of ten years which is being spread on the residents of the City of Mayville for a sewer cleaning charge. This special assessment expired in 1977. However, the City Auditor inadvertently spread the assessment again for the year 1978.

This error was not noticed until after the assessments had been spread and the County Auditor had sent out the tax statements. Therefore, we have a circumstance where residents within the City of Mayville are paying an extra \$9 up to \$350 for special assessments that should have not been spread.

The questions that the City Council of Mayville would like to raise are:

1. Is the City Council of the City of Mayville by law required to refund these special assessment overpayments to each of the individual taxpayers? Or can such overpayment be deposited in the general fund for the benefit of the entire city. The mechanics and economical cost of refunding the overpayment could be considerable when compared to the refund amount which would be of benefit to the individual taxpayer.
2. If the special assessment overpayment has to be refunded by law, what procedure is followed and when does such refund have to be made? Specifically, some taxpayers do not pay their 1978 taxes until two or three years hence. Therefore, is it incumbent upon the City of Mayville to refund the special assessment overpayment immediately or do they wait until payment for the taxes have been received?
3. Is it incumbent upon the City Council of the City of Mayville to notify its tax paying residents of this error in the spreading of special assessments, or can they ignore such error and deposit the moneys according to a refunding procedure or in the general fund of the City?

Clearly your inquiry involves a situation where a mistake has

occurred. We would note that Section 40-26-02 of the North Dakota Century Code makes specific provisions for correction of such errors or mistakes. The same provides as follows:

40-26-02. CORRECTING ERRORS, MISTAKES, AND DEFICIENCIES IN SPECIAL ASSESSMENTS. - If errors or mistakes occur in making an assessment in respect to the total cost of the improvement or otherwise, or if there was a deficiency in any assessment, the governing body shall cause additional assessments to be made in the manner provided in section 40-26-03 to supply such deficiencies or correct such errors or mistakes. The total of all special assessments for an improvement shall not exceed the benefits to the property derived from such improvement. An additional assessment shall be a lien upon the lots and lands on which it is levied, shall be payable in the same manner and in the same installments, shall draw interest at the same rate, and shall be enforced through the same procedure as the original assessment. (Emphasis supplied)

While Section 40-26-03, as does much of Chapter 40-26, refers to court action, we do not believe that court action must be instituted in order for the city to make additional assessments or to correct errors or deficiencies in the original assessments. We note that Section 40-26-02 had its origin in Section 3712 of the Compiled Laws of 1913 and has not been amended since that time except for the adoption of the 1943 North Dakota Revised Code. The 1913 provision did not contain a specific reference to what is now Section 40-26-03 of the N.D.C.C. (Section 3713 of the Compiled Laws). However, the 1943 Revisor's Notes indicates the section was "revised for clarity without change in meaning." Thus we construe Section 40-26-02 as permitting an additional assessment, if errors or deficiencies exist, or the correction of other errors or mistakes, without the necessity of court action as specified in Section 40-26-03 of the North Dakota Century Code. In this connection, see *Kvello v. City of Lisbon*, 164 N.W. 305 (N.D. 1917) cited in the annotations to Section 40-26-03.

Clearly the statutes provide that the extension of special assessments on the tax lists shall be kept in the respective funds. We would note the provisions of Section 40-24-14 of the North Dakota Century Code, providing as follows:

40-24-14. EXTENSION OF SPECIAL ASSESSMENTS ON TAX LISTS - COLLECTION - PAYMENT OVER TO MUNICIPALITY. - The county auditor shall extend the special assessments upon the tax lists of the municipality for the current year, and such assessments with interest and penalties shall be collected as general taxes are collected and paid over to the treasurer of the municipality and shall be placed by him in the respective funds for which they were collected. (Emphasis Supplied)

Likewise, we note that Section 40-24-18 of the North Dakota Century Code, as amended, makes provision that such special improvement moneys shall be kept separate. The same also provides that remaining moneys may be transferred into the general fund of the municipality. The same provides as follows:

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 city auditor 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. (Emphasis Supplied)

With regard to the instant situation which you relate in your letter, however, we feel a distinction exists in that the amounts remaining in the special funds are not surplus as a result of the original assessment or the estimates of cost upon which the special assessments are based, but rather as the result of a clear mistake in asserting and entering upon tax statements amounts represented as due pursuant to the original assessments. It would appear clear to us that such assessments are void by reason of the mistake and by reason of the fact that the same are beyond and outside of the authority originally acquired to make such assessments.

With these principles in mind, we would respond to your specific questions as follows:

With regard to your first question, we believe that the city must refund the special assessment overpayments to each of the individual taxpayers. We do not believe that it would be proper or authorized by law to transfer such amounts to the general fund for the reason that the same are not the result of proper collection and are therefore not "surplus" to the particular project for which the assessment was originally authorized. The payments to which your letter refers are simply erroneously collected taxes and as such, we do not believe they are subjected to the provisions permitting the transfer of moneys remaining in special funds to be transferred to the general fund.

With regard to your second question, it would appear to us that a simple refund be made to those persons who have paid such overpayments and the immediate cessation of collection of such overpayments from those individuals that have not yet paid their taxes. While we cannot prescribe the exact mechanics of how the city prefers to handle the matter, it would appear that it would be extremely inequitable to those taxpayers that promptly paid their taxes and overpayments, if such overpayments were to be held by the city until such time at the last of such overpayments were collected from those who may not pay their taxes for two or three years hence.

In view of our response to your first two questions, it would appear that a specific response to your third question would not be necessary. We believe it is incumbent upon the city to make the

refunds to those persons that have made their payments pursuant to such erroneously asserted overcharge, and to cease making collections of such overcharges to those that have not yet paid the same.

We trust that the foregoing general observations, comments and expressions will adequately set forth our opinion upon the matters submitted.

Sincerely,

ALLEN I. OLSON

Attorney General