

Date Issued: August 1, 1985 (AGO 85-27)

Requested by: Honorable Philip Dolyniuk  
Mayor, City of Belfield

- QUESTION PRESENTED -

Whether money in a special assessment fund for a street improvement district may be either transferred to the city's general fund or refunded to property owners in the special assessment district if a surplus exists after a city has retired refunding improvement bonds for a street improvement district.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that money in a special assessment fund for a street improvement district may be either transferred to the city's general fund or refunded to property owners in the special assessment district if a surplus exists after a city has retired refunding improvement bonds for a street improvement district.

- ANALYSIS -

N.D.C.C. chapter 40-27 governs refunding improvement bonds. N.D.C.C. section 40-27-05 provides:

40-27-05. SPECIAL FUND FOR PAYMENT OF BONDS ISSUED FOR PURCHASE OF SPECIAL ASSESSMENT WARRANTS - TAX LEVY. The governing body of a municipality which issues bonds for the purchase of special assessment warrants shall create a special fund for the payment of the principal and interest of such bonds as they become due and shall credit to such a fund all special assessments collected for the payment of the special assessment warrants purchased. The governing body shall make a general tax levy annually on all the property in the municipality which, together with the special assessments collected, shall be sufficient to pay the principal and interest of the bonds when they become due. The levy imposed shall not be subject to any of the tax levy limitations imposed by section 57-15-08 or acts amendatory thereof. If any money remains in the special fund after the payment of the principal of all the bonds and the interest thereon, such balance may be transferred to the general fund. (Emphasis supplied).

Thus, in cases involving refunding improvement bonds, a city may transfer excess special assessment fund moneys to the general fund of the municipality. However, because the authority to transfer the moneys is discretionary and not mandatory, the question remains whether such moneys may be refunded to property owners within the special assessment district.

A leading commentator on municipal corporations has stated the following:

Landowners paying special assessments to a fund to pay bonds

issued to cover the actual cost and expenses of the improvement in excess of the sum required, due to miscalculation or mistake, are, in equity, justly entitled to have such excess refunded to them, each landowner to receive the excess paid by him, that is, the excess should be prorated among the property owners, as it may appear that each has paid. Such money, when collected from the several property owners becomes a trust fund, to be used only for the purpose specified, and when the bond and interest and other legal expenses chargeable against such fund have been satisfied, the balance belongs to the landowner. Each lot or parcel of land in the improvement district must bear its equal share in the total cost and no more.

14 E. McQuillin, Municipal Corporations section 38.336 (Third Ed. 1970 and Supp. 1984).

In *Bray v. Department of State* 341 N.W.2d. 92 (Mich. 1983) (Levin, J., dissenting) (decided on other grounds), the court quoted the preceding portion of McQuillin, supra and stated that "in situations involving land improvements, when the purpose of a special assessment has been met and money remains in the special assessment fund, the excess belongs to the persons who have contributed to the fund in proportion to the amount of their original contribution." 341 N.W.2d. at 105.

In *Chicago, I. and P. Ry. Co. v. Excise Board of Canadian County* 25 P.2d. 70 (Okla. 1933), a taxpayer asserted that a surplus accumulated from penalties and interest upon special assessments in a street paving improvement district could be used to reduce the tax levy for the city's general fund. The court rejected the taxpayer's claim and held that, by statute, the money had to be "used for the purpose of repairing and maintaining any improvement for which assessments had been levied." 25 P.2d. at 70. The court quoted McQuillin, supra and stated:

A fund created by a city in collecting interest and penalties upon delinquent special assessments in a street improvement district, in excess of what is necessary to pay the bonds for which the assessments were levied, in the absence of a statute or ordinance directing the disposition of the same, is not the property of the city, but such a fund is a trust fund held by the city for the landowners in the assessment district.

*Id.* at 72.

In *Spitzer v. City of El Reno* 138 P.797 (Okla. 1913), the city contracted with a paving company for construction of certain street improvements. When the work was completed, the paving company asserted that it was entitled to "all the bonds and interest remaining in the hands of the city." *Id.* at 798. The court stated that "in equity these sums should be prorated among the property owners of the district. They belong to them and to no one else." *Id.* at 803.

Thus, absent a statute mandating that excess special assessment fund money be transferred to a city's general fund, it is my opinion that

a city may either transfer such money to the city's general fund or refund the money to property owners in the special assessment district if a surplus exists after a city has retired refunding improvement bonds for a street improvement district.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-02. It governs the actions of public officials until the question presented is decided by the courts.

NICHOLAS J. SPAETH  
Attorney General

Assisted by: Tobyn J. Anderson  
Assistant Attorney General