

Date Issued: May 21, 1987 (AGO 87-07)

Requested by: Albert J. Hardy
Belfield City Attorney

- QUESTION PRESENTED -

I.

Whether the date of issuance of two separate refunding improvement bond issues creates a prior claim on behalf of the earlier issued bonds to money in a deficiency fund.

II.

Whether the governing body of a city is required to levy a tax upon all taxable property in the city to pay principal and interest due on special assessment warrants, when the special assessments levied and collected are insufficient to pay principal and interest then due.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the date of issuance of two separate refunding improvement bonds does not create a prior claim on behalf of the earlier issue bonds to money in a deficiency fund.

II.

It is my further opinion that the governing body of a city is required to levy a tax upon all taxable property in the city to pay principal and interest due on the special assessment warrants, when the special assessments levied and collected are insufficient to pay principal and interest then due.

- ANALYSES -

I.

It appears from the assumptions contained in the questions presented there is uncertainty regarding the nature of the lien granted in N.D.C.C. section 40-24-01. The question assumes that the issuance of debt creates a lien under N.D.C.C. section 40-24-01, and that lien runs to the direct benefit of the holders of refunding improvement bonds.

N.D.C.C. section 40-24-01 provides as follows:

40-24-01. LIEN OF SPECIAL ASSESSMENT - ATTACHES ON APPROVAL OF ASSESSMENT LIST - SUBJECT ONLY TO GENERAL TAX LIEN. A special assessment, together with all interest and penalties which accrue thereon, shall be and remain a lien upon the property upon which the assessment is levied from the time the assessment list is approved by the governing body until the assessment is paid fully. Such lien shall have precedence over all other liens except general tax liens and shall not be

divested by any judicial sale. No mistake in the description of the property covered by the special assessment lien or in the name of the owner of such property shall defeat the lien if the assessed property can be identified by the description in the assessment list.

The lien created by a properly levied special assessment runs to the benefit of the city and is established at the time an assessment list "is approved by the governing body" under N.D.C.C section 40-24-01. It is intended as the enforcement mechanism for the city's collection of special assessments. It is not a lien which is created upon the issuance of refunding improvement bonds. Rather, the collected special assessments paid on properly issued warrants are pledged for the direct benefit of holders of refunding improvement bonds issued pursuant to N.D.C.C. chapter 40-27.

The security for the holders of refunding improvement bonds is established in N.D.C.C. section 40-27-12. That statute provides as follows:

40-27-12. RIGHTS OF WARRANT HOLDERS OR BONDHOLDERS TO BE PRESERVED - TAX LEVY FOR DEFICIENCY - WHEN LEVIED. A municipality issuing refunding special assessment warrants or bonds shall preserve and enforce, for the security of the refunding warrants or bonds, all of the rights and duties which constituted security for the refunded warrants or bonds. At the date of the maturity of the last maturing warrant or bond of the original issue, the governing body shall levy a tax for the payments of any deficiency in the special improvement fund against which the refunded special assessment warrants or bonds were drawn. Such tax may be made payable in the years and in the amounts required to pay the principal of and interest on the refunding warrants or bonds as the same becomes due. (Emphasis supplied).

The municipality, in enforcing the rights and duties which "constituted security for the refunded warrants or bonds," would be obligated to levy a deficiency levy pursuant to N.D.C.C. section 40-26-08. That statute provides as follows:

40-26-08. MUNICIPALITY LIABLE GENERALLY FOR DEFICIENCIES IN SPECIAL IMPROVEMENT FUND. Whenever all special assessments and all utility revenues and taxes, if any, appropriated and theretofore collected for a special improvement, made under authority of any law authorizing the payment of the cost thereof in whole or in part from special assessments, are insufficient to pay principal or interest then due on the special improvement warrants issued against such improvement, the governing body shall levy a tax upon all of the taxable property in the municipality for the payment of such deficiency. If at any time a deficiency is likely to occur within one year in such special improvement fund for the payment of principal and interest due on such warrants, the governing body, in its discretion, may levy a general tax upon all the taxable property in the municipality for the payment of such deficiency. In case a balance remains unexpended in such special improvement fund after the payment of all warrants

drawn thereon with interest, it shall be paid over or transferred to the general fund of the municipality. (Emphasis supplied).

Therefore, the security granted to holders of refunding improvement bonds is the enforcement of all obligations for the original refunded debt, which in this instance were definitive warrants, including the deficiency levy granted in N.D.C.C. section 40-26-08. The definitive warrants are held as an asset of funds created under N.D.C.C. section 40-27-11. That statute provides as follows:

40-27-11. SPECIAL FUND CREATED FOR PAYMENT OF REFUNDING SPECIAL ASSESSMENT WARRANTS OR BONDS - PROCEDURE ON PAYING REFUNDED WARRANTS OR BONDS. A special fund or special funds shall be created in accordance with this section for the payment of refunding special assessment warrants or bonds. Such special fund may be created as a single consolidated fund for warrants or bonds issued to refund special assessment warrants or bonds of more than one district, or a separate special fund may be created for warrants or bonds issued to refund special assessment warrants or bonds of each district. In either case, the refunded warrants or bonds shall not be canceled but shall be retained by the municipality as an asset of the fund from which the refunding warrants or bonds are payable. The special fund or funds from which the refunded warrants or bonds are payable shall be continued, and payments therefrom shall be made on the warrants or bonds drawn thereon, in the same manner as though none of such warrants or bonds had been refunded. All payments made on the principal and on the interest of refunded warrants or bonds shall be credited to the fund from which the appropriate refunding warrants or bonds are payable and shall be applied in payment of the principal and on the interest on the refunding warrants or bonds in the manner prescribed by the resolution authorizing the issuance of such refunding warrants or bonds. To the extent refunding warrants or bonds are issued to refund the principal or interest, or both, of warrants or bonds, due or to become due within one year, for which a deficiency exists or is likely to exist in the fund or funds against which such outstanding warrants or bonds are drawn due to nonpayment or anticipated nonpayment of special assessments, any payments of such delinquent special assessments and such amounts of accrued interest and penalty thereon as necessary shall be set aside for the payment or redemption of the refunding warrants or bonds issued to fund such delinquencies. (Emphasis supplied).

Following the final maturity of the original refunded warrants held as an asset within the funds of the refunding improvement bonds an additional levy of a general property tax pursuant to N.D.C.C. section 40-27-12 must be made in the event that payments of special assessments on the refunded special assessment warrants or bonds were insufficient to meet all payments of principal and interest payable on the refunding improvement bonds following the original refunded warrants' last date of maturity.

A properly established deficiency tax properly levied under N.D.C.C. section 40-26-08 must be either mandatory or descretionary when

special assessments levied and collected are insufficient to "pay principal or interest then due" or for a deficiency which is deemed "likely to occur within one year." In order to know what "the principal or interest then due" actually is, or that a deficiency is "likely to occur," the governing body must know the name of the issue of refunding improvement bonds for which the special assessments on pledged warrants have been collected in an amount which is less than the actual special assessments which were levied. The revenues raised by a deficiency levy under N.D.C.C. section 40-26-08 and placed in a specific fund under the operation of N.D.C.C. section 40-27-11 are by implementation directed to the payment of principal and interest on a specifically named refunding improvement bond.

If the fund was not created under N.D.C.C. section 40-26-08, and was only meant as a label for a budgetary line item of the city, then the payment of principal and interest would be in the manner established by the city which could include a pro rata division of proceeds in the deficiency fund. The payment of debt service between two distinct bond issues could be determined on a pro rata basis from one deficiency fund only in the case of the nonstatutory budgetary deficiency fund previously mentioned.

However, under the existing documents, each of the separate refunding improvement bond issues has pledged to its respective repayment funds established pursuant to N.D.C.C. section 40-27-11 the proceeds from special assessments collected on the respective warrants held in those funds and the enforcement of a deficiency levy for the respective special assessment warrants pursuant to N.D.C.C. section 40-26-08. The specific resolutions authorizing the issuance of the Refunding Improvement Bonds of 1983, and the Refunding Improvement Bonds of 1984 Series A and Series B by the city of Belfield all established that when moneys available in the funds established under N.D.C.C. section 40-27-11 are insufficient to meet both principal and interest then due on the refunding improvement bonds, the available money shall be first used to pay the interest then accrued on all such refunding bonds outstanding and the balance, if any, shall be applied in payment of the principal of the refunding improvement bonds.

If, however, the deficiency fund was one established for general needs and was a levy of a property tax for contingencies under the city's general budgetary process, then it would be a discretionary act of the city to decide which fund is to receive available moneys for the payment of debt service.

Therefore, the date of issuance of two separate refunding improvement bonds does not create a prior claim on behalf of the earlier issued bonds to money in a deficiency fund, if the fund is established by the city pursuant to N.D.C.C. section 40-24-08.

II.

As stated previously, N.D.C.C. section 40-26-08 requires the municipality's governing body to levy a tax upon all of the taxable property in the municipality for the payment of a deficiency created when revenues and other moneys appropriated and collected under the

authority of any law authorizing the payment of the cost of a debt instrument in whole or in part are insufficient to pay principal or interest then due on the special improvement warrants issued for that improvement. The absolute obligation of the city to impose such a levy, the constitutionality of such a levy, and the ability of courts through mandamus to require the levy of such taxes has been approved. Specifically, the North Dakota Supreme Court has stated that when a deficiency in the fund created to pay debt service on a special assessment warrant did occur "it became the liability of the city, definite in amount." Marks v. City of Mandan, 296 N.W. 39, 49 (N.D. 1941). See also Stutsman v. Arthur, 16 N.W. 2d. 449 (N.D. 1944).

Additionally, if the deficiency levies implemented under N.D.C.C. section 40-26-08 and enforcement of other "rights and duties which constituted security for the refunded warrants or bonds" are insufficient following the last maturity of the refunded special assessment warrant or bond, the "governing body shall levy a tax for the payment of any deficiency in the special improvement fund against which the refunding and special assessment warrants or bonds were drawn." N.D.C.C. section 40-27-12.

Therefore, the city is obligated pursuant to N.D.C.C. section 40-24-08 to put in place a deficiency tax levy against all of the taxable property in the municipality in an amount sufficient for the payment of principal and interest then due on special assessment warrants pledged in the special funds established by N.D.C.C. section 40-27-11 when the collections from properly levied special assessments are insufficient to pay the principal and interest then due on the pledged special assessment warrants.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-01. It governs the actions of public officials until such time as the questions are decided by the courts.

NICHOLAS J. SPAETH
Attorney General

Assisted by: Gary Bauer
Assistant Attorney General