

**OPINION**  
**56-27**

December 18, 1956           (OPINION)

CITIES

RE: Special Assessment - Curb and Gutter Construction

This is in reply to your letter of November 29, 1956 in re curb and gutter assessments.

You inform us that in June of 1955 the City Council of your municipality entered into an agreement with the State of North Dakota, acting through its highway department, for the construction of Highway Number 5 through the city limits of your city; the agreement in essence being on the basis of a cost sharing plan, the State to pay seventy five percent of the cost of pavement, the city to pay twenty five percent of the cost of pavement and one hundred percent of the cost of curb and gutter. The agreement was solidified insofar as the city was concerned and construction completed during the summer of 1955.

The city did not have at that time and still does not have to present date an ordinance or resolution as contemplated by section 40-3101 N.D.R.C. of 1943. The original cost of the curbing was paid from what you refer to as the contingent expenses provided by section 40-4005 of the 1953 Supplement to the N.D.R.C. of 1943.

Nothing was done to recover cost of curb and gutter from the adjoining property owners until this fall, when proceedings in accordance with chapter 40-22 N.D.R.C. 1943 were instituted. As approximately seventy percent of the affected property owners protested, such proceedings were dropped in accordance with section 40-2218 N.D.R.C. 1943.

Your question is stated as: "\* \* can the City at this stage, after the construction is completed, the expenditure made therefor, proceed to collect the cost of the curb and gutter from the property owners under the provisions of chapter 40-31, by passing a suitable ordinance or resolution under that law.

We find the general statement in McQuillin, Municipal Corporations, Vol. 5, page 749, section 2173 that:

"If the improvement has been made without any intention of meeting the cost by local assessment, the municipal corporation cannot thereafter reimburse itself for the cost thereof by levying an assessment therefor, but if the improvement proceedings are properly had with a view of paying for the same by local assessment, and the improvement is made and paid for by the municipality, the municipality may reimburse itself by imposing assessments therefor."

In view of the specific provisions of sections 40-3107 and 40-2206 of the N.D.R.C. of 1943, it seems doubtful that it could be suggested

that the original improvement was intended to be financed by any method other than special assessments against the benefited property, either pursuant to said chapter 40-31 or said chapter 40-22, N.D.R.C. 1943.

Chapter 40-31 does not require resolution of necessity and does not make specific provision for the hearing of protests of the owners of the benefited property, excepting the provision for adjustments of assessments as a hearing to be held for such purpose. The basic purpose of the initiating resolution would appear to be the prescribing of standards for the installation of curbing rather than a determination of the method or proportion of the assessment. While we have not examined the highway department contract concerned, it would be our thought that the specifications prescribed pursuant thereto would accomplish substantially the same result as such an initiating ordinance. It is therefore apparent that the persons to be assessed are not injured by the order in which the prescribed procedures specified by chapter 40-31 are completed.

The decisions of the Supreme Court of our State considering the question of re-assessment or new assessment where there have been errors in preliminary proceedings for the most part involve special assessments under statutory proceedings of the type contemplated by chapter 40-22 N.D.R.C. 1943 rather than the type of proceedings specified by chapter 40-31 N.D.R.C. 1943. (See: for example, *Budge v. City of Grand Forks*, 1 N.D. 310, *McKenzie v. Mandan*, 35 N.D. 107). As you point out the distinction between such proceedings is clearly recognized and to a certain extent explained by the decision of *Deutscher v. City of Jamestown*, 237 N.W. 814.

In conclusion we might therefore state that it is the opinion of this office that your city may legally proceed to assess the benefited property for the cost of curbing pursuant to chapter 40-31 N.D.R.C. in the circumstances which you describe. In view of the order in which the proceedings are carried out and the extent to which chapter 40-31 N.D.R.C. 1943 is used generally, there may be some difficulty in negotiating curbing assessment warrants, however, this we believe should be taken up with the officers of the institutions to which you intend to negotiate same.

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