

**OPINION
60-188**

May 23, 1960 (OPINION)

MUNICIPAL GOVERNMENT

RE: Improvements by Special Assessment Method - Curbs and Gutters

This is in reply to your opinion request of 13 May, 1960.

You state that the City of Kenmare intends to pave certain streets and avenues and that, in compliance with a recommendation of engineers, there will be a reduction of street width which will, of course, necessitate the building of new curbs and gutters. The streets, now approximately fifty feet wide, will be narrowed to a width of forty feet.

You inform us that the "improvement will be by the special assessment method as set forth in Chapter 40-22 of the North Dakota Revised Code of 1943," as amended.

You note that section 223 of the Revised Ordinances of the City of Kenmare provides that, with one exception, the streets will be fifty-one feet wide, and that,

"Whenever any property owner has curbed or curbed and boulevarded along his property, and the city council by reason of petition or otherwise deem it necessary or expedient to erect new curbing along said property, then the city shall replace said particular property at its own expense."

You ask two questions:

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1. "Does the City of Kenmare, by its City Council, pursuant to the advice of licensed engineer, have the authority to narrow the streets from 51 to 40 feet?"
2. "If the present curb and gutter is removed and new curb and gutter is constructed in order to make a 40 foot street, must the City of Kenmare pay for the construction of the new curb and gutter?"

You comment it is your opinion that the first question is to be answered in the affirmative, but that the answer to the second should be in the negative in that the portion of the ordinance providing for city payment of curbing costs is invalid for the reason that it conflicts with section 185 of the Constitution of North Dakota.

As to the first question: We concur with your opinion that it is within the power of the governing body of the city to reduce the street width. Section 40-3101, N.D.R.C. of 1943, provides:

"GOVERNING BODY TO PRESCRIBE PLANS AND SPECIFICATIONS FOR

CURBING BY ORDINANCE OR RESOLUTION. The governing body of a city, by resolution or ordinance, may:

1. Prescribe the plans and specifications for the curbing to be used in the city;
2. Establish the widths between the same in different locations; and

. . . .

Of course, the existing ordinance pertaining to street width would have to be appropriately amended.

As to the second question: Here too we concur with your opinion that the portion of the ordinance requiring the city to replace curbing at its own expense is invalid. We, however, do not choose to found its invalidity on the proposition that it conflicts with section 185 of the Constitution of North Dakota.

It is axiomatic that a municipality has only those powers which are delegated to it by the legislature. The legislature has provided municipalities with two statutory approaches to the construction and repair of curbing; Chapters 40-22 and 40-æ1, N.D.R.C. 1943, as amended. The latter chapter pertains specifically and solely to the matter of the construction of curbs, while the former, though it does refer to curb construction, is concerned with improvements the cost of which are met in whole or in part by the special assessment method.

It is the opinion of this office, for reasons hereinafter set out, that the cost of curb construction cannot be absorbed, in whole or in part, by the city, but that such cost must be met wholly by special assessment whether the city proceeds under chapter 40-22 or 40-31.

Assuming that chapter 40-31 were nonexistent, the city, under chapter 40-22, could pay for by general taxation no more than one-fifth of the cost of any improvement financed by the levying of special assessments. This restriction upon the expenditure of funds raised by general taxation is imposed by section 40-2410, 1957 Supplement to N.D.R.C. of 1943, which provides, in part, that:

"ONE-FIFTH OF COST OF IMPROVEMENT MAY BE PAID BY GENERAL ASSESSMENT WITHIN CONSTITUTIONAL DEBT LIMIT. Any municipality, at the option of its governing body, may provide for the payment by general taxation of all the taxable property in the municipality of not more than one-fifth of the cost of any improvement financed by the levying of special assessment other than the opening and widening of streets. ."

Consequently, assuming chapter 40-22 constituted the sole statutory approach to curb construction, the city could pay for no more than one fifth of the cost of curbing. And, therefore, in that curb improvement is not a revenue producing improvement, the remaining four-fifths would have to be met by special assessments.

But chapter 40-31 is very much in existence, and, as above noted, is

concerned solely and specifically with the matter of curb construction. Its provisions and those of 40-22 pertaining to curbs being in pari materia, said provisions must be construed in the light of one another. And the provisions of chapter 40-31 being particular or specific while those of 40-22 are general, the former necessarily control the latter in those areas where there is seeming conflict.

Section 40-3107 of chapter 40-31, N.D.R.C. of 1943, as amended, provides:

"CURBING NOT TO BE PAID FOR BY GENERAL TAXATION; EXCEPTION. Except as otherwise provided in this chapter, a city shall not be liable generally on any contract for the building or repairing of curbing and shall not be required to pay funds raised by general taxation upon any such contract." (Emphasis added)

Section 40-3102 provides:

"The curbing in the city shall be built, repaired, or rebuilt at the expense of the lot or parcel of land fronting on or adjoining such curbing. . . ."

The chapter (40-31) contains no exception to its mandate that curb construction costs are to be paid by the owners of the property curbed. Said chapter being particular or specific, its provisions prevail over those of 40-22, as far as curb construction costs are concerned, and thus prohibit the payment from general tax funds of even one-fifth of the cost of curbing.

In summation: It is the opinion of this office that it is within the power of the governing body of the city to reduce street width, and that the cost of curb construction cannot be absorbed, in whole or in part, by the city.

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Attorney General