

N.D.A.G. Letter to Ingstad (Nov. 5, 1985)

November 5, 1985

Honorable Jack W. Ingstad
State Senator
District 17 & 18
2501 DeMers Avenue
P.O. Box 5068
Grand Forks, ND 58206-5068

Dear Senator Ingstad:

Thank you for your letter of October 11, 1985, submitting to this office five questions for clarification. The five questions you have posed deal with special assessments as part of an agreement between the city and the highway department or the county for street, sewer, or water main improvements.

Before responding to your specific questions, I believe it would be helpful to review North Dakota law as found at N.D.C.C. § 40-22-06. This particular statute authorizes a city to enter into an agreement with either the State Highway Department or with the Board of County Commissioners of the county in which the city is located, or both, for the improvement of streets, sewers, and water mains. If any portion of the cost of such a project is to be paid by the levy of special assessments, this statute requires the city governing body to declare the necessity of the improvement by resolution. In the resolution of necessity, the city shall state the approximate amount or fraction of the cost which the city will be obligated to pay under the cooperating agreement. Furthermore, the statute requires the resolution to state the amount proposed to be paid by the city by the levy of special assessments upon property benefited by the improvement.

The statute continues by stating that protests may be filed against such an improvement project. The statute indicates that, if under the terms of the resolution of necessity the portion of the cost of the project to be assessed upon benefited property does not exceed 25 percent of the total cost to be paid by the cooperating entities, written protests by the owners of 75 percent of the property liable to be assessed for the improvement shall be a bar to further proceedings. Otherwise, the usual majority rule of N.D.C.C. § 40-22-18 would apply in handling the protests which may be received to the project.

Your first question asks the effect of the presence of federal funds upon the 25 percent limitation provided for in this statute with respect to the special assessment contribution of the city. The first point to be made is that there is no 25 percent limitation on the percentage of the total costs to be paid by the special assessment. The 25 percent figure refers exclusively to the manner in which protests shall be handled which may be received against the project following the publication of the resolution of necessity. Where the amount to be paid through the levy of special assessments does not exceed 25 percent of

the total cost of the project, written protests by 75 percent of the owners of property to be assessed will act to bar further proceedings. Where the portion of the cost of the project to be paid by special assessment exceeds 25 percent of the total cost, a majority of the owners who protest shall act to bar further proceedings.

As to the question itself, with respect to the effect of the presence of federal funds, we fail to see where the presence of such funds enters into the calculation. In determining the total costs paid on the project, one simply adds together the costs paid by the highway department and/or the county commissioners and the city. The fact that one or more of the entities are administering federal funds does not change the result that money is indeed being paid.

Your second question concerns the effect of the resolution of necessity. N.D.C.C. § 40-22-06 specifically requires said resolution to state the amount which is proposed to be paid by the levy of special assessments upon benefited property. As this office has previously stated in a letter dated September 12, 1963, to City Attorney Lowell Tjon, the language of this statute strongly implies that the expenditure by the city may not exceed the amount set forth in the resolution. The fear expressed in the 1963 letter was that to permit a city to exceed the levy proposed in the resolution of necessity would act to mislead property owners and affect their decisions as to whether or not to file protests. Thus, the conclusion to be drawn is that the amount to be paid by the levy of special assessments as provided for in the resolution of necessity is a maximum amount and may not be exceeded. Where conditions exist that prevent the adherence to the amount provided for in the resolution of necessity, as in the factual situation described in the 1963 letter, the procedure will have to begin anew.

Your third question asks whether the city is under any obligation to determine those costs which may be paid for by federal funds and those costs which may be excluded. The statute clearly does not require the city to inquire as to restrictions on those costs which will and will not be paid for by the federal government. Naturally, if these facts are important in arriving at an accurate amount for purposes of the resolution of necessity, the city would be well advised to so inform itself.

Your fourth question asks whether the levy of special assessments provided for in the statute may be increased beyond the 25 percent limitation. As indicated earlier, there is no 25 percent limitation upon the levy of special assessments provided for in this statute. The 25 percent rule refers solely to the manner in which protests shall be handled which may be received with respect to the project in question.

Your fifth and final question asks whether the assessments provided for in the resolution of necessity may be exceeded. As indicated previously, the amount to be levied as provided for in the resolution of necessity controls as it is specifically required by statute and it places the property owners on notice as to the intent of the city. The amount to be levied may not be exceeded unless the city chooses to abandon the current proceeding and to begin a new proceeding with new figures and a new resolution of necessity.

A copy of the 1963 letter is enclosed for your review.

Sincerely,

Nicholas J. Spaeth

cv

Enclosure