

N.D.A.G. Letter to Olson (Jan. 7, 1992)

January 7, 1992

Mr. Richard W. Olson
Attorney at Law
P.O. Box 787
Grand Forks, ND 58206-0787

Dear Mr. Olson:

Thank you for your December 4, 1991, letter regarding the city's ability to assess attorneys fees in successful attempts to collect delinquent accounts on sewer maintenance and garbage collection.

"The traditional 'American Rule' is that attorney fees are not awardable to the winning party unless statutorily or contractually authorized; however exceptions exist in that an award may be made to [the] successful party if the opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons . . ." BLACK'S LAW DICTIONARY 75 (5th ed. 1979). In regard to municipal corporations in particular, "the allowance of attorney's fees and costs in actions and proceedings to enforce and collect an assessment for public improvements is dependent on statute or charter." 14 McQuillin, Municipal Corporations § 38.326 (3rd ed. 1987).

There is no North Dakota statute which specifically allows a city to be awarded attorneys fees attributable to the costs of collection of delinquent accounts. In regard to sewage and garbage disposal, North Dakota law states, "[i]f the established service charge is not paid when due, such sum may be recovered by the municipality. . . in an action at law, or such sum may be assessed against the premises served and collected and returned in the same manner as other county and municipal taxes are assessed, certified, collected, and returned." N.D.C.C. § 40-34-05. In addition, when a municipality constructs a sewer improvement by special assessment, "[t]he governing body of the municipality shall provide for the . . . collection of service charges for the services furnished by such improvement and the utility system of which it forms a part . . ." N.D.C.C. § 40-22-16. North Dakota law also states that if a bill for garbage collection is not paid when due, "the amount thereof may be assessed against the premises on which such work is done, or for which the service is rendered, and collected and returned in the same manner as other municipal taxes are assessed, certified, collected, and returned. This section shall not be construed to limit or affect in any manner any methods which now or in the future may be used for the collection of costs incurred by the municipality for the purposes set forth in this section, but the remedies provided for herein shall be in addition to such methods." N.D.C.C. § 40-05-01.1.

A North Dakota law does state that "[a]ny provision contained in any . . . evidence of debt

[which provides] for the payment of an attorney's fee in case of default in payment or in proceedings had to collect such . . . evidence of debt . . . is against public policy and void." N.D.C.C. § 28-26-04.

Considering the foregoing general rules and various North Dakota statutes, it would appear that the traditional American rule would prevail. Thus, attorneys fees would not be awardable to the winning party in an action to collect delinquent sewer and garbage fees. An argument could be made, however, that if a provision for the award of attorneys fees is included in a city charter, then a city may attempt to recover the cost of attorneys fees attributable to the collection of delinquent accounts. It would, in the end, be up to a court to determine whether to allow or disallow such fees.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

krb