

**OPINION
79-294**

July 11, 1979 (OPINION)

Mr. Duane R. Breitling
Attorney at Law
133 West Main Street
Box 458
West Fargo, North Dakota 58079

Dear Mr. Breitling:

This is in response to your letter dated May 24, 1979, requesting an opinion from this office as to whether or not a drain board may reassess benefits for a legal drain pursuant to section 61-21-44 of the North Dakota Century Code. Your letter begins:

This firm represents the Cass County Drain Board. In that regard, we have received a request from a group of individuals owning property within the assessment district of Cass County Drain No. 52 for a reassessment of benefits pursuant to section 61-21-44 of the North Dakota Century Code. We have reviewed section 61-21-44 of the North Dakota Century Code and find that the same contains certain language which limits the application of the provisions contained therein providing for the reassessment of benefits.

You have included documents used to establish the legal drain. After explaining that bonds were sold to pay for construction of the project, you continue:

Assessments are made against the benefited property on a year-to-year basis in a sum sufficient to pay all costs of interest that must be paid during that year as well as the amount of principal needed to cover the face amount of those bonds which come due in that particular year. To date, a very small reserve has been accumulated in that bond fund due to the prepayment of some assessments. No bonds, however, have been called for redemption or prepayment. We do not anticipate that any bonds will be called for redemption or prepayment prior to the last year or two of the bond issue.

In light of certain language contained in section 61-21-44 of the North Dakota Century Code, we have a substantial concern as to whether or not a reassessment of benefits can occur prior to either the complete payment of the obligation evidenced by the outstanding bonds or the accumulation of a sufficient reserve in the bond fund to pay all outstanding bonds in full, with interest. The particular language we are concerned with is that portion of section 61-21-44 of the North Dakota Century Code which reads as follows:

* * * nor shall any assessment or balance thereof supporting a drainage fund be reduced or impaired by reassessment or otherwise as long as bonds payable out of

such fund remain unpaid and moneys are not available in such fund to pay all such bonds in full, with interest.

We have initially determined and have informed the petitioners requesting a reassessment of benefits for Cass County Drain No. 52 that as long as there are bonds payable out of such fund which remain unpaid, and as long as there are insufficient funds in that bond fund to pay all such bonds in full with interest, a reassessment of benefits would not be permitted under the statute. Our primary reason for so advising the petitioners is due to the fact the language of the statute speaks to both the reduction or impairment by reassessment or otherwise as long as bonds payable out of such fund remain unpaid and moneys are not available in such fund to pay all such bonds in full, with interest.

A request for the reassessment of benefits for a legal drain necessarily carries with it the implication that the petitioners feel that their assessments are too high and are seeking a reduction in assessment. Indeed, many of the petitioners in this case have indicated to me that their reason for seeking the reassessment of benefits is to, hopefully, procure a reduction in their assessment. Given this information, we would appreciate it immensely if you could provide us with an opinion as to whether or not a drain board may reassess benefits by reducing assessments, regardless of whether or not the action taken might impair a drain fund, as long as bonds payable out of such fund remain unpaid and moneys are not available in such fund to pay all such bonds in full, with interest.

It appears that your letter proposes two separate questions. First, you state that you "have initially determined and have informed the petitioners requesting a reassessment of benefits for Cass County Drain No. 52 that as long as there are bonds payable out of such fund which remain unpaid, and as long as there are insufficient funds in that bond fund to pay all such bonds in full with interest, a reassessment of benefits would not be permitted under the statute." Given this fact situation, the first question would appear to be whether any reassessment of benefits is permitted under section 61-21-44 of the North Dakota Century Code.

The second question is succinctly stated in your letter:

Given this information, we would appreciate it immensely if you could provide us with an opinion as to whether or not a drain board may reassess benefits by reducing assessments, regardless of whether or not the action taken might impair a drain fund, as long as bonds payable out of such fund remain unpaid and moneys are not available in such fund to pay all such bonds in full, with interest.

Since these issues have not been addressed by the North Dakota Supreme Court, this opinion must be based on interpretation of section 61-21-44 of the North Dakota Century Code. A close review of section 61-21-44 does not indicate legislative intent that the only type of reassessment of benefits permissible is one which results in

a total reduction of assessments. While a petition for reassessment may carry the implication that the petitioners feel their assessment is too high, it is entirely possible for the appropriate Board to reassess benefits without an overall reduction in the assessment or balance thereof supporting a drainage fund. For example, a reassessment could possibly consist of a combination of increases and decreases which do not result in a total reduction or increase in the overall assessment. Thus, in response to the first question, it is our opinion that section 61-21-44 does not absolutely prohibit any reassessment of benefits, notwithstanding the given situation. Several reasons support this position.

1. Section 61-21-44 provides that "upon petition of any affected landowner . . . the Board shall hold a hearing for the purpose of determining the benefits of such drain to each tract of land affected." While this statute does not mandate any reassessment of benefits, it clearly authorizes, or upon receipt of a petition, requires the appropriate Board to conduct a hearing to determine if a reassessment is warranted. It does not seem likely that the Legislative Assembly would mandate the appropriate Board to hold a hearing, upon receipt of a petition, if that Board was not authorized to make any reassessment if bonds payable out of a drainage fund were unpaid, or if moneys in a drainage fund were not sufficient to pay all bonds in full, with interest.

2. Second, the statute provides that any reassessment of benefits carried out by the appropriate Board shall be in accordance with the provisions of chapter 61-21 governing the original determination of benefits and assessment of costs. Those provisions are set out in sections 61-21-20 through 61-21-23 of the North Dakota Century Code, and contain factors to be used in determining assessments, procedures, and deadlines for review and appeal, and recording of the assessments. Again, the legislative intent indicates the appropriate Board is to seriously consider the matter of reassessments, regardless of the status of the drainage fund.

3. Finally, it would have been a simple matter for the Legislative Assembly to state that if bonds payable out of a drainage fund are unpaid, or if moneys are not available in the drainage fund to pay all bonds in full, with interest, there shall be no reassessment. Indeed, as a practical matter, such a provision would render the statute ineffective, since in many cases there would be no need to reassess benefits if bonds were paid, or if the drainage fund had sufficient moneys to pay the bond in full, with interest.

Thus, in the situation you describe, where the drain board has received a petition, the Drain Board is required to hold a hearing to determine if reassessment of benefits is warranted. Reassessment of benefits is authorized and permissible as long as it does not violate limitations provided in the statute.

This leads directly to the second question presented, which is whether a drain board may reassess benefits, in a manner which would result in a reduction or impairment of assessments or balance thereof supporting a drainage fund, as long as bonds payable out of such fund remain unpaid and moneys are not available in such fund to pay all such bonds in full, with interest. The language of section 61-21-44

of the North Dakota Century Code seems quite clear. It provides two limitations. First, a drain board cannot be forced to reassess benefits more than once every ten years. Second, any assessment or balance thereof supporting a drainage fund cannot be reduced or impaired by reassessment or otherwise as long as bonds payable out of such fund remain unpaid and moneys are not available in such fund to pay all such bond in full, with interest.

In summary, it is our opinion while the Cass County Drain Board is authorized to reassess benefits, it is explicitly prohibited from doing so in a manner that would reduce or impair a drain fund, as long as bonds payable from such fund remain unpaid, and moneys are not available in such fund to pay all bonds in full.

Sincerely,

ALLEN I. OLSON

Attorney General