

LETTER OPINION
94-L-28

February 1, 1994

Mr. Douglas D. Sletten
Garrison City Attorney
PO Box 68
Garrison, ND 58540

Dear Mr. Sletten:

Thank you for letter regarding the proper use by the city of Garrison of a connection fee received from a rural water association.

You indicate that the city of Garrison recently completed work on a new water system including a new intake structure at Lake Sakakawea, a new pipeline from the lake to the city, a new treatment plant, and renovation of the water storage tanks. The total cost was about \$2.5 million and was financed with special assessments to city water users and revenue bonds paid from the sale of the water to city users. You indicate that the city is in its second year of a twelve year pay off of the revenue bonds. After the project was completed, a rural water association was formed by outlying farmers and ranchers who paid for their own pipeline system for distribution, and contracted with the city of Garrison for the city of Garrison to furnish the rural water association with treated water for distribution among its own users. The rural water association bills for, collects, and distributes the water to its own users. The contract calls for a payment from the rural district to the city of a connection fee in the amount of \$232,086.

You ask whether the connection fee must be deposited in the sinking and interest fund to retire the revenue bonds, whether it must be used to reduce present city water bills, or whether it may be used in any way the city sees fit, including putting all or a part of the connection fee in the general fund.

N.D.C.C. ch. 40-33 governs a city's operation of a municipal utility. The city and the rural water

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district presumably entered into the contract pursuant to the following authority:

40-33-13. Municipality may sell surplus electricity or water outside of municipal limits. Whenever the governing body shall deem it advisable, a municipality owning and operating its own electric lighting system or waterworks may enter into contracts with persons, corporations, or limited liability companies maintaining manufacturing plants, residences, or other buildings outside of the municipal limits, to furnish such plants or buildings with electricity or water if it can be furnished from the surplus remaining after supplying the needs of the municipality and its inhabitants.

40-33-14. Contract to supply surplus water or electricity outside of municipal limits. If the governing body decides to furnish electricity or water outside the municipal limits, it shall be done by a contract authorized by the governing body and executed on its part by the executive officer and the city auditor and by the customer or customers to be supplied. No such contract shall be authorized or entered into at any rate or price for electricity or water which shall discriminate against the inhabitants of the municipality, or which shall impose any direct tax burden upon the taxable property in the municipality, or in such amount as will interfere with the ability of the municipality to provide adequate electricity or water for its own use and the use of the inhabitants thereof.

I first will address whether the connection fee must be deposited in the sinking and interest fund to retire the revenue bonds. N.D.C.C. ?? 40-33-19 and 40-33-20 provide, in relevant part:

40-33-19. Agreements authorized - Special rates and charges. In and by such resolutions and contract [for the purchase and installation of a water treatment plant] the city may bind itself to establish and maintain special rates and charges for the service of said plant, over and above its regular water rates, sufficient to produce net revenues adequate to make or to establish and maintain a prescribed schedule of such rates and charges, to pay, at an agreed rate or rates, for treatment of all water used by the city and not resold, and to do and perform any other acts or things which, in the discretion of the governing body, are deemed reasonable and appropriate for the construction, operation, and financing of said plant on the most efficient and economical basis, and the city may make covenants and agreements with respect to any and all of the matters stated in section 40-35-13 [regarding revenue bonds].

40-33-20. Indebtedness not general obligation of municipality - Conditional sales authorized. . . . No revenues received from taxes or any other source, other than the revenues derived from said plant as hereinabove provided [in N.D.C.C. ? 40-33-19], shall be pledged for the payment of any contract executed or revenue bonds or certificates issued under the provisions of sections 40-33-17 through 40-33-21 [regarding the purchase and installation of a water treatment plant]. . . .

N.D.C.C. ch. 40-35 governs the issuance of revenue bonds. A city may issue revenue bonds for an undertaking, including "[t]he obtaining of a water supply and the conservation, treatment, distribution, and disposal of water for public and private uses."
N.D.C.C. ? 40-35-02(1). A city has the power to:

[p]ledge to the punctual payment of . . . [revenue] bonds and the interest thereon all or any part of the revenues of such undertaking, including the revenues of improvements, betterments, or extensions thereof which may be constructed or acquired subsequent to the issuance of such bonds as well as the revenues of existing systems, plants, works, instrumentalities and properties of the undertaking so improved, bettered, or extended, or of any part of such undertaking.

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N.D.C.C. ?40-35-03(4). N.D.C.C. ch. 40-35 also provides that "[a]ny ordinance or resolution authorizing the issuance of [revenue] bonds . . . may contain covenants . . . [that] may limit the exercise of powers conferred by . . . chapter [40-35], as to . . . [t]he use and disposition of the revenues of said undertaking." N.D.C.C. ? 40-35-13(2).

Given the foregoing statutory provisions in N.D.C.C. chs. 40-33 and 40-35, to determine whether the connection fee must be deposited in the sinking and interest fund to retire the revenue bonds, the city must review the contracts it entered into in relation to the issuance of the revenue bonds. If revenues dedicated by the contracts to retire the revenue bonds include such moneys as the connection fee, then such fee must be used in the manner described in the contracts.

If the connection fee is not required by the contracts to be used to assist in retiring the revenue bonds, the connection fee may be used by the city as it sees fit. N.D.C.C. ? 40-33-10 provides:

Municipal utilities fund - Contents - Kept separate from other funds - Use and disbursement. All money received by a municipality for the service of any utility owned and operated by the municipality, and all money, receipts, and returns received from any investments of the earnings of such utilities, shall be paid into the treasury of the municipality and kept in a fund known as the municipal utilities fund. . . .

It is my opinion that the connection fee does not constitute "money received . . . for the service of [the] . . . utility", and therefore, the connection fee is not required to be deposited in the municipal utilities fund. The connection fee is money paid to the city by the rural water association for the (1) right to purchase up to ten percent of the output capacity of the water treatment plant and (2) right to space in the water treatment plant required for the rural water association's pumping system. Water Treatment and Delivery Contract, dated June 2, 1992, Recital, Paragraph 3.

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Thus, state law does not require the city to use the connection fee in any specific manner. If the contracts the city entered into in relation to the issuance of the revenue bonds do not require the connection fee to be used to assist in retiring the bonds, it is my opinion that the city may use the connection fee in any way the city sees fit, including putting all or part of the moneys into the general fund, or using it to reduce present city water bills.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

las/vkk