**LETTER OPINION**
**96-L-47**

March 26, 1996

Honorable Dennis J. Schimke
State Representative
P.O. Box 525
Edgeley, ND 58433-0525

Dear Representative Schimke:

Thank you for your letter regarding the procedures a city must follow when making special assessments.

Your first question is whether a special assessment commission must use the square foot formula provided in N.D.C.C. ch. 40-23.1 whenever it determines to use a square foot rate for assessing benefits.

The North Dakota Supreme Court has held:

> As we see it, the only issue that is before us in this appeal is whether a special assessment commission is required to apply the provisions of Chapter 40-23.1, N.D.C.C., when it uses square feet as a factor in determining special benefits. We think not.
>
> In our review the election provided for in Section 40-23-07, N.D.C.C., is with the Special Assessment Commission. If the members of the Special Assessment Commission wish to avoid personally inspecting any and all lots and parcels of land within the improvement district, they apparently may do so by utilizing Chapter 40-23.1, N.D.C.C. If they utilize Chapter 40-23.1, they may make the benefit assessments on the basis of the provisions contained in Chapter 40-23.1 without regard to other factors and without the necessity of making a personal inspection of each of the lots and parcels of land within the district. What the constitutional consequences may be of utilizing such a method, we would not wish to speculate about today. We conclude, however, that with respect to the issue presented by Buehler today, that Chapter 40-23.1 does not prohibit the use of square feet as a factor in determining benefits under Chapter 40-23, N.D.C.C.

Buehler v. City of Minot, 239 N.W.2d 522, 525-526 (N.D. 1976).

It is therefore my opinion that N.D.C.C. ch. 40-23.1 does not prohibit the use of a square foot rate as a factor in determining

benefits under N.D.C.C. ch. 40-23. However, if special assessments are made pursuant to N.D.C.C. ch. 40-23, personal inspection of the lots or parcels of land and other procedures in accordance with N.D.C.C. § 40-23-07 are required. Similarly, if special assessments are made pursuant to N.D.C.C. ch. 40-23.1, all of the procedures in that chapter must be followed.

Your next question is whether failure to follow statutory procedures in either N.D.C.C. ch. 40-23 or N.D.C.C. ch. 40-23.1 renders the assessment invalid. This question arises because of the allegation that a special assessment commission did not personally inspect property, determine what lots were especially benefited, but, rather, based the assessment only on the square feet of each lot within the assessment district. As noted above, the use of square foot determinations as a factor in special assessments under N.D.C.C. ch. 40-23 is not prohibited when all procedures required by that chapter, including personal inspections, are properly performed.

Generally, all presumptions are in favor of the validity of assessments for local improvements and the burden is on persons attacking the validity of assessments to show that they are invalid. Reed v. City of Langdon, 54 N.W.2d 148, 150 (N.D. 1952); Cloverdale Foods Co. v. City of Mandan, 364 N.W.2d 56, 60 (N.D. 1985).

There are three requirements that must be met for a special assessment to conform to N.D.C.C. § 40-23-07. The Supreme Court has described those requirements as:

> The special benefit accruing to each lot or parcel of land from the improvement must be determined. The special assessment levied against each lot must be limited to its just proportion of the total cost of the improvement. The assessment against any lot or parcel of land must not exceed the benefit which has been determined to have accrued thereto.

Northern Pac. R.R. Co. v. City of Grand Forks, 73 N.W.2d 348, 351 (N.D. 1955); Cloverdale Foods Co. v. City of Mandan at 61.

N.D.C.C. ch. 40-26 provides for correction of errors in special assessments, review by the courts, and actions to restrain collection of assessments.

The standard of review the courts exercise is:

> . . . the assessment of benefits made by the special assessment commission and confirmed by the city commission for street, curb, and gutter improvements which involve judgment and discretion will not be reviewed by the court, and it is not the province of the court to substitute its judgment for that of the commission making such decision, but merely to determine whether the commission was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and to determine whether there is substantial evidence to support or justify the determination.

Soo Line R.R. Co. v. City of Wilton, 172 N.W.2d 74, 75 (N.D. 1969); Cloverdale Foods Co. v. City of Mandan at 60.

"[T]he process of quantifying benefits accruing to each lot inevitably rests on the judgment and discretion of the special assessment commission. There simply is no precise formula for quantifying benefits." Haman v. City of Surrey, 418 N.W.2d 605, 608 (N.D. 1988).

In McKenzie v. City of Mandan, 147 N.W. 808 (N.D. 1914), the North Dakota Supreme Court stated, in its syllabus #3 that

> If, in seeking to levy an assessment under section 2801, Rev. Codes 1905, [the predecessor to N.D.C.C. § 40-23-07] the commission neglects to inspect the land and to make, or cause to be made, a complete list of both the benefits and the assessments, or, in computing such assessment, adopts a method which is unwarranted by the statute, the assessment is void, and property owners will not be precluded from bringing an action in a court of equity to enjoin the collection of the same by the mere fact that they did not appear before the board of commissioners or the city council to object to such assessment.

In its opinion in McKenzie, the supreme court noted that the action in question had been brought within the six-month period prescribed by section 2790, R.C. 1905 (the predecessor to N.D.C.C. § 40-26-07). McKenzie v. City of Mandan at 810.

It is therefore my opinion that if protesters to special assessments seek review by the courts pursuant to N.D.C.C. ch. 40-26 and the facts show a failure by the special assessment commission to comply with the statutes under which it exercises its authority (i.e.,

N.D.C.C. chs. 40-23 or 40-23.1), then the court may declare the special assessments void.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/pg