

without notice or at a public sale.⁵⁵ Revenue bonds may be sold for a period not to exceed forty (40) years⁵⁶ and may contain covenants as authorized by state law.⁵⁷

E. Special Assessment Bonds.

1. General Discussion. Special assessment bonds are likely the most common way that cities in North Dakota finance various improvements. The improvements that may be financed by special assessments include street, water lines, sewer lines, sidewalks and related items.⁵⁸ Generally an improvement district is created, the property that benefits from the improvement is assessed, and the assessments for the property are utilized to make the scheduled bond payments. Special assessment bonds are payable from special assessments that are assessed against benefitted property, but are backed by the full faith and credit of the city. Thus, if assessments from a particular district are not sufficient to pay the principal and interest on the bonds when due, the city is required by law to levy a general tax against all the properties in the municipality to make up the deficiency. Special assessments can only be used where improvements benefit certain property in the

⁵⁵N.D.C.C. § 40-35-09 (2007).

⁵⁶N.D.C.C. § 40-35-08(4) (2007).

⁵⁷N.D.C.C. § 40-35-15 (2007).

⁵⁸See N.D.C.C. § 40-22-01 (2007).

city and not others.⁵⁹ For example, if a city desires to construct a public library for the entire city, in that all of the properties within the city would have to benefit from the library, it is likely not an improvement for which special assessments may be levied. Quite simply, there is no distinct special benefit accruing to individual properties distinct and separate from the common benefit accruing to the public at large.

It should be noted that there is a great deal of legislative decision making (subjectivity) involved in the determination of what property is benefitted by an improvement and how much benefit that particular property receives. (Not to mention a public which generally does not like to pay special assessments.) Consequently, there has been a considerable amount of litigation involving special assessment financing. This is much different than general obligation or revenue bonds which have seen much less litigation challenge. However, the legal challenges generally do not involve the authority of the city to issue improvement bonds, but, rather relate to whether or not the city followed the proper procedures in

⁵⁹The three requirements to validly levy special assessments are as follows:

- (1) The special benefit accruing to each lot or parcel of land from the improvement must be determined;
- (2) The special assessment levied against each lot must be limited to its just proportion of the total cost of the improvement; and
- (3) The assessment against each lot or parcel of land must not exceed the benefit which has been determined to have accrued to the property.

Cloverdale Foods Co. v. City of Mandan, 364 N.W.2d 56 (N.D. 1985).

creating the improvement districts and in properly levying the assessments.

2. Statutory Authority. Chapter 40-22, N.D.C.C. is the chapter that sets forth the basic requirements for cities intending to undertake improvements and to have those improvements specially assessed. Pursuant to this chapter a variety of improvements may be made by special assessment financing. They include construction of a water system, sewage system, street system, pedestrian tunnels, curbs, gutters, sidewalks, street lights, Christmas street lights, improvements of boulevards, flood protection, construction of parking lots, ramps, etc.⁶⁰ Nonetheless there are other chapters that specifically address sidewalks,⁶¹ curb and gutter,⁶² street lights⁶³ and boulevards.⁶⁴ In addition, park districts are authorized to issue special assessments for the purposes of opening, establishing and improving parks or boulevards and of ways and streets in the park.⁶⁵ Unlike General Obligation Bonds, no election is required prior to the issuance of special assessment bonds. Rather there is a specific procedure in which a majority of

⁶⁰N.D.C.C. § 40-22-01 (2007).

⁶¹Chapter 40-29, N.D.C.C. (2007).

⁶²Chapter 40-31, N.D.C.C. (2007).

⁶³Chapter 40-30, N.D.C.C. (2007).

⁶⁴Chapter 40-32, N.D.C.C. (2007).

⁶⁵N.D.C.C. § 40-49-12(4) (2007).

the property owners can protest and stop the creation of an improvement.

3. Procedural Requirements. There are three separate procedures that cities must follow in order to issue a special assessment bond. These three procedures include:

- i. Establishing the improvement district and letting the contract.
- ii. The determination and levy of special assessments.
- iii. Actually issuing the special assessment bonds.

It is important to note that unless the procedures are followed correctly, no bonds may be issued. This presentation will briefly cover all three areas, however the levying and determination of special assessments has been more fully covered in another presentation today.

i. Creation of the Improvement District.

The first step in the process is to create an improvement district which includes all property which in the judgment of the governing body, will be benefitted by the construction of the improvement project.⁶⁶ The next step is for the city engineer to prepare a report as to the general nature, purpose and feasibility of the proposed improvement and the estimated proposed cost of the work for the improvement.⁶⁷

⁶⁶N.D.C.C. § 40-22-08 (2007); N.D.C.C. § 40-22-09 (2007).

⁶⁷N.D.C.C. § 40-22-10 (2007).

In the case of all improvements, except for water and sewer improvements, the governing body of the city will approve the engineer's report and declare the improvements are necessary.⁶⁸ The resolution must then be published in the official newspaper of the city once each week for two consecutive weeks.⁶⁹

In the case of water and sewer improvements a resolution declaring the improvements to be necessary is not required.⁷⁰ The North Dakota Supreme Court has held that the term sewer as used in N.D.C.C. § 40-22-15 includes both storm sewers and sanitary sewers.⁷¹ According to the court,

Sewers are installed for sanitary purposes, and to preserve public health. In this connection, there is no difference or distinction between sanitary sewers and storm sewers. Both are installed to protect the public health and for sanitary purposes.⁷²

In the case of all other improvements, if within thirty (30) days after the first publication of the resolution of necessity, protests are not filed with the city auditor by a majority of the landowners in the district by area, the city may proceed with the

⁶⁸N.D.C.C. § 40-22-15 (2007); this requirement is mandatory. See Mitchell v. City of Parshall, 108 N.W.2d 12 (N.D. 1961).

⁶⁹N.D.C.C. § 40-22-15 (2007).

⁷⁰Id.

⁷¹Kirkham, Michael & Associates v. City of Minot, 122 N.W.2d 862, 864 (N.D. 1963).

⁷²Id.

project.⁷³ Following the 30 day project the governing body must meet and determine if there are sufficient protests to bar the project.⁷⁴ If there are sufficient protests, the project is stopped.⁷⁵

As previously noted, a resolution of necessity is not required for water and sewer improvements. In addition, if the city has entered into an agreement with a state agency or federal agency for the improvement, and if the cost of the project to be assessed does not exceed twenty-five percent (25%) of the total cost of the project, written protests by the owners of more than seventy-five percent (75%) of the property liable to be assessed are required to bar further proceedings.⁷⁶

The engineer must also prepare plans⁷⁷ and specifications which are to be approved by the governing body prior to advertising for construction of the improvement.⁷⁸ The construction work must be advertised by the governing body in the official newspaper of the municipality once each week for two consecutive weeks.⁷⁹ Once the

⁷³N.D.C.C. § 40-22-17 (2007).

⁷⁴Id.

⁷⁵Id.

⁷⁶N.D.C.C. § 40-22-06 (2007).

⁷⁷N.D.C.C. § 40-22-11 (2007).

⁷⁸Id.

⁷⁹N.D.C.C. § 40-22-19 (2007).

bids are received, opened and deemed proper, the city may award the bid to the lowest responsible bidder.⁸⁰

ii. Special Assessments.

The special assessment of property is set forth in Chapter 40-23 of the North Dakota Century Code. Chapter 40-23.1 of the North Dakota Century Code sets for the an alternative method of levying special assessments against benefitted property.

Special assessments are initially apportioned and levied by the city's special assessment commission. The special assessment commission is comprised of three members.⁸¹ At any time after the contract has been let, the governing body of the city may direct the special assessment commission to apportion and levy special assessments.⁸² The special assessment commission then meets and develops and determines a list of property setting forth the amount each property is benefitted by the improvement and how much each property is to be assessed.⁸³ Following the initial meeting of the special assessment commission, the list and notice of public hearing before the special assessment commission is published once each week for two consecutive weeks in the official newspaper of

⁸⁰Id.

⁸¹N.D.C.C. § 40-23-01 (2007).

⁸²N.D.C.C. § 40-23-05 (2007).

⁸³N.D.C.C. § 40-23-09 (2007).

the municipality.⁸⁴ At the hearing the special assessment commission may alter the special assessments, but the total amount assessed may not be adjusted.⁸⁵ After the hearing, the list is confirmed by the special assessment commission, the list is certified by the special assessment commissioners, and is filed with the city auditor.⁸⁶

Notice of the confirmation of the list is published in the official newspaper of the city at least 15 days before the public hearing before the city council.⁸⁷ Any person who is aggrieved the decision of the special assessment commission may file notice of an appeal with the city auditor prior to the hearing before the city council.⁸⁸ The governing body of the city will then hear any appeals filed with the city auditor.⁸⁹ The city council may adjust the special assessments, except that the total aggregate amount assessed shall not be changed.⁹⁰ Following the hearing, the list is confirmed by the city council and an aggrieved individual may

⁸⁴N.D.C.C. § 40-23-10 (2007).

⁸⁵N.D.C.C. § 40-23-10 (2007).

⁸⁶N.D.C.C. § 40-23-12 (2007).

⁸⁷N.D.C.C. § 40-23-13 (2007).

⁸⁸N.D.C.C. § 40-23-14 (2007).

⁸⁹Id.

⁹⁰N.D.C.C. § 40-23-15 (2007).

file an appeal with the district court.⁹¹ However, such an appeal must be filed within 30 days and in accordance with Section 28-34-01 of the North Dakota Century Code.⁹²

iii. Issuance of Special Assessment Bonds.

A city may issue bonds to cover the cost that is incurred in connection with the improvements to be assessed. Following the making of the contract for the costs and improvements to be financed in whole or part by the special assessments, the city council may issue warrants or improvement bonds for the cost of such a project.⁹³ When a municipality issues a warrant to cover the cost of the improvements, it must set upon the face of the warrant the purpose for which it was issued, the funds from which it is to be payable along with the proper signature of an authorized city officials.⁹⁴

Commonly cities issue improvement warrants⁹⁵ and immediately exchange such warrants for refunding improvement bonds.⁹⁶ The

⁹¹N.D.C.C. § 40-26-01 (2007).

⁹²N.D.C.C. § 40-26-01 (2007).

⁹³N.D.C.C. § 40-24-19.

⁹⁴N.D.C.C. § 40-24-20 (2007).

⁹⁵A warrant is an instrument in the form of an order drawn by a municipal officer directing him or her to pay a specified amount to a person, named in the warrant or bearer of the warrant. 15 McQuillin Mun. Corp. § 42:1 (3rd) (2007).

⁹⁶N.D.C.C. § 40-27-01 (2007).

issuance of such bonds is not subject to election.⁹⁷ The resolution authorizing the issuance must describe the warrants refunding the amount, must describe the warrants to be refunded and the amount, maturity, and other details of the refunding warrants or bonds.⁹⁸ Following the issuance of the initial resolution, the city officials then complete other essential closing documents and the issue closes and the money is transferred to the city to be available to refund the costs the city has incurred in the creation and construction of the improvement district.

F. Other Financing.

There are other kinds of municipal debt such as TIF financing, which allows a city to designate an area and utilize the tax revenue associated with the increase in value from construction in the area to reimburse costs of improvements, the acquisition costs of the property, and the clearing and grading of the property.⁹⁹ Cities may also issue revenue bonds from municipal industrial development projects.¹⁰⁰ However, revenue bonds issued under this

⁹⁷N.D.C.C. § 40-27-02 (2007).

⁹⁸N.D.C.C. § 40-27-07.

⁹⁹See N.D.C.C. § 40-58-20.1 (2007).

¹⁰⁰A project is defined as any real property, buildings, improvements on real property or the buildings thereon, and any equipment located on such real property or in such buildings, or elsewhere, or personal property which is used or useful in connection with a revenue producing enterprise, or any combination of two or more such enterprises, engaged or to be engaged in: a) assembling, fabricating, manufacturing, mixing, or processing of any agricultural, mineral, or manufactured products, or any combination thereof; b) storing, warehousing, distributing, or