OPINION
58-180

October 30, 1958 (OPINION)

MUNICIPAL GOVERNMENT

RE: Assessment of Benefits - Validation of Prior Assessments

This is in reply to your letter requesting an opinion of this office in regard to a petition to assess part of Cox Addition improvement against property south of Twenty-fourth Avenue South of the city of Grand Forks. From your letter and the enclosure thereto, it is our understanding that the city of Grand Forks paved and otherwise improved a street, whose outer edge at the time the improvement was made was the southernmost limits of the city. Special assessments were certified and confirmed by the city council. Now property owners in the original assessment district are objecting to the fact that the property on the premises to the south of the street, which has subsequently been platted and annexed to the city, is receiving the benefits of the street improvement without obligation of payment for the improvement.

As we understand the theory of the persons bringing up the question, it is their thought that the premises concerned could have been assessed under section 40-2308 of the 1957 Supplement to the North Dakota Revised Code of 1943.

Said section 40-2308 provides:

> 40-2308. ASSESSMENTS COLLECTED BY SUIT FROM BENEFICIAL USER OF EXEMPT PROPERTY. Whenever any real property is exempt from special assessments, or cannot be assessed, as provided in this title, for any improvement for any reason, and such real property otherwise would be assessable for such improvement, an assessment may be levied against the occupant or beneficial user of the property and collected by suit from the occupant or person enjoying the beneficial use thereof."

It is contended that under this statutory provision, the property should have been assessed in the first instance. Since this was not done, it is claimed that this was an error, mistake, or deficiency in the original assessment and that same should be corrected under the authority contained in chapter 40-26 of the North Dakota Revised Code of 1943.

It is the opinion of this office that the purpose of section 40-2308 is and was at the time of the assessment here concerned to enable assessment of benefits against the beneficial user or occupant of real property in those cases where the assessment could not be enforced against the property itself. Note that the usual method of collection of special assessments is by sale of the real property to pay the special assessment in the same manner as general taxes are collected. (See: section 40-2501 of the 1957 Supplement to the North Dakota Revised Code of 1943). The method of collection specified in section 40-2308 is by suit against the occupant or

person enjoying the beneficial use of the property. (Compare this statute with section 57-0226 of the North Dakota Revised Code of 1943. Note, also, the history of the statute, i.e., the reference in the provision of the 1943 Code to "because the title thereof is in the United States, or for any other reason", and the provision of section 40-2307 of the North Dakota Revised Code of 1943 exempting property belonging to the government of the United States.) Actually the statute both before and after the enactment of the amendment appearing in the 1957 Supplement would appear to be merely a codification of a part of the general legal rule, i.e., "It is generally held that an exemption from special or local assessments, where enjoyed by governmental bodies with respect to lands owned by them does not extend to the leasehold interest of a tenant of those lands. . . ." (See: 48 Am. Jur. 639, Special or Local Assessments Section 83). In the present instance, we can see no necessity or reason why the benefits should have been or should be assessed against an occupant or beneficial user, rather than the property itself. If the property were exempt by reason of ownership by an exempted governmental body, by reason of statute, or for other reason could not be assessed, where the occupant or beneficial user were not so exempt, there might be a purpose in applying the statute; however, such does not seem to be the case here. As a practical matter, it would seem a much simpler matter to assess the benefit against the property and collect by the sale thereof than to assess against an individual and collect by suit against such individual, except, of course, in the instances to which we believe this statute applies, where the property itself cannot be sold to pay the special assessment.

Also, we do not see that there is any showing of error or mistake in the making of the assessment which would justify corrective action under chapter 40-26 of the North Dakota Revised Code of 1943. Possibly, as of the time the assessment was being made, protests or appeals could have been made or taken on the point of the lack of assessment of the property south of the street, although as is apparent from the correspondence enclosed, there is some question as to whether or not assessment could have been levied on property either beyond the boundaries of the city. From the information available in the correspondence presented to us, it would appear that the parties to be assessed did not so protest or appeal, which at least would indicate that as of the time of the making of the assessment, they did not have objection to the assessment on this basis. It would thus appear that rather than there being an error or mistake in the making of the assessment, they did not have objection to the assessment on this basis. It would thus appear that rather than there being an error or mistake in the making of the assessment, that the parties concerned deliberately chose to allow the assessment to be levied in the manner it was. There are probably many reasons why such a choice might be made. For example: the legal questions as to assessing beyond the corporate limits of the city or beyond the limits of the assessment district were not raised with the result that the time and expense of possible appeals through the courts was not incurred, which could have delayed the paving of the street at a time it was needed by the occupants of the assessment district. Possible protests on behalf of the property beyond the limits of the district on other than legal grounds were not made. Also, while provisions for reassessments, etc., are made, it would not seem

equitable that the rights of the property owners concerned to protect, etc., are made, it would not seem equitable that the rights of the property owners concerned to protest, etc., would be properly protected in accordance with our general statutory assessment procedure by setting up the new assessment subsequent to the paving of the street.

Under these circumstances, we can see no justification for the city taking action to in this instance assess the property south of Twenty-fourth Avenue South, for the paving of said Twenty-fourth Avenue South at this time. If, of course, individuals in the original assessment district believe they have legal grounds herein for an action in the court, it is, or course, possible that the assessment might be found to be void, and a reassessment made of all property benefited by the street; however, on the grounds hereinbefore considered, it seems doubtful that the assessment would be held void.

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