

OPINION
56-34

July 18, 1956 (OPINION)

CITIES

RE: Special Street Lighting Payment

This is in reply to your request for an opinion on the method of payment for the cost of a special street lighting system.

You call our attention to section 40-3002 of the N.D.R.C. of 1943, and in particular, the provision thereof that: " * * * the city may proceed to provide for the construction of the improvement and to assess the cost thereof or such part thereof as the governing body shall deem proper against the abutting property in the manner and with the notice and according to the forms and procedure provided in this title for the construction and assessment of street paying * * * ". You further call our attention to the general provisions of chapter 40-22 of the N.D.R.C. of 1943, and the specific provisions of section 40-2410 of the 1953 Supplement to the N.D.R.C. of 1943 to the effect that any municipality at the option of its governing body may provide for the payment of general taxation of all the taxable property in the municipality of not more than one-fifth of the cost of any improvement financed by the levying of special assessments other than the opening and widening of streets or the laying of sewer or water connections from the main to the curb line.

Your question appears to be whether the city may pay such part of the total costs of the improvement as it may think proper by general taxation, assessing remaining cost against property immediately contiguous to the streets or avenues where the improvement is made or whether the provision that the city may pay through general taxation not more than one-fifth of the cost of the improvement is applicable.

Taking the language of section 40-3002 by itself, it would in the first instance appear that the proportion of cost to be paid by special assessment and the proportion to be paid by general taxation is a matter solely within the discretion of the governing body concerned, further dependent of course on the proper determination of the benefit of said abutting property. However, we note that chapter 30-02 does not of itself, in terms, authorize the municipality to incur an indebtedness for this purpose, or provide a method or procedure of setting up the improvement and financing same. Considering said chapter 30-02 in context, it would appear to have the effect of authorizing a city to use its authority granted by chapter 40-24, chapter 40-22 and specifically by section 40-2410 in the acquisition of special street lighting systems. In this regard we believe the language of the concurring opinion of Judge Christianson, in *Mandan News v. Henke*, 48 N.D. 402, 184 N.W. 991, 992, while not necessarily controlling is at least enlightening. He states, "A city has power, subject to the debt limit provisions of the Constitution, to provide that not exceeding one-fifth of the cost of certain local improvements to be paid by general taxation. Section 3723 C.L. 1913. * * * ". Section 3723 is, of course, the

source of section 40-2410 of the N.D.R.C. of 1943. The case involves a special system of street lighting under section 3745 of the Compiled Laws of North Dakota of 1913, as amended by chapter 69 of the Session Laws of 1915 (the source of chapter 40-30 of the N.D.R.C. of 1943).

In conclusion, it is our opinion that while funds on hand raised by general taxation might be used to pay any proportion of the cost of the special street lighting improvement determined by the governing body, chapter 40-30 does not necessarily grant the city specific authority to incur an indebtedness solely payable from a general tax. Therefore, an indebtedness representing a greater proportion of the cost of the improvement than the one-fifth authorized by section 40-2410 is open to question as to validity.

LESLIE R. BURGUM

Attorney General