

**OPINION
78-169**

July 11, 1978 (OPINION)

Mr. A. S. Benson
Attorney-at-law
Benson Building
616 Main Street
Bottineau, ND 58318

Dear Mr. Benson:

This is in response to your letter of June 16, 1978, wherein you request an opinion of this office relative to Section 11-28.2-02 of the North Dakota Century Code, as amended, and its application to certain proceedings which you have described in your letter of inquiry. You submit the following facts and data in your letter:

I am requesting an opinion from your office relative to the establishment of a recreation district in the Lake Metigoshe area. As far as I know, the recreation district was legally established, although I have not had an opportunity to see the documents, establishing the district, and they don't seem to be on file in the County Auditor's office in Bottineau County. I am assuming that the district was properly documented.

After the creation of the district proceedings were maintained to specifically assess the particular businesses and cabin owners in this district. From my determination, the notice given was a publication in the Bottineau paper, the Rugby paper and the Minot paper, for a protest to the assessment made in the area. It doesn't appear that any written notice of the hearing was mailed to each owner of property nor was there a publication of the special assessment list.

The number of lots in the area is about 800 and when the documents porporting the assessment were filed with the Auditor, he called and asked me if he should file the documents. I advised him that in my opinion the documents should be filed and that he should request an opinion from this office as to the validity of the documents, before the special assessments were spread.

It would appear to me that the statute has not been strictly complied with, especially in view of 11-28-2.04, regarding the notice required to the property owners.

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Based on the facts that I have, is it your opinion that the proceedings are valid? I might point out in addition to the facts related that there was a double assessment called for in the first year, in other words the assessment called for \$25.00 per lot owner yearly assessment and the first year would have the \$50.00 assessment, which in my opinion would be highly irregular; but perhaps legal.

Inasmuch as your request and inquiry assumes proper and legal creation of the subject recreation service district, we will not address our response to such proceedings.

With regard to your initial question, whether the proceedings had to establish the special assessments are legal and proper, we would note the requirements of the statute relative to notice of meetings as set forth in Section 11-28.02-02 of the North Dakota Century Code, as amended, which provides in part:

11-28.2-02. MEETINGS OF RECREATION SERVICE DISTRICTS - ELECTION BOARD. * * * In addition to the annual meeting, the board of recreation service district commissioners may call a special meeting of the voters of the district at such time and place as the board may select. For any annual or special meeting the board shall publish notice of the meeting not less than fifteen days prior to the meeting in the official county newspaper of the county in which the district is located and the notice shall be mailed by regular mail to property owners of the district is located not less than fifteen days prior to the meeting. * * * (Emphasis supplied)

From the text of your letter, we are uncertain whether the proceedings to set up the special assessments involved the meeting specified in Section 11-28.2-04 of the North Dakota Century Code, as amended, requiring the approval by a majority of the qualified voters of the district affected by such special assessment or publication requirements of the assessment list and notice of hearing of objections to such list set forth under Section 40-23-10 of the North Dakota Century Code, as amended, are the subject of the possible defective notice. We are not aware of any requirement that a meeting need be set up for the purpose of actually levying the assessments contemplated by Section 11-28.2-04, however, we would note that a meeting to obtain approval by the majority of qualified voters is required. In view of this uncertainty, we will assume that your question relates to the meeting contemplated by Section 11-28.2-04 of the North Dakota Century Code, as amended, held for the purpose of obtaining approval by the specified majority of qualified voters. In this vein, we would note the provisions of Section 11-28.2-04 of the North Dakota Century Code, as amended, which provides in part:

11-28.2-04. POWERS OF RECREATION SERVICE DISTRICTS - LEVYING OF SPECIAL ASSESSMENTS. Each recreation service district established under the provisions of this chapter shall have the authority to provide police protection, sewer and water, garbage removal services, and public road construction and maintenance, in addition that that provided by the local governing body or other agency to summer homes, cottages, and

other residences and establishments as may exist within its boundaries, and to provide for the improvement and control of the environmental quality of the recreation service district, and to levy special assessments as may be necessary to provide such services. All projects and services to be provided by a recreation service district shall first be approved by a majority of the qualified voters of the district affected by such special assessment and present and voting at an annual or special meeting called as provided in this chapter. (Emphasis supplied)

From the facts set forth in your letter, it would appear that the publication requirement was properly accomplished, however, you specify that it does not appear that any written notice of the meeting was mailed to each owner of property which appears to be one of the requirements set forth in the statute. In this respect, we can only conclude that the jurisdictional aspects of such proceedings have not been met as required by the statute. In considering this aspect of establishing and levying of special assessments, we would note that the recreation service districts are creatures of the legislature and have only such authority and powers as expressly or impliedly given to them by law. In this respect we would note that two questions arise which were considered by the Supreme Court of North Dakota in *Murphy v. City of Bismarck*, 109 N.W.2d. 635, wherein the court noted that such authority is limited first in that such creatures of the statute can only do what they are expressly or impliedly authorized to do by law and that in doing those things they are authorized to do may be done only in the manner prescribed by law. In view of the fact that the subject statute requires the mailing of notice to property owners of the district as an integral part of the required notice, and such factor is a requisite to proper jurisdiction, we can only conclude that the board did not acquire jurisdiction to establish special assessments and spread the same against the property of the district.

With regard to the corrective features of Section 40-22-43 of the North Dakota Century Code, as amended, providing that defects and irregularities in improvement proceedings are not fatal where such proceedings are for a lawful purpose and are unaffected by fraud and do not violate any constitutional limitation or restriction, we would conclude that such special assessment levy, if lacking jurisdiction in the first instance, would be the spreading of taxes in a manner not pursuant to law, contrary to the provisions of Section 175 of the North Dakota Constitution.

With regard to your expressed opinion relative to the double assessment for the first year, while irregular as you have noted, may be legal and proper if in accord with the assessment of benefits established at the time such assessments were spread against the property, pursuant to valid proceedings establishing such special assessment district.

Accordingly, it is our opinion that if the proceedings had to establish the special assessments and specifically assess the particular businesses and cabin owners in the district, failed to include the required mailing of notice to property owners of the district as recorded in the county treasurer's office in which the

district is located, as required by statute, that the governing board of the said recreation service district is without jurisdiction to collect such assessments or to properly certify the same to the county auditor for collection.

We trust that the foregoing comments and expressions will adequately set forth our opinion on the manner.

Sincerely,

ALLEN I. OLSON

Attorney General