

N.D.A.G. Letter to Holm (Oct. 3, 1985)

October 3, 1985

Mr. John O. Holm
Attorney for the City of Gladstone
17 Second Avenue West
Dickinson, ND 58601

Dear Mr. Holm:

Thank you for your letter dated August 27, 1985, in which you requested an Attorney General's opinion concerning N.D.C.C. § 40-26-08. Specifically, you inquired whether the deficiency levy provisions for special assessments in N.D.C.C. §40-26-08 are limited to a "particular year . . . within an ongoing amortization bond schedule," or whether they "apply when an entire special assessment becomes due to a default and an inability to refund [a] temporary warrant."

You stated that in 1982 the City of Gladstone issued a \$430,000 temporary improvement warrant for a street improvement district. You also stated that the temporary warrant becomes due in October, 1985, that there are no moneys available from the special improvement district to pay the warrant, and that it is unlikely that the City will be able to locate anyone who will purchase a new bond to reamortize the present bond. Thus, you anticipate that the entire outstanding indebtedness of \$430,000, plus interest of approximately \$18,000.00, will become due next month.

N.D.C.C. § 40-26-08 provides, in pertinent part:

40-26-08. MUNICIPALITY LIABLE GENERALLY FOR DEFICIENCIES IN SPECIAL IMPROVEMENT FUND. Whenever all special assessments and all utility revenues and taxes, if any, appropriated and theretofore collected for a special improvement, made under authority of any law authorizing the payment of the cost thereof in whole or in part from special assessments, are insufficient to pay principal or interest then due on the special improvement warrants issued against such improvement, the governing body shall levy a tax upon all of the taxable property in the municipality for the payment of such deficiency. If at any time a deficiency is likely to occur within one year in such special improvement fund for the payment of principal and interest due on such warrants, the governing body, in its discretion, may levy a general tax upon all the taxable property in the municipality for payment of such deficiency. . . . (Emphasis supplied.)

In Marks v. City of Mandan, 296 N.W.2d 39 (N.D. 1941), the court considered the scope of N.D.C.C. § 40-26-08, which was then §3716 of the 1913 Compiled Laws of North Dakota as amended by 1923 N.D. Sess. Laws 174 and 1929 N.D. Sess. Laws 171. The

present N.D.C.C. § 40-26-08 and the old 3716 are essentially identical with respect to the liability of a municipality for deficiencies in special assessment funds. The 1923 and 1929 amendments "[obligate] municipalities to levy general taxes to make good deficiencies in special assessment funds. . . ." Stutsman v. Arthur, 16 N.W.2d 449, 455 (N.D. 1944). Thus as the court stated in Marks, "[§40-26-08] broadens the liability [of a municipality] from one of a special contingency to that of a general contingent liability of any deficiency whatever the cause." Marks, supra at 45 (emphasis supplied).

The emphasized language in N.D.C.C. § 40-26-08 and the emphasized language in Marks indicate that the liability of a municipality for deficiencies in special assessment funds is extensive. Therefore, I do not believe that the deficiency levy provisions for special assessments in N.D.C.C. § 40-26-08 are limited to a particular year within an ongoing amortization bond schedule. I believe that N.D.C.C. §40-26-08 applies when an entire special assessment becomes due as a result of a default and an inability to refund a temporary warrant.

N.D.C.C. § 40-26-08 does state that "[i]f at any time a deficiency is likely to occur within one year in [a] special improvement fund . . . the governing body, in its discretion, may levy a general tax. . . ." Unfortunately, there is no legislative history for that portion of N.D.C.C. §40-26-08 because the Legislature inserted that phrase in 1955 and there are no legislative committee minutes for legislative sessions before 1959. However, I do not believe that the phrase "within one year" refers to a particular year within an ongoing amortization bond schedule. Rather, I believe that the Legislature inserted that language to enable a municipality to foresee special assessment fund shortages and avert them.

If you have further questions, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

cv