

**LETTER OPINION
2003-L-13**

February 25, 2003

Mr. Richard W. Olson
Thompson City Attorney
PO Box 5788
Grand Forks, ND 58206-5788

Dear Mr. Olson:

Thank you for your letter relating to the filing of written protests to a street improvement project to be financed by special assessments. Your specific inquiry concerns the application of N.D.C.C. § 40-22-18 in determining the sufficiency of protests when a written protest is not signed by all the owners of a piece of property.

Section 40-22-18, N.D.C.C., provides, in pertinent part, “[i]f the governing body finds the protests to contain the names of the owners of a majority of the area of the property included within the improvement district, the protests shall be a bar against proceeding further with the improvement project.” Chapter 40-22, N.D.C.C. does not address your specific inquiry. Likewise, no decision of the North Dakota Supreme Court or opinion from this office has resolved the issue.

Courts generally have concluded that “one cotenant to a protest will protect not only his own interest but that of his cotenant.” Mosher v. City of Phoenix, 263 P. 5, 9 (Ariz. 1928); see also Los Angeles Lighting Co. v. City of Los Angeles, 39 P. 535, 535-36 (Cal. 1895); Findley-Kehl Inv. Co. v. O’Connor, 256 S.W. 798, 802 (Mo. 1923) (involving a tenancy by the entirety)¹; Bonner v. City of Imperial, 32 N.W.2d 267, 269-70 (Neb. 1948); Disco v. Board of Selectmen of Amherst, 347 A.2d 451, 452 (N.H. 1975); contra Warren v. Borawski, 37 A.2d 364, 366 (Conn. 1944) (while noting cases holding that a tenant in common “is an owner in the sense that he can sign a protest for all owners,” the court held otherwise, relying on cases that have determined that one cotenant is not an “owner” for purposes of signing a petition for an improvement). The theory behind the general rule is that a cotenant has the implied authority from the other cotenants to protect their joint interest in the property.

¹ But see Blackwell v. City of Lee’s Summit, 32 S.W.2d 63, 67-68 (Mo. 1930) (distinguishing Findley-Kehl as being decided on a frontage basis rule rather than on a per capita basis).

In Bonner, a city intended to fund a street improvement through a special assessment. 32 N.W.2d at 268. An ordinance permitted the overriding of the improvement if a majority of the owners of the property abutting the improvement area filed written objections. Id. Written objections were submitted by husbands who owned property in joint tenancies with their wives. Id. at 269. The wives, however, neither filed objections nor joined in their husbands' objections. The city council deemed the wives to be non-objecting owners. The husbands argued that they fully represented their respective joint tenancies. Id.

The court in Bonner recognized the right of a co-owner to protect the estate by filing a protest to an assessment. "[A] remonstrance signed by either representative for the purpose of protecting the estate is valid." Id. The court indicated that the wives could have chosen to express their opposition to the objections. Id. at 270. The court, accordingly, concluded that when one joint tenant files an objection and the other joint tenant does not, a presumption arises that the objecting tenant represents the joint tenancy unless a contrary intent is shown. Id.

Similarly, in Disco a city intended to amend a zoning ordinance. 347 A.2d at 452. A statute permitted owners to protest an intended zoning amendment that would affect their land. A dispute arose regarding the validity of a protest that included the signature of only one of two joint tenants. Id. The court in Disco recognized the right of a cotenant to act as a representative to protect the entire property held in joint tenancy. Id. The court explained that "allowing one cotenant to protest a change in zoning which would diminish the protection the ordinance affords to their jointly owned land is consistent with the well-established duty of a joint tenant to protect the common title." Id. The court noted that the cotenant's right "also prevents a cotenant from reducing the existing protection to the joint land by inaction on her part." Id. The court, accordingly, concluded that the protest validly represented the joint tenancy. Id.

The foregoing demonstrates the general rule that one cotenant has the implied authority to protect the joint interest and may properly sign a protest objecting to a public improvement that would affect the property. Further, unless a non-signing cotenant expresses disagreement with the protest, the objecting tenant represents the interests of all cotenants. Therefore, it is my opinion that when there are multiple owners of a piece of property and a protest is signed by fewer than all the owners the protest covers all the property, unless a non-signing owner expresses a contrary intent.

Sincerely,

Wayne Stenehjem
Attorney General