

**LETTER OPINION
2004-L-40**

June 1, 2004

Ms. Rhonda R. Ehlis
Gladstone City Attorney
PO Box 570
Dickinson, ND 58602-0570

Dear Ms. Ehlis:

Thank you for your letter asking whether a protest against an improvement project which fails to describe the property subject to the protest is legally sufficient. It is my opinion that a protest which fails to describe the property subject to the protest is legally insufficient and, therefore, invalid.

ANALYSIS

If a property owner wishes to protest the creation of an improvement project, the property owner must comply with N.D.C.C. § 40-22-17. Section 40-22-17, N.D.C.C., provides:

If, within thirty days after the first publication of the resolution declaring the necessity of an improvement project of the type specified in any one of the subsections of section 40-22-01, the owners of any property within the improvement district file written protests describing the property which is the subject of the protest with the city auditor protesting against the adoption of said resolution, the governing body of the municipality, at its next meeting after the expiration of the time for filing such protests, shall hear and determine the sufficiency thereof.

If the protests contain the names of the owners of a majority of the area of property included within the district, the city is barred from proceeding further with the project. N.D.C.C. § 40-22-18.

Burlington Northern Santa Fe Railroad (BNSF) filed a protest against Street Improvement District No. 2003-1. You question whether BNSF complied with the property description requirement in N.D.C.C. § 40-22-17. To aid in this office's inquiry, you attached the protest BNSF submitted. While this office will typically not engage in

fact-finding to resolve opinion requests, even a cursory glance at the BNSF letter indicates the complete absence of any type of description of the property to which the protest relates.

Section 40-22-17, N.D.C.C., specifically requires a protester to describe the property that is the subject of the protest within the protest. The provisions governing improvement projects must be strictly followed. Murphy v. City of Bismarck, 109 N.W.2d 635, 643 (N.D. 1961). All essential elements relating to objections to improvement projects should be followed. 13 Eugene McQuillin, Municipal Corporations § 37.52 (3d ed. 1997). See also Bd. of Trustees of the Ohio Tp. Public Library v. Brooks, 784 N.E.2d 1035, 1039-40 (Ind. 2003) (remonstrance process can only be initiated when all prerequisites of statutes providing for the process have been met; a protest was insufficient when petitioners failed to verify the petition with the state board of accounts before filing it with the county auditor). In Montgomery Ward Development Corp. by Ad Valorem Tax, Inc. v. Cedar Rapids Bd. of Review, 488 N.W.2d 436, 441 (Iowa 1992), overruled on other grounds, Transform, Ltd. v. Assessor of Polk County, Iowa, 543 N.W.2d 614 (Iowa 1996), the court held that the provision in a protest statute requiring protesters to give the legal description and assessment of comparable properties was mandatory; the failure to include this information was fatal to lodging a successful protest. Id. Including a list of comparable properties was essential to the statute's main purpose which was to enable the board to make a preliminary determination on whether the property was equitably assessed. Id.

Likewise, the requirement in N.D.C.C. § 40-22-17 to describe the property is essential to the main objective of N.D.C.C. § 40-22-18 which is to enable the city to preliminarily determine whether the project is barred because the owners of a majority of the area in the proposed improvement area have protested the improvement. The description of the property is an essential element of the objection. It is my opinion that a protest of an improvement project which fails to include a description of the property subject to protest is legally insufficient and, therefore, invalid.

The statute does not specify the detail it requires of that property description. N.D.C.C. § 40-22-17. As such, whether the statute requires a formal legal description of the subject property may be arguable.¹ At a minimum, however, the description must be clear enough to allow the governing body to determine whether "the owners of a majority of the area of the property included within the improvement district" have protested against the improvement project. See N.D.C.C. § 40-22-18; see also Gallagher v. City of Fargo, 64 N.W.2d 444 (N.D. 1954).

¹ However, the word "describe" is defined as "[o]f land, to give the metes and bounds." Black's Law Dictionary 445 (6th ed. 1990). "Description" is defined as "[t]hat part of a conveyance, advertisement for sale, etc., which identifies the land or premises intended to be affected." Id. at 446. See N.D.C.C. § 1-02-03.

The BNSF has argued that by virtue of merely having the BNSF name on its protest letter, Gladstone should consider its protest letter as providing the description of essentially all BNSF property within the improvement district. Because a property owner may own a large tract of property or more than one tract of property in an improvement area, a mere name is insufficient to put a governing body on notice that an owner is objecting on behalf of all unidentified property that person may own within the improvement district. In addition, interpreting N.D.C.C. § 40-22-17 to require only the name of the protester ignores the specific requirement that a protest “describ[e] the property which is the subject of the protest.” N.D.C.C. §40-22-17. We must presume the Legislative Assembly did not perform an idle act when it included that requirement in N.D.C.C. § 40-22-17. See Bickel v. Jackson, 530 N.W.2d 318, 320 (N.D. 1995) (“There is a presumption the legislature acts with purpose and does not perform idle acts.”). Without a description of the property, the city will be unable to determine whether the owners of a “majority of the area” of the property were protesting. Accordingly, a protest under N.D.C.C. § 40-22-17 must contain a description of the property that is the subject of the protest. Since BNSF did not provide any type of description of the property subject to its protest, it is my opinion the protest filed by BNSF is legally insufficient² and, therefore, invalid.

Sincerely,

Wayne Stenehjem
Attorney General

sam/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

² See N.D.A.G. Letter to Geiser (Feb. 20, 1968) (“If the protest is in writing and contains the name of the person and the description of the property and a statement that such person or persons protest the improvement, it would appear to be sufficient.”).