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SPECIAL ASSESSMENTS - BACKGROUND MEMORANDUM

House Bill No. 1206 (attached as an appendix) directs a study of several topics, including "all aspects of improvements by special assessment." Under North Dakota law, cities have had authority to levy special assessments for improvements since 1897, counties have had that authority since 1983, and townships were given that authority in 2001 legislation.

Eight chapters of the North Dakota Century Code (NDCC) govern improvements by special assessment in cities. County authority for improvements by special assessments simply adopts the city provisions by reference. Township special assessment levy authority is governed by an abbreviated statutory procedure provided under NDCC Chapter 58-18, as created by 2001 Senate Bill No. 2328. Because the provisions governing improvements by special assessments in cities are the oldest and most detailed, this memorandum reviews the stages of the special assessment process in cities and then reviews the statutory provisions for special assessment levies by counties and townships.

INITIATION OF PROCESS FOR IMPROVEMENTS BY SPECIAL ASSESSMENT

An improvement district must be created as a jurisdictional prerequisite before a public improvement to be paid for by special assessments may be undertaken (*Merchant's Nat. Bank of Fargo v. City of Devils Lake*, 173 N.W. 748 (1919); NDCC Section 40-22-08). A special improvement district may be created by ordinance or resolution adopted by a city governing body by a majority vote, except a two-thirds vote of the governing body is required to establish a sewerage system (NDCC Sections 40-22-08 and 40-22-02).

Although there is no statutory provision for initiation of improvements by special assessment through a petition process, it appears from discussions with city officials that special assessment districts are almost universally initiated by petition of property owners. After a petition is received or the governing body decides to proceed, the city generally schedules an informal meeting with property owners or notifies them by mail that a project will be considered. The size and the form of a special assessment district is a matter to be decided entirely by the city governing body after consultation with the city engineer (*Robertson Lbr. Co. v. City of Grand Forks*, 147 N.W. 249 (1914); NDCC Section 40-22-09).

A city may create a water district, sewer district, water and sewer district, street improvement district,

boulevard improvement district, flood protection district, or parking district. After a special improvement district has been created, the city governing body must direct the city engineer to prepare a report as to the nature, purpose, and feasibility of the improvement and an estimate of the probable cost of the project (NDCC Section 40-22-10). The city governing body must direct the city engineer to prepare detailed plans and specifications for construction of the improvement (NDCC Section 40-22-11).

After filing and approval of the city engineer's report, the city governing body may adopt a resolution declaring the necessity of the improvements (NDCC Section 40-22-08). A resolution of necessity is not required if the improvement is a water or sewer improvement, the improvement will be paid for by service charges, or a petition signed by owners of a majority of the area of property included within the district has been received. The resolution must be published once each week for two consecutive weeks in the official newspaper of the city (NDCC Section 40-22-15).

PROTEST OF IMPROVEMENTS BY SPECIAL ASSESSMENT

Within 30 days after the first publication of the resolution of necessity, owners of property in the proposed improvement district are entitled to file written protests against adoption of the resolution (NDCC Section 40-22-17). If protests are filed, the city governing body must consider the protests at its next meeting after the expiration of the time for filing protests. If the protests received contain the names of owners of a majority of the area of property within the improvement district, the protest is a bar against proceeding further with the improvement project (NDCC Section 40-22-18). If the protests contain the names of owners of a majority of any separate property area included within the district, the protest is a bar against proceeding with the portion of the improvement to be assessed in whole or in part upon property within that area.

Concerns about the statutory requirement of protests by owners of a majority of the property within an improvement district prompted introduction of 2001 Senate Bill No. 2346. The bill would have excluded political subdivision property from consideration in protests and allowed a successful protest to be made by owners of a majority of the remaining property in the district. The bill failed to pass but pointed out the problem with existing law that a political subdivision could structure a special improvement district to contain a majority of property owned by the political

subdivision, which would make it impossible for remaining property owners to successfully protest the project.

PROJECT BIDS

After adoption of a resolution of necessity and if sufficient protests are not filed, the city governing body must advertise for bids on a project. Public improvement contract bidding is governed by NDCC Chapters 48-01.1 and 48-02 (NDCC Section 40-22-19). The city governing body must award a contract for construction of a public improvement to the lowest responsible bidder (NDCC Section 48-01.1-02). The governing body may reject any bid and readvertise for proposals if no bid is satisfactory. If a contract for construction of a public improvement is estimated to exceed \$100,000, plans, drawings, and specifications must be procured from a licensed architect or registered professional engineer (NDCC Section 48-01.1-04). Before acceptance of any bid, the city governing body must require the city engineer to reestimate the cost of the work under the bids. The governing body may not award the contract if the city engineer's estimate of work under the bids exceeds the engineer's original estimate of cost of the project by 40 percent or more (NDCC Section 40-22-29).

ASSESSMENT OF BENEFITS TO PROPERTY OWNERS

The executive officer of a city appoints three "reputable residents and freeholders" of the city to the special assessment commission for the city. The special assessment commission must determine the lots and parcels of property which will be especially benefited by the improvement and "determine the amount in which each of the lots and parcels of property will be especially benefited" and assess against each of such lots and parcels "such sum, not exceeding the benefits, as shall be necessary to pay its just proportion of the total cost of such work . . ." (NDCC Section 40-23-07). As an alternative, the special assessment commission may assess benefits against property on a per square foot basis with consideration of the distance of the property from the marginal line of the public way or area improved (NDCC Chapter 40-23.1). Property of political subdivisions is not exempt from special assessments (NDCC Sections 40-23-07 and 40-23.1-06).

Either the special assessment commission or the city auditor must prepare a complete list of benefits and assessments showing each lot, tract, or parcel benefited by the improvement and the amount assessed against it (NDCC Sections 40-23-09 and 40-23.1-07). Either the commission or the city auditor must publish the assessment list in the official city newspaper once each week for two consecutive weeks

and include a notice of the time and place when the commission or the city auditor will meet to hear objections to any assessment by any interested party (NDCC Sections 40-23-10 and 40-23.1-08). At the hearing, the special assessment commission or the city auditor may make alterations in assessments as may be just or necessary (NDCC Sections 40-23-11 and 40-23.1-09). Any person still aggrieved after consideration by the commission or city auditor may appeal by filing a written notice of appeal stating the grounds for the appeal (NDCC Sections 40-23-14 and 40-23.1-12).

At the regular meeting of the city governing body at which the assessment list is to be acted upon, any person who has appealed may appear and present reasons for not confirming the action of the commission or city auditor. The governing body of the city may increase or diminish any assessment it deems just (NDCC Sections 40-23-15 and 40-23.1-13).

COLLECTION OF SPECIAL ASSESSMENTS

A special assessment is a lien against the property on which it is levied (NDCC Section 40-24-01). Special assessments may be paid by a property owner without interest within 10 days after they have been approved by the city governing body (NDCC Section 40-24-02). After 10 days, interest accrues on special assessments at an annual rate not exceeding one and one-half percentage points above the average net annual interest rate on any warrants or bonds for which they are pledged. Special assessments are generally payable in annual installments, which for most projects may be extended for up to 30 years (NDCC Sections 40-24-04 through 40-24-08). Annual installments of assessments must be certified by the city auditor to the county auditor annually for collection with property tax collections (NDCC Section 40-24-11).

WARRANTS OR BONDS

After a construction contract for an improvement has been entered and the time has passed for filing protests, the city governing body may issue warrants or improvement bonds on the fund created for the improvement district (NDCC Section 40-24-19). Warrants or bonds are payable from the fund, and if the fund has insufficient amounts for payment, the city may issue refunding special assessment warrants or bonds. Refunding special assessment warrants or bonds may be issued to extend maturities, reduce the rate of interest, equalize taxes to be levied by the city, or consolidate two or more outstanding issues of warrants or bonds.

SPECIAL ASSESSMENTS FOR PROMOTION OF BUSINESS ACTIVITY

Cities have authority under NDCC Chapter 40-22.1 to establish a special assessment district for business promotion to include all properties that will be benefited by the business improvement project. Under Chapter 40-22.1, an auditor's report and plans, specifications, and estimates must be prepared, and a resolution of necessity must be adopted and published. Protests may be filed to bar further proceeding with the project. The provisions of law governing special assessment collection and indebtedness apply to special assessments for business promotion.

COUNTY SPECIAL ASSESSMENTS

For a defined area outside the limits of any incorporated city, the board of county commissioners may levy special assessments for improvements. Prior to August 1, 2001, initiation of a special assessment district by a county could only be by receipt of a petition of 60 percent of the landowners in the defined area. Passage of 2001 Senate Bill No. 2298 allows initiation of a county special assessment district by resolution of the board of county commissioners. Under NDCC Section 11-11-55.1, a county is given all the authority and duties with regard to special assessments which belongs to cities in Chapters 40-22, 40-23, 40-23.1, 40-24, 40-25, 40-26, 40-27, and 40-28, and whenever action is required of city officials in those chapters, the comparable county officials shall take the action.

TOWNSHIP SPECIAL ASSESSMENTS

Under NDCC Chapter 58-18, created by 2001 Senate Bill No. 2328, townships are given authority to defray expenses of improvements through special assessment districts. A board of township supervisors may create an improvement district upon petition of 60 percent of the freeholders in a proposed improvement district area. Each improvement district must be of a size and form to include all properties the township board of supervisors believes will be benefited by the improvement project. The bill created a definition of the term "freeholder" for purposes of Title 58, meaning the legal title owner of the surface estate in real property.

After a township special improvement district has been created, the board of township supervisors is required to direct a competent engineer to prepare a report on the nature, purpose, and feasibility of the improvement and the probable costs of the work. The board of township supervisors must provide 30 days'

written notice by first-class mail to each freeholder within the improvement district and publish a notice in a legal newspaper published in the township or, if there is no such newspaper, in the county's official newspaper at least 10 days prior to a special meeting for public disclosure of the findings of the engineer.

At the special township meeting for public disclosure of the findings of the engineer, the freeholders of the township in attendance are entitled to vote on the question of whether to proceed with the improvement project. Approval by 60 percent or more of the votes cast at the meeting or filed with the township clerk within 15 days after the meeting is required before the project may proceed. A freeholder affected by the project is entitled to one vote for each dollar of the proposed special assessment against the freeholder's property within the proposed improvement district. If there is more than one owner of a parcel of property, the votes available for the parcel must be prorated among the owners in accordance with their percentage ownership interests. If fewer than 60 percent of the votes cast on the question approve the project, the election result is a bar against proceeding further with the improvement project.

Aggrieved freeholders may appeal an assessment against their properties by notice of appeal to the township clerk. The township must schedule a special meeting to hear appeals. An aggrieved freeholder may present reasons to change the freeholder's assessment at the special meeting and the board of township supervisors may increase or diminish any assessment as it may deem just.

SUGGESTED STUDY APPROACH

The minutes for House Bill No. 1206 do not indicate why special assessments were added to the study directive. The only apparent controversy regarding special assessments during the 2001 legislative session was addressed by Senate Bill No. 2346, which related to the exclusion of property of political subdivisions in determining the requirements for protesting special assessments.

Representatives of the North Dakota League of Cities, North Dakota Association of Counties, and North Dakota Township Officers Association should be provided an opportunity for recommendations on the committee's action with regard to statutory authority on special assessments.

ATTACH:1