NOT SO SPECIAL: SPECIAL ASSESSMENTS AND THE FADING CONCEPT OF BENEFIT

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ABSTRACT

Special assessments have been used in North Dakota since territorial days and for that long have been a source of property owner irritation, litigation, and legislative action. Special assessments are a widely used financing tool for city infrastructure. But, are special assessments really special? In other words, are special assessments restricted to special benefit, or do they function more like ad valorem taxes?

Part I provides an overview of special assessment law in North Dakota. Part II discusses the procedural process of using special assessments and the issuance of warrants and bonds. Part III describes the special assessment commission. Part IV covers judicial review. Part V considers the fading concept of benefit by examining citywide assessment districts, property inspection by the special assessment commission and a recent dissenting opinion in a North Dakota Supreme Court case.

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I. SPECIAL ASSESSMENTS IN NORTH DAKOTA

In 1887 the Legislative Assembly of the Territory of Dakota enacted a law authorizing cities "to make assessments for local improvements on property adjoining or benefited thereby."[1] The State of North Dakota adopted special assessments in 1897.[2] In 1905 the legislature passed a comprehensive act of city powers including special assessments.[3] The 1905 act serves as the foundation for current special assessment structure.[4]

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1. *See* VICTOR ROSEWATER, SPECIAL ASSESSMENTS – A STUDY IN MUNICIPAL FINANCE 50 (1893) (citing Compiled Laws of Dakota, 1887, §§ 959-999); 1887 LAWS DAKOTA 217. The author traces the first use of special assessments to London where it was used after the great London fire of 1666. *Id*. at 16-18. *But cf*. Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 THE J. OF LEGAL STUDIES 201, 201, 203 (1983) ("defenders of the special assessment had appealed to its supposed English and colonial roots. It is not clear, however, that the statutes cited constituted instances of benefit taxation or even that they were applied.") (citing Town of Macon v. Patty, 57 Miss. 378, 399 (1879)). *See generally* Newby v. Platte Cnty., 25 Mo. 258 (1857); People *ex rel.* Griffin v. City of Brooklyn, 4 N.Y. 419 (1851).

2. 1897 N.D. LAWS 47.

3. 1905 N.D. LAWS 91. *See generally The New Law Governing Cities – Synopsis of the New City Code Which Passed with Emergency Clause – Many Changes of Great Importance to Every City in the State*, FARGO FORUM, Mar. 6, 1905, at 5.

4. *See* Megarry Bros. v. City of St. Thomas, 66 N.W.2d 704, 709 (N.D. 1954) ("Most of the provisions of this chapter [40-22] had their origin in Chapter 62, SLND 1905."); Price v. City of Fargo, 139 N.W. 1054, 1058 (N.D. 1913) ("[I]t is quite clear that its main and special purpose is to provide for a more complete and comprehensive scheme in regard to what are generally known as special or local improvements . . . .").

The special assessment method involves local government apportioning the cost of public improvements to properties in a defined geographical area benefiting from the work. A special assessment is levied against property on the basis of benefit. The amount assessed is limited to and may not exceed the benefits to the property. "Special assessments are not the personal obligation of the owners of the property assessed."[5] Special assessments are distinguished from ad valorem property taxes.[6] A general tax is imposed for a general or public object, while a special assessment is levied for a special purpose with the subject property assessed in proportion to benefit.[7] Special assessments are imposed on certain properties enjoying a unique or special benefit as opposed to the general benefit to the wider community.[8] The legislature has the power to delegate to cities the authority to create improvement districts.[9] The distinction between special and general benefit is also referred to as private and public benefits. The foundation of the ability to levy special assessments exists under the taxing power.[10] However, in some instances the right to specially assess rests on the police power.[11] Special

5. Marks v. City of Mandan, 296 N.W. 39, 44 (N.D. 1941).

6. *See* Illinois Cent. R.R. Co. v. Decatur, 147 U.S. 190 (1893) (recognizing the distinction between general taxes and special assessments). *See also* State *ex rel.* Moore v. Furstenau, 129 N.W. 81, 83 (N.D. 1910) ("A special assessment is a tax in the sense that it is an enforced contribution from the property owner for the public benefit, but not in the sense that it is a burden, as he receives an equivalent in the shape of the enhanced value of his property, and only property benefited by the improvement may be assessed, the district being determined legislatively, but the amount of the tax is determined judicially, and according to the benefits. Although possessing many points of similarity, special assessments and taxes are inherently different, and the same rule of construction where the words are used in statutes will not be indiscriminately applied."). *See generally* State *ex rel*. Viking Twp. v. Mikkelson, 139 N.W. 525 (N.D. 1912). *See also* N.D. CENT. CODE § 57-15-01 (2021) ("taxes must be levied or voted in specific amounts of money," except for special assessment taxes, i.e. special assessments based on benefit). In general, special assessments are not deductible for federal income tax purposes but can be added to the cost basis of a home. *See generally* IRS, TAX INFORMATION FOR HOMEOWNERS 530 (2020), https://www.irs.gov/pub/irs-pdf/p530.pdf.

7. N.D. Op. Att'y Gen. 45-66 (June 14, 1945) ("A 'special assessment' for benefits is a mode of levying upon particular property and charging it with a local burden, with reference to the peculiar and specific benefit to such property by reason of the improvements.") (citing Atlantic Coast Line R. Co. v. City of Gainesville, 29 A.L.R. 668) (Fla. 1922)).

8. *See* Murphy v. City of Bismarck, 109 N.W.2d 635, 646 (N.D. 1961); *see also* Village of Norwood v. Baker, 172 U.S. 269, 278-279 (1898) ("As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement.").

9. *See* Webster v. City of Fargo, 82 N.W. 732 (N.D. 1900), *aff'd* 181 U.S. 394 (1901); Fisher v. City of Minot, 188 N.W.2d 745 (N.D. 1971).

10. *See* Ellison v. City of LaMoure, 151 N.W. 988, 989 (N.D. 1915). *See also* N.D. CONST. ART. X, § 5 ("taxes shall be uniform upon the same class of property"); Rolph v. City of Fargo, 76 N.W. 242 (N.D. 1898).

11. *See* N.D. CENT. CODE § 40-05-01.1 (2021) ("Whenever it becomes necessary for the general welfare, public health, fire protection, or public safety" for the city to perform certain work not performed by the property owner, the city may assess the cost of the work against the particular premises). *See also* N.D. CENT. CODE §§ 40-29-18 to -21 (2021) (special assessments for the cost

assessments are payable by property owners over a period of up to thirty years with interest.[12] The end result of a special assessment is a lien on the subject property until paid.[13] An assessment lien has "precedence over all other liens except general tax liens."[14] Special assessments have withstood constitutional scrutiny.[15]

Cities have a debt limit equal to five percent of the assessed value[16] of the taxable property within the city, which can be increased to eight percent

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of snow and ice removal from sidewalks if not done by the property owner, which are a permanent lien on the property until paid); Ennis v. City of Ray, 1999 ND 104, ¶ 19, 595 N.W.2d 305, 312 (holding city allowed to collect fees for unpaid garbage collection service); Meyer v. City of Dickinson, 451 N.W.2d 113, 117-18 (N.D. 1990) (assessment allowed against property for delinquent water bill); N.D. Op. Att'y Gen. 92-L-115 (Dec. 2, 1992) (cost of grass cutting allowed as an assessment against property when necessary to protect general welfare, public health, fire protection, or public safety). *Accord* N.D. CENT. CODE § 63-05-03 (2021) (duty of landowners with land adjoining county and township highways to cut all weeds and grasses including in the public right of way; if landowner fails to act, the county or township may cut the weeds and grass and have the expenses charged against the land. The charges are not referred to as special assessments but act the same way. The expenses "shall be charged against the land of the landowner and shall become a part of the taxes to be levied against the land for the ensuing year . . . ."); N.D. CENT. CODE CH. 11-28.1 (2021) (board of county park commissioners may establish a police protection and garbage removal service district and levy special assessments for the services); N.D. CENT. CODE § 11-28.2-04 (2021) (recreation service district may impose special assessments to provide services). *See also* N.D. Op. Att'y Gen. 94-L-276 (Oct. 17, 1994) (recreation service district can make assessment for biking and hiking trail). Special assessments for the general welfare is not a new concept. *See* COMPILED LAWS OF N.D., 1913, §§ 2867 (destruction of grasshoppers) and 2871 (extermination of gophers). *See generally* H.B. 1380, 63rd Legis. Assemb. (N.D. 2013); H.B. 1051, 56th Legis. Assemb. (N.D. 1999), (attempts to establish chapter 40-22.2 allowing special assessments for the costs of police and fire protection against tax-exempt property). *See also* N.D. Op. Att'y Gen. 2001-F-09 (Nov. 2, 2001) (a home rule city is prohibited from levying special assessments on tax exempt entities to recover costs relating to police and fire protection services). *Accord* N.D. Op. Att'y Gen. 94-L-123 (Apr. 15, 1994); N.D. Op. Att'y Gen. 99-L-28 (Mar. 30, 1999).

12. N.D. CENT. CODE §§ 40-24-04 to -07 (2021). *But cf.* N.D. CENT. CODE § 40-24-08 (2021) (assessments for street beautification limited to 10 years). *See also* 1981 N.D. LAWS 1164 (prior to 1981 street improvement assessments were limited to ten years).

13. N.D. CENT. CODE § 40-24-01 (2021).

14. *Id*. (a mistake in the description of the property or in the name of the property owner will not defeat the lien if the assessed property can be identified by the description in the assessment list).

15. *E.g*. Rolph v. City of Fargo, 76 N.W. 242 (N.D. 1898) (holding constitutional requirement of uniformity of taxes provision not applicable); Fisher v. City of Minot, 188 N.W.2d 745 (N.D. 1971) (holding due process of law not violated); City of Fargo v. Fahrlander, 199 N.W.2d 30 (N.D. 1972) (holding special assessments do not contravene takings provision); Paving Dist. 476 Grp. v. City of Minot, 2017 ND 176, 898 N.W.2d 418 (holding gift provision of N.D. CONST. ART. X, § 18 not violated). *See also* N. Pac. Ry. Co. v. City of Grand Forks, 73 N.W.2d 348, 351 (N.D. 1955) ("Since compliance with . . . statutory requirements would undoubtedly remove all constitutional objections we shall confine our consideration to the question of whether in the instant case there has been compliance with the statute with respect to the assessments made upon plaintiff's property."). *See also* McKone v. City of Fargo, 138 N.W. 967 (N.D. 1912) (regarding U.S. CONST. AMEND. XIV). *See generally* Ralph R. Neuhoff, *Special Benefit Assessments as Due Process of Law*, 1 ST. LOUIS L. REV. 310 (1916).

16. N.D. CENT. CODE § 57-02-01(3) (2021) ("'assessed valuation' means fifty percent of true and full value of property"); N.D. CENT. CODE § 57-02-01(15) (2021) (true and full value definition); N.D. CENT. CODE §§ 57-02-27, -01(13) (2021) (taxable valuation is a percentage of assessed valuation).

of assessed value with two-thirds voter approval.[17] Home rule cities are able to set their own debt limits.[18] Obligations in excess of debt limitations are void.[19] Debt has a specific meaning in the context of public finance. Generally, a borrowing is debt, and subject to constitutional and statutory limits, if it irrevocably binds future governing bodies of the borrower and is payable from a general tax.[20] Significantly, special assessment warrants and bonds are not considered debt in terms of constitutional and statutory limits.[21] Accordingly, there is no legal limit on the amount of special assessment debt a city may incur other than that imposed by the public (whether through protests if applicable or the ballot box through election or recall of the governing body) or the bond market (through reluctance to purchase a city's bonds).[22]

17. N.D. CONST. Art. X, § 15; N.D. CENT. CODE § 21-03-04 (2021); N.D. CENT. CODE § 40-24-10 (2021) (same provision). *See* MANDAN, N.D., PROC. OF THE BD. OF CITY COMM'RS (Sept. 5, 1910) (canvassing the results of the August 30, 1910 special election wherein voters approved increasing the debt limit to 8% with 75 yes votes and 32 no votes). *See generally* N.D. LEGIS. COUNCIL STAFF FOR THE COMM. OF FIN. AND TAX'N, CONSTITUTIONAL DEBT LIMITATIONS – CAN THE LEGISLATIVE ASSEMBLY PROVIDE FOR LOWER LIMITS? (Oct. 1978). *Cf.* N.D. CONST. Art. X, § 13 (state constitutional debt limit).

18. N.D. CONST. Art. VII, § 6; N.D. CENT. CODE § 40-05.1-06(2) (2021); N.D. Op. Att'y Gen. 76-17 (July 19, 1976) (home rule cities may establish debt limits in excess of constitutional and statutory limits).

19. N.D. CENT. CODE § 21-03-04 (2021). *See also* N.D. CENT. CODE § 21-03-05 (2021) (overlapping debt of other political subdivisions does not count towards limit).

20. *See* Schieber v. City of Mohall, 268 N.W. 445, 450 (N.D. 1936) (the debt limit "is intended as a limit on general taxation, a protection to taxpayers."); Marks v. City of Mandan, 296 N.W. 39, 45 (N.D. 1941) (adopting the special fund doctrine in North Dakota).

21. *E.g.*, Vallelly v. Bd. of Park Comm'r, 111 N.W. 615, 616 (N.D. 1907) ("It is generally held that constitutional provisions limiting corporate indebtedness are held not to apply to assessments upon property for improvements."). *See also* Robertson Lumber Co. v. City of Grand Forks, 147 N.W. 249, 252 (N.D. 1914) (regarding special assessments "we think we are safe in saying that it never would have been sanctioned if it had not been for the fact that in all parts of the United States municipalities in the period of their youth and prodigality, and even dishonesty, had exceeded their debt limits so that unless special assessments were authorized, really necessary improvements could not be forthcoming.").

22. *See generally* Official Statement for City of Hazen North Dakota, ELEC. MUN. MKT. ACCESS (Apr. 23, 2021), A-7, 8, https://emma msrb.org/P11490662-P11155139-P11569752.pdf (city debt limit of $4,280,984 but with outstanding special assessment debt of $8,760,189) (city debt limit calculated by multiplying $85,619,689 assessed valuation by 5%); Official Statement for City of Anamoose, North Dakota, ELEC. MUN. MKT. ACCESS (July 18, 2013), 11, https://emma msrb.org/ER686143-ER531815-ER934322.pdf (city debt limit of $153,456 but with outstanding special assessment debt of $1,990,000) (city debt limit calculated by multiplying $3,069,129 assessed valuation by 5%).

State law authorizes twelve[23] political subdivisions[24] to employ special assessments to one extent or another: city,[25] county,[26] township,[27] county park commission,[28] city park district,[29] municipal steam heating authority,[30] municipal parking authority,[31] water district,[32] water resource district,[33] irrigation district,[34] recreation service district[35] and the Garrison Diversion

23. *See* S.B. 2375, 64th Legis. Assemb. (N.D. 2015) (bill would have added a thirteenth political subdivision by creating chapter 40-64, community facilities districts with special assessment powers).

24. *See* N.D. CONST. ART. VII, § 2 ("The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law."). *See generally* Mike Maciag, *North Dakota Leads in Hyper-Local Government*, GOVERNING (Sept. 12, 2012) (North Dakota's roughly 2,666 local governments are easily the most in the United States on a per capita basis).

25. N.D. CENT. CODE CHS. 40-22 to -27 (2021); *see also* N.D. CENT. CODE § 40-05-01(60) (2021) (general power to make special assessments for local improvements). *See* N.D. Op. Att'y Gen. 85-32 (Aug. 29, 1985) (N.D. CENT. CODE § 40-05-01(60) (2021) does not allow a city to cancel delinquent special assessments). Home rule cities may adopt variations on the statutory procedures if provided for in the home rule charter and implemented by ordinance. *See* Home Rule Charter, City of Fargo, N.D., Amendment #1 (1992) ("No city-wide special assessment district shall be established" absent a vote by the electors and approval by a sixty percent majority). *See also* N.D. Op. Att'y Gen. 2000-L-156 (Nov. 2, 2000) (home rule city may finance a special assessment improvement district with a bank loan rather than through the issuance of warrants and bonds and may elect not to provide for a deficiency levy), N.D. Op. Att'y Gen. 96-F-17 (Aug. 16, 1996) (regarding N.D.C.C. ch. 40-22.1, ordinance implementing a power in the home rule charter must be sufficiently detailed to properly inform the public of the special assessment scheme).

26. N.D. CENT. CODE § 11-11-55.1 (2021); *see generally* N.D. CENT. CODE § 11-09.1-05(3) (2021) ("[H]ome rule county may not supersede section 11-11-55.1 relating to the sixty percent petition requirement for improvements and of section 40-22-18 relating to the barring proceeding for improvement projects.") (enacted in response to N.D. Op. Att'y Gen. 95-L-48 (Feb. 27, 1995) (opining that home county could create improvement districts and impose assessments)); *see also* N.D. Op. Att'y Gen. Letter to Omdahl (Aug. 16, 1989).

27. N.D. CENT. CODE CH. 58-18 (2021); *see generally* 2017 N.D. LAWS 1664 (codified at N.D. CENT. CODE § 58-18-08 (2021), adding a financing option for township special assessment improvement districts); N.D. CENT. CODE CH. 58-16 (2021) (assessments for streetlights and sidewalks in unincorporated townsite); N.D. Op. Att'y Gen. 67-327 (Feb. 27, 1967) (no township special assessment in 1967). *Accord* N.D. Op. Att'y Gen. 59-286 (Dec. 8, 1959).

28. N.D. CENT. CODE §§ 11-28.1-01 to -05 (2021).

29. N.D. CENT. CODE §§ 40-49-12(4), -18 (2021).

30. N.D. CENT. CODE § 40-33.1-15 (2021).

31. N.D. CENT. CODE CH. 40-61 (2021).

32. N.D. CENT. CODE §§ 61-35-14, -48 to -86 (2021).

33. N.D. CENT. CODE §§ 61-16.1-01 to -63 (2021); N.D. CENT. CODE §§ 61-21-01 to -67 (2021); *see generally* N.D. Op. Att'y Gen. 99-F-17 (Dec. 23, 1999) (regarding section 61-16.1-40.1 maintenance assessment). *See generally* Robert E. Beck and Bruce E. Bohlman, *Drainage Law in North Dakota: An Overview*, 47 N.D. L. REV. 471 (1970).

34. N.D. CENT. CODE §§ 61-08-01 to -42 (2021); N.D. CENT. CODE §§ 61-09-01 to -20 (2021).

35. N.D. CENT. CODE § 11-28.2-04 (2021) (assessments for services); N.D. CENT. CODE § 11-28.2-04.1 (2021) (bonding for assessment district improvements, enacted in 1979 in response to the need to build a sewage system at Lake Metigoshe); *see generally* N.D. Op. Att'y Gen. 78-169 (July 11, 1978) (failure to provide notice to property owners jurisdictional defect).

Conservancy District.[36] This article focuses on city special assessments.[37] Municipalities[38] are authorized to defray the expenses of the following types of improvements by special assessments:[39] water supply system,[40] sewerage

36. N.D. CENT. CODE CH. 61-24.8 (2021); 2011 N.D. LAWS 1581 (chapter 61-24.8 effective through July 31, 2013, and after that date is ineffective except for projects for which all steps up to and including approval as described in chapter 61-24.8 are completed before August 1, 2013).

37. Several of the political subdivisions authorized to use special assessments are directed to use the procedures applicable to cities. *See* N.D. CENT. CODE § 11-11-55.1 (2021) (counties); N.D. CENT. CODE § 58-18-08 (2021) (townships); N.D. CENT. CODE § 40-49-18 (2021) (park districts); N.D. CENT. CODE § 11-28.2-04.1 (2021) (recreation service districts); *see generally* State v. Julson, 202 N.W.2d 145, 150 (N.D. 1972) ("general rule is that it is permissible for one statute to adopt the particular provisions of another statute by specific and descriptive reference to the statute or provision adopted."); *see also* Robertson Lumber Co. v. City of Grand Forks, 147 N.W. 249, 251 (N.D. 1914) ("Each class of special assessments has its required statutory procedure, and, while similar, they are not identical or always analogous in principle. Holdings on farm drainage benefits, for instance . . . are not necessarily applicable to an improvement which is made under the authority of an act which relates to the government of cities . . . .").

38. *E.g*. JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, 448-49 (5th ed. 1911) ("It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, - not simply convenient, but indispensable."). Municipalities have only those powers expressly granted to them by the Constitution or the legislature, and those necessarily implied from the power expressly granted. The long-established statement of municipal powers is commonly known as Dillon's Rule. *See also* Thomas v. McHugh, 256 N.W. 763, 766 (N.D. 1934) ("A municipal corporation takes its powers from the statutes which give it life, and has none which are not either expressly or impliedly conferred thereby or essential to effectuate the purposes of its creation.") (quoting Lang v. City of Cavalier, 228 N.W. 819 (N.D. 1930)); *see also* State ex rel. Bauer v. Nestos, 187 N.W. 233 (N.D. 1922) (where statute grants a specific power, by implication confers authority to employ all means that are usually employed and that are necessary to the exercise of the power or the performance of the duty); *see generally* N.D. CENT. CODE §§ 40-01-01(4) (2021) (municipality includes all cities organized under state law), -01(1) (city includes cities incorporated under the city council form and city commission system); *see generally* 1967 N.D. LAWS 651 (transition of villages to cities); *see generally* Harold D. Shaft, *Powers and Procedures of City and Village Governing Boards*, 31 N.D. L. REV. 137 (1955).

39. N.D. CENT. CODE § 40-22-01 (2021). *See also* N.D. Op. Att'y Gen. 57-26 (Jan. 4, 1957) (noting that the statute uses the permissive word "may" as opposed to the mandatory "shall").

40. N.D. CENT. CODE § 40-22-01(1) (2021); *see generally* N.D. CENT. CODE § 40-22-38 (2021) (special assessments for water mains and waterworks apply only to cities which own or contemplate owning a system of waterworks and water mains); *see also* N.D. CENT. CODE § 40-33-16 (2021) (voter approval required to purchase water at wholesale (normally from rural water systems)); *but cf*. N.D. CENT. CODE § 61-40-05(19) (2021) (cities exempt from voting requirements if purchasing water in relation to initial construction of western area water supply authority); N.D. CENT. CODE § 40-33-16(2) (2021) (cities exempt from voting requirements if purchasing water in relation to initial construction of Red River valley water supply project); N.D. CENT. CODE § 61-24-08(27) (2021) (same provision, regarding Garrison Diversion Conservancy District).

system[41] (sanitary and storm[42]), municipal street system,[43] boulevards and other public places,[44] flood protection[45] and parking facilities.[46] For the purpose of making such improvements, cities may create water districts, sewer districts, water and sewer districts, street improvement districts, boulevard improvement districts, flood protection districts and parking districts.[47]

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41. N.D. CENT. CODE § 40-22-01(1) (2021); *see generally* N.D. CENT. CODE § 40-22-02 (2021) (establishment of a sewerage system requires the affirmative vote of two-thirds of the members of the governing body).

42. *See* Kirkham v. City of Minot, 122 N.W.2d 862, 864 (N.D. 1963) ("Sewers are installed for sanitary purposes, and to preserve public health. In this connection, there is no difference or distinction between sanitary sewers and storm sewers. Both are installed to protect the public health and for sanitary purposes."); *see also* Nandan, LLP v. City of Fargo, 2017 ND 72, ¶ 14, 892 N.W.2d 165 (section 40-22-01(1) includes ditch or surface drain).

43. N.D. CENT. CODE § 40-22-01(2) (2021) (including "any one or more of the processes of acquisition, opening, widening, grading, graveling, paving, repaving, surfacing with tar, asphalt, bituminous, or other appropriate material, resurfacing, resealing, and repairing of any street, highway, avenue, alley or public place within the municipality, and the construction and reconstruction of overhead pedestrian bridges, pedestrian tunnels, storm sewers, curbs and gutters, sidewalks, and service connections for water and other utilities, and installation, operation, and maintenance of streetlights and all types of decorative streetlighting, including but not restricted to Christmas streetlighting decorations"); *see* Parker Hotel Co. v. City of Grand Forks, 177 N.W.2d 764, 771 (N.D. 1970) ("municipal street system" in section 40-22-01(2) is synonymous with "streets" referred to in section 40-05-01(8) and (22) (general powers regarding streets) and section 40-22-06 (city agreement with federal or state agencies or other political subdivisions for improvement of streets, sewers, water mains or flood control projects)); *see generally* N.D. Op. Att'y Gen. Letter to Flynn (Jan. 29, 1914) (1909 N.D. LAWS 47 assessments for street lighting); *see also* N.D. CENT. CODE § 21-03-07(4) (2021) (street improvements upon any federal or state highway or any other street designated by ordinance as an arterial street may be financed with general obligation bonds "to the extent that the governing body determines that such cost should be paid by the city and should not be assessed upon property specially benefited thereby . . . .").

44. N.D. CENT. CODE § 40-22-01(3) (2021) (including "the planting of trees, the construction of grass plots and the sowing of grass seed therein, and the maintenance and preservation of such improvements by the watering of such trees and grass, the cutting of such grass, and the trimming of such trees, or otherwise in any manner which may appear necessary and proper to the governing body of the municipality").

45. N.D. CENT. CODE § 40-22-01(4) (2021); *see also* N.D. CENT. CODE § 40-22-01.1 (2021) (special assessments to cover cost of removing material and repairing damages relating to temporary emergency flood control protection systems); *see generally* N.D. CENT. CODE § 40-23-22.1 (2021) (flood control special assessment exemption for state property).

46. N.D. CENT. CODE § 40-22-01(5) (2021) ("The acquiring or leasing of the necessary property and easements and the construction of parking lots, ramps, garages, and other facilities for motor vehicles."); *see also* N.D. CENT. CODE CHS. 40-60 (Promotion and Acquisition of Municipal Parking Facilities), 40-61 (Municipal Parking Authority Act). *See also* N.D. CENT. CODE §§ 40-22-44, to -46 (2021) (discontinuance of municipal parking lots); N.D. CENT. CODE § 40-23-23 (2021) (assessments for parking improvements); *see generally* Patterson v. City of Bismarck, 188 N.W.2d 734 (N.D. 1971); Patterson v. City of Bismarck 212 N.W.2d 374 (N.D. 1973) (discussing chapter 40-60).

47. N.D. CENT. CODE § 40-22-08 (2021); *see also* Rybnicek v. City of Mandan, 93 N.W.2d 650, 655 (N.D. 1958) (improvement district formed for two or more purposes, such purpose must be common to all areas in the district); N.D. CENT. CODE § 40-22-09 (2021) (a single district may be created for more than one improvement "notwithstanding any lack of uniformity among the types, items, or quantities of work and materials to be used at particular locations throughout the district."); *see Testimony of Tom Baker, Bismarck City Auditor: Hearing on H.B. 827 Before the S. Pol. Subdivisions Comm*., 36th Legis. Assemb. (N.D. 1959) (stating that there is an advantage to

Not surprisingly, special assessments are unpopular with property owners. The North Dakota Supreme Court observed:

> It is natural for the average property owner to resent the burden thus laid upon him, and he easily persuades himself that the thing for which he is asked to pay is a detriment, rather than a benefit, to his land, and ordinarily it is not difficult for him to find plenty of sympathizing neighbors who will unite in supporting his contention.[48]

Justices have also questioned the necessity of some improvements:

> In winter time pavement is of no use and in summer time a day or two of wind and sunshine puts the streets in a splendid condition. And so a pavement can be of no real benefit only during the few days of the spring and autumn. Then it does appear that the northern part of the city is largely composed of lowly homes, where the children need bread and butter and clothing more than they need a pavement for a few days of the year.[49]

And finally, in the pioneering case of *Robertson Lumber Co. v. City of Grand Forks*,[50] the court cautioned:

> It is really time that the courts should insist upon a greater care and a stricter compliance with the fundamental law in the case of special assessments. The real fact is that any kind of taxation by means of special assessments comes dangerously near to a violation of the constitutional provisions in regard to the uniformity of taxation and the proper protection of property and of property owners from harsh and unequal burdens. There is hardly any so-called special improvement which does not redound to the benefit of the whole community, if indeed it benefits any one at all. Such improvements are often forced upon persons who are absolutely unable to pay for them, and who really derive no benefit whatever from their construction.

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combining districts as you can get cheaper bids). *See generally* Rebecca Hendrick and Shu Wang, *Use of Special Assessments by Municipal Governments in the Chicago Metropolitan Area: Is Leviathan Tamed?*, PUB. BUDGETING & FIN. 3 (Feb. 2018) (special assessment district "does not possess general, independent, or corporate powers separate from its parent government" and is not recognized as independent special district government by the U.S. Census Bureau).

48. Soo Line R.R. Co. v. City of Wilton, 172 N.W.2d 74, 83 (N.D. 1969) (quoting Chicago, R. I. & P. Ry. Co. v. City of Centerville, 153 N.W. 106, 108 (Iowa 1915)).

49. Will v. City of Bismarck, 163 N.W. 550, 556 (N.D. 1917) (Robinson, J., dissenting). Justice Robinson's acerbic style was also directed at drain assessments. McHenry Cnty. v. Brady, 163 N.W. 540, 550 (N.D. 1917) (Robinson, J., dissenting) ("And the judges of this court may well take judicial notice of what is known to every person of common sense and observation in drainage cases, that a large bulk of the cost is composed of charges going into the pocket of the drainage commissioners. It is no uncommon thing for them to meet ten minutes on a day and charge up for a day's work, and to allow their attorney a fee of $1,000 as a retainer."). *See generally* Robert Vogel, *Justice Robinson and the Supreme Court of North Dakota*, 58 N.D. L. REV. 83 (1982).

50. 147 N.W. 249 (N.D. 1914).

> Cases, indeed, are numerous where poor men have bought property and builded [sic] homes upon credit, which they would not have bought and could not have afforded to build if it were not for the cheapness of the land, and who, afterwards and because other persons have desired improvements, often merely for commercial purposes alone and to enhance the value of outlying property, have been confronted with special assessments far in excess of the original cost of the property to them. Many a mortgage has been foreclosed, not because the mortgagor and home-builder would have been unable to pay it standing by itself, but because the added burden of unanticipated special assessments has been more than he could bear.[51]

Improvements by special assessment method are the most intensive in terms of procedural requirements and tend to generate the greatest amount of confusion and the most litigation in terms of local government financing options.[52] Special assessments are a frequent topic at the legislature generating abundant legislative council memorandums,[53] numerous failed bills[54] and

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51. *Id.* at 252; *but cf*. D&P Terminal, Inc. v. City of Fargo, 2012 N.D. 149, ¶ 18, 819 N.W.2d 491 ("To the extent *Robertson* was based upon statutory, legal and factual premises which no longer exist, it is no longer valid precedent.").

52. *See generally* Scott D. Wegner, *Public Finance in North Dakota* (Sept. 2019) (discussion of political subdivision financing options) (unpublished manuscript) (on file with author).

53. *E.g.*, N.D. LEGIS. COUNCIL, ELECTED OR APPOINTED STATUS OF OFFICIALS LEVYING SPECIAL ASSESSMENTS, 66th Legis. Assemb., Tax'n Comm. (Jan. 2020); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENT REVENUE REPLACEMENT STUDY – BACKGROUND MEMORANDUM, 66th Legis. Assemb., Tax'n Comm. (July 2019); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENT FEES IN VARIOUS CITIES, 65th Legis. Assemb., Tax'n Comm. (Sept. 2018); N.D. LEGIS. COUNCIL, PREVIOUS INTERIM COMMITTEE STUDIES OF SPECIAL ASSESSMENTS, 65th Legis. Assemb., Tax'n Comm. (July 2018); N.D. LEGIS. COUNCIL, USE OF SPECIAL ASSESSMENTS IN OTHER STATES, 65th Legis. Assemb., Tax'n Comm. (May 2018); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENTS, 65th Legis. Assemb., Tax'n Comm. (May 2018); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENT PROJECT PROTESTS IN SELECTED STATES, 62nd Legis. Assemb., Tax'n Comm. (Jan. 2012); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENT INDEBTEDNESS, POLITICAL SUBDIVISION LIABILITY, AND THE SPECIAL FUND DOCTRINE, 62nd Legis. Assemb., Tax'n Comm. (Oct. 2011); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENT IMPOSITION AND CHALLENGES, 62nd Legis. Assemb., Tax'n Comm. (Oct. 2011); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENTS AND ALTERNATIVE FUNDING METHODS FOR PUBLIC IMPROVEMENTS IN OTHER STATES, 62nd Legis. Assemb., Tax'n Comm. (Oct. 2011); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENTS – BACKGROUND MEMORANDUM, 62nd Legis. Assemb., Tax'n Comm. (Aug. 2011); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENT PROTESTS OR PROPERTY TAX LEVY REFERRALS, 60th Legis. Assemb., Tax'n Comm. (Sept. 2007); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENT LIEN ATTACHMENT TO PRIVATELY OWNED BUILDING ON STATE-OWNED LAND, 57th Legis. Assemb., Tax'n Comm. (June 2002); N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENTS – BACKGROUND MEMORANDUM, 57th Legis. Assemb., Tax'n Comm. (July 2001).

54. *E.g.*, H.B. 1300, 67th Legis. Assemb. (N.D. 2021) (special assessment fund balances); H.Con.Res. 3042, 67th Legis. Assemb. (N.D. 2021) (constitutional measure limiting authority to levy assessments to elected officials); H.B. 1307, 66th Legis. Assemb. (N.D. 2019) (property must receive a special benefit, meaning increase in market value); H.B. 1488, 66th Legis. Assemb. (N.D. 2019) (special assessment fund balances); H.B. 1494, 66th Legis. Assemb. (N.D. 2019) (state loans to political subdivisions must be market rate if political subdivision uses special assessments for

many proposals enacted into law[55] in recent sessions. Locally, cities have organized committees and task forces to study the problem of special assessments.[56] Yet, special assessments remain the primary financing tool for city infrastructure. In 1985, city special assessment debt in North Dakota was approximately $280 million.[57] Today, city special assessment debt in North

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repayment); H.B. 1351, 65th Legis. Assemb. (N.D. 2017) (approval of special assessment projects by elected governing bodies); H.B. 1322, 64th Legis. Assemb. (N.D. 2015) (study use of special assessments); H.B. 1341, 64th Legis. Assemb. (N.D. 2015) (presumption that improvement district will be citywide); S.B. 2302, 64th Legis. Assemb. (N.D. 2015) (homestead credit for special assessments); S.B. 2371, 63rd Legis. Assemb. (N.D. 2013) (homestead credit for special assessments); H.B. 1341, 63rd Legis. Assemb. (N.D. 2013) (water resource district special assessments), H.B. 1380, 63rd Legis. Assemb. (N.D. 2013) (special assessments for safety and emergency services); H.B. 1220, 62nd Legis. Assemb. (N.D. 2011) (changing protest requirement to "owners of property that will be subject to a majority of the proposed costs"); H.B. 1331, 62nd Legis. Assemb. (N.D. 2011) (limit of up to 50% of project cost which may be paid from levy of special assessments); H.B. 1508, 60th Legis. Assemb. (N.D. 2007) (notice and ballot by mail to property owners in improvement district); H.B. 1242, 60th Legis. Assemb. (N.D. 2007) (when true and full value of property for property tax purposes may include value of improvements by special assessment); S.B. 2284, 58th Legis. Assemb. (N.D. 2003) (duty of seller to provide notice of unpaid specials to buyer, limiting allowable costs, and interest rate on assessments); S.B. 2346, 57th Legis. Assemb. (N.D. 2001) (excluding political subdivision property for purposes of protest requirement).

55. *E.g.*, 2021 N.D. LAWS 1232 (codified at N.D. CENT. CODE §§ 40-22-10(2)), 40-23-10(7), 40-23.1-08 (2021)) (information in engineer's report, website posting of assessment list and hearing); 2021 N.D. LAWS 1226-29 (codified at N.D. CENT. CODE §§ 40-22-01.3, 40-23-21(2), 40-05.1-06(4) (2021)) (infrastructure fee in lieu of special assessments); 2021 N.D. LAWS 2226 (concurrent resolution to study, inter alia, apportionment of voting rights in the formation of an improvement district) (topic was not selected for study during the 2021-22 interim); 2019 N.D. LAWS 1154 (codified at N.D. CENT. CODE § 40-22-18 (2021)) (government property excluded from protest); 2019 N.D. LAWS 1701 (codified at N.D. CENT. CODE § 57-02-08.3(1) (2021)) (special assessment homestead credit, adjust with CPI); 2019 N.D. LAWS 1601 (codified at N.D. CENT. CODE § 40-23-22.1(1) (2021)) (flood control specials on state land); 2017 N.D. LAWS 1664 (codified at N.D. CENT. CODE § 58-18-08 (2021)) (township special assessment bonding); 2017 N.D. LAWS 1172 (codified at N.D. CENT. CODE § 40-29-11 (2021)) (sidewalk assessments); 2015 N.D. LAWS 1554 (codified at N.D. CENT. CODE § 40-26-08 (2021)) (deficiency levy); 2015 N.D. LAWS 1184 (codified at N.D. CENT. CODE § 40-22-01.2 (2021)) (city policy regarding cost allocation among properties in improvement district); 2015 N.D. LAWS 1182 (codified at N.D. CENT. CODE § 40-22-18 (2021)) (protest requirements); 2013 N.D. LAWS 957 (codified at N.D. CENT. CODE § 40-22-01.1 (2021)) (restoration of property during declared disaster or emergency); 2011 N.D. LAWS 1028 (codified at N.D. CENT. CODE § 40-26-01 (2021)) (court review of agricultural property assessments); 2009 N.D. LAWS 1308 (codified at N.D. CENT. CODE § 40-23-07 (2021)) (cemetery assessments).

56. *See* Cherly McCormack, *Task Force Takes In-Depth Look at Special Assessments,* BISMARCK TRIB., July 11, 2017, at A8; Wendy Reuer, *West Fargo to Hold Special Assessment Forums*, INFORUM, Aug. 20, 2018; Tu-Uyen Tran, *The One Thing Everyone Talks About: Special Assessments, and Their Complexities, Emerge as Top Election Issue*, INFORUM, June 3, 2018 (city archives show that property owners have been complaining about special assessments since at least the 1960s); *Valley City City Commission Proceedings* (Nov. 6, 2006) (recommendation from Special Assessment Committee). *See also* N.D. Op. Att'y Gen. 2004-L-38 (May 26, 2004) (absent exercise of home rule power no authority to reduce assessments based on ability to pay or value of property); N.D. Op. Att'y Gen. 82-43 (June 9, 1982) (city asked if it could sponsor games of chance with proceeds used to assist in funding street improvements and was answered in the negative).

57. DOUGHERTY, DAWKINS, STRAND & YOST, PUBLIC DEBT IN NORTH DAKOTA 44-80 (1985) ($276,575,735 total but excluding the outstanding special assessment debt of 57 cities each reporting less than $250,000 of total debt, so there was likely another $3 million or so of special assessment debt).

Dakota aggregates in the neighborhood of $1.5 billion.[58] North Dakota has ranked first among states[59] in terms of collection of special assessments per capita[60] and second among states for city special assessment revenue as a percentage of all capital and construction expenditures.[61] Given the vast use of special assessments it is timely to ask if North Dakota special assessments are, well, special.

58. Estimate based on data from https://emma msrb.org, and state and federal agencies. There is no consolidated list of city debt. Each city (and each bond issue for that city) must be examined individually. Also, some city debt is held in the form of bank loans and by federal and state agencies which may not be reported or be readily accessible. Financial statements and audits will yield debt information but again, only on a city-by-city basis. *See generally* N.D. CENT. CODE § 54-10-14 (2021) (political subdivision audits). Prospectuses (known as official statements) for publicly offered bonds are available at https://emma msrb.org/IssuerHomePage/State?state=ND. The legislature has considered a reporting requirement for bonds and other evidences of indebtedness. *See, e.g.*, 2015 N.D. LAWS 1182 (study recommendation, rejected by legislative management, was to "include collection of any available information on the kinds and amounts of current indebtedness of political subdivisions and determination of whether that information is available or accessible to the public"); Interim Tax'n Comm., 62nd Legis. Assemb. (N.D. 2012) (version 13.0015.02000) (bill draft relating to the filing of informational reports on political subdivision indebtedness); *see also* 2021 N.D. LAWS 192 (BND to report to legislative management political subdivision loan information); N.D. CENT. CODE § 40-58-20.3 (2021) (tax increment financing reports filed with the department of commerce); N.D. CENT. CODE § 40-63-03(10) (2021) (renaissance zone reporting); *but cf.* 2009 N.D. LAWS 1321 (repealing MIDA bond information reporting requirement which had been in effect for thirty years); *Testimony of Harold Kocher, Examiner for the Securities Department: Hearing on H.B. 1266 Before the H. Pol. Subdivisions Comm*., 61st Legis. Assemb. (N.D. 2009) ("The Securities Department has not received a request to provide the information relating to all issues or a single issue for over 20 years."). *Accord* 2017 N.D. LAWS 216 (repealing section 54-40.3-03 which encouraged political subdivisions to file joint powers agreements with the advisory commission on intergovernmental relations); 1993 N.D. LAWS 851 (repealing Section 21-03-31 requiring notice of general obligation bond sales to the State Tax Commissioner and the Bank of North Dakota); *Summary of Senate Bill 2454, Testimony on S.B. 2454 Before the S. Fin. & Tax'n Comm*., 53rd Legis. Assemb. (N.D. 1993) ("The longstanding practice at the Bank of North Dakota has been to discard these notices."). *See generally* N.D. LEGIS. COUNCIL, NORTH DAKOTA POLITICAL SUBDIVISION BONDED INDEBTEDNESS, 62nd Legis. Assemb., Legacy and Budget Stabilization Fund Advisory Bd. (Aug. 2011) (only 22 cities responded to survey regarding bonded indebtedness).

59. Most states utilize special assessments. *See* Wang & Hendrick, *Financing Urban Infrastructure and Services under the New Normal in* PRIVATE METROPOLIS: THE ECLIPSE OF LOCAL DEMOCRATIC GOVERNANCE 181, 193 (Dennis R. Judd, Evan McKenzie and Alba Alexander ed., 2021) ("The consensus in the literature seems to be that all fifty states allow their local governments to use SAs, but there is no systematic investigation or documentation of enabling legislation in all states.").

60. Mathew D. McCubbins and Ellen C. Seljan, *Fiscal Secession: An Analysis of Special Assessment Financing in California*, 56(2) URB. AFF. REV. 480, 484 (2020) (citing 2014 Annual Survey of State and Local Finance (U.S. Census Bureau 2014)).

61. Wang & Hendrick, *supra* note 59, at 195-96 (citing U.S. Census of Governments).

II. SPECIAL ASSESSMENT METHOD

A. BASIC PROCEEDINGS

City special assessment law is set forth in North Dakota Century Code Chapters 40-22 through 40-27.[62] In addition to these chapters, cities are authorized to make and finance improvements and levy special assessments under any alternate procedure set forth in Title 40.[63] The alternate procedures are considerable.[64]

Special assessment proceedings[65] are commenced by resolution[66] or ordinance[67] creating an improvement district which is identified by number and type of improvement.[68] While normally initiated by the city, an improvement district can be established based on property owner petitions. It seems that a municipality could decline to undertake an improvement project even if

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62. *See* McLauren v. City of Grand Forks, 43 N.W. 710, 711 (Dakota 1889) (special assessment statutes are in derogation of the common law and must be strictly constructed).

63. N.D. CENT. CODE § 40-22-08 (2021).

64. *E.g.,* N.D. CENT. CODE CH. 40-22.1 (2021) (promotion of business activity through establishment of business improvement districts, although amended to prohibit financing improvements with bonds or warrants; 2011 N.D. LAWS 1027 (codified at N.D. CENT. CODE § 40-22.1-01 (2021))); N.D. CENT. CODE CH. 40-28 (2021) (service connections); N.D. CENT. CODE CH. 40-29 (2021) (sidewalks); *Cf.* N.D. Op. Att'y Gen. 46-256 (June 3, 1946); N.D. CENT. CODE CH. 40-30 (2021) (street lights); *see generally*, N.D. Op. Att'y Gen. 51-20 (Jan. 20, 1951) (regarding special assessment warrants for street lighting system); N.D. CENT. CODE CH. 40-31 (2021) (curb and gutter; curb and gutter improvements under Section 40-22-01(2) are subject to protest while the same improvements made pursuant to Chapter 40-31 provide no opportunity for protest). *See generally,* N.D. Op. Att'y Gen. 74-43 (May 15, 1974) (citing Deuchscher v. City of Jamestown, 237 N.W. 814 (N.D. 1931)); N.D. CENT. CODE CH. 40-32 (2021) (boulevards); N.D. CENT. CODE CH. 40-33 (2021) (municipal utilities; municipality may not undertake a water improvement project unless approved by a majority vote of the electorate, unless eighty percent or more of the project cost is to be paid by special assessments or system revenues). *See* N.D. Op. Att'y Gen. Letter to Berg (Mar. 9, 1988) (the "cost" of a project does not include funds available to pay for the project, such as grants; given the Attorney General's interpretation, it is hard to conceive of a situation where specials are used and a vote is still required). *Accord* N.D. Op. Att'y Gen. 70-55 (July 16, 1970). *See also* N.D. Op. Att'y Gen. 2005-L-43 (Dec. 8, 2005) (pursuant to home rule city could reject the voter approval requirement); N.D. CENT. CODE § 40-33.1-15 (2021) (municipal steam heating authorities); N.D. CENT. CODE § 40-34-02(5) (2021) (sewage and garbage disposal); N.D. CENT. CODE CH. 40-54 (2021) (gravel surfacing); N.D. CENT. CODE CH. 40-56 (2021) (residential paving projects); N.D. CENT. CODE CH. 40-60 (2021) (parking facilities); N.D. CENT. CODE CH. 40-62 (2021) (city pedestrian mall improvements).

65. *See* N.D. CENT. CODE § 40-22-40 (2021) (city auditor required to keep a record of all proceedings relating to special assessment improvement projects).

66. *See* 1949 N.D. LAWS 341 (codified at N.D. CENT. CODE § 40-22-08 (2021)) (adding option of resolution, prior law required city to create the improvement district by ordinance); *see also* Mitchell v. City of Parshall, 108 N.W.2d 12, 14 (N.D. 1961) (recording of "yea" and "nay" votes not required in relation to a resolution creating improvement district, discussing Section 40-11-03).

67. *See* N.D. CENT. CODE § 40-12-08 (2021) (ordinances are subject to referral).

68. N.D. CENT. CODE §§ 40-22-08, -09 (2021). *See also* N.D. CENT. CODE § 44-04-20 (2021) (all proceedings by the governing body of the city related to a special assessment project are subject to the state's open meeting law). *See also* Green v. Beste, 76 N.W.2d 165, 170 (N.D. 1956) (special assessment proceedings adopted at a meeting that was not a legal meeting are void). *See generally* N.D. CENT. CODE §§ 40-08-10, -09-11 (2021) (requirements to establish regular and special meeting dates for city councils and commissions).

petitioned by owners of a majority of the area of property.[69] The creation of an improvement district is a jurisdictional prerequisite to making the improvement.[70] If an improvement district is not properly created special assessments may not be levied.[71] District boundaries must be drawn so as to include all properties which in the judgment of the governing body, after consultation with the engineer, will be benefited by the construction of the improvement.[72] The city council or commission may include all items of work and materials which in its judgment are necessary or reasonably incidental to the completion of the improvement project.[73] The city has no authority to assess property outside the limits of the improvement district.[74] Additionally a city has no authority to assess property outside of its corporate limits, although the improvement district may include land outside the limits of the

69. *Cf.* N.D. CENT. CODE § 40-22-09 (2021) (city may enlarge an improvement district upon receipt of a petition signed by the owners of three-fourths of the area to be added to the district). Again, it seems that since the language is permissive, the governing body could decline to enlarge a district. Other reasons argue in favor of discretion on the part of the city. The fact that the city's general obligation stands behind special assessment bonds in the form of the deficiency levy suggests that the city have some say as to the scope and type of improvement. Also, the type of petitioned improvement may not be compatible with city land-use, planning and zoning. Finally, if a municipality is required to undertake a project supported by petitions, the result may be an unconstitutional delegation of legislative power. *See* GLENN W. FISHER, FINANCING LOCAL IMPROVEMENTS BY SPECIAL ASSESSMENT 25 (Mun. Fin. Officers Ass'n 1974). *See also* N.D. Op. Att'y Gen. 94-L-276 (Oct. 17, 1994) (no common law rule or general principle of law that allows the electorate of a political subdivision to force its governing body to levy a special assessment). *But cf.* N.D. Op. Att'y Gen. 56-32 (Aug. 30, 1956) (regarding authority to drop out part of a petitioned improvement district, "the board of control has not the power, acting on such petition, to lengthen or decrease the part of the street which the petition seeks to have improved.") (quoting Minor v. The Bd. of Control of the City of Hamilton, 20 Ohio Cir. Ct. Rep. 4 (1899)).

70. Dakota Land Co. v. City of Fargo, 224 N.W.2d 810, 814 (N.D. 1974); Boynton v. Bd. of City Comm'rs of Minot, 211 N.W. 441, 443 (N.D. 1926).

71. Green v. Beste, 76 N.W.2d 165, 170 (N.D. 1956).

72. N.D. CENT. CODE § 40-22-09 (2021) (city council or commission may subsequently enlarge the district upon petition signed by the owners of three-fourths of the area to be added). One district may contain two or more separate property areas. The governing body determines the existence and boundaries of any separate property area. *See* Murphy v. City of Bismarck, 109 N.W.2d 635, 645 (N.D. 1961) ("If the property owner or group of property owners, such as these plaintiffs, can determine that any area is a separate property area, logically each property owner could determine that his own individual lot constituted such separate property area, or a group of one, two or three lots. Such a discretion and such a determination was not delegated by the statute [40-22-09] to the individual property owners but to the Board of City Commissioners exercising its legislative discretion, subject to judicial review for bad faith or fraud.") (alteration in original) (quoting city attorney's brief) (internal quotation marks omitted).

73. N.D. CENT. CODE § 40-22-01 (2021). *See* Nandan, LLP v. City of Fargo, 2015 ND 37, ¶ 31, 858 N.W.2d 892 (remand for determination of whether certain repairs were incidental to water and sewer improvement district); Nandan, LLP v. City of Fargo, 2017 ND 72, ¶ 20, 892 N.W.2d 165 (street and utility repairs were incidental to water and sewer project).

74. Crane Johnson Lumber Co. v. City of Fargo, 2003 ND 181, ¶ 6, 671 N.W.2d 814; Dakota Land Co. v. City of Fargo, 224 N.W.2d 810, 812 (N.D. 1974) ("Property outside of the limits of an improvement district is not subject to special assessment.") (quoting Reed v. City of Langdon, 54 N.W.2d 148, 149 (N.D. 1952)).

city[75] and the improvement project itself may involve work beyond the municipal limits.[76] Property that is outside the city limits at the time an improvement is made is subject to assessment if subsequently annexed.[77] Assessments may also be imposed for any improvement determined to benefit property that was outside the corporate limits at the time of the improvement, regardless of whether or not an improvement district was previously created for the improvement. The city may create one or more improvement districts comprising all or part of the annexed territory. In determining the amount of any subsequent assessment, the governing body may use a reasonable depreciation schedule for the improvements.[78]

After creating the improvement district, the city council or commission approves the engineer's preliminary report and cost estimate.[79] A 2021 amendment requires the report to include information describing how the improvement district was created to include "any considerations as to which properties are determined to receive a benefit . . . ."[80] Following the engineer's preliminary report and cost estimate the governing body declares it necessary to make the improvement.[81] The resolution of necessity must refer to the engineer's report and must include a map[82] of the municipality showing

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75. Hector v. City of Fargo, 2010 ND 168, ¶ 10, 788 N.W.2d 354 ("Because creation of a special improvement district must precede any assessments, it follows that N.D.C.C. § 40-23-19, by allowing the assessment of property that is subsequently annexed to a municipality, necessarily authorizes the creation of special improvement districts that include land outside the limits of a municipality.").

76. *See* N.D. CENT. CODE § 40-22-03 (2021) (acquiring property for sewers, water mains and water supply beyond corporate limits); *see also* N.D. CENT. CODE § 40-22-05 (2021) (condemnation of land and rights of way, including land outside of the city limits, plus quick take authority); *see generally* N.D. CONST. ART. I, § 16.

77. N.D. CENT. CODE §§ 40-23-17, -19 (2021).

78. *Accord* N.D. Op. Att'y Gen. 74-79 (June 27, 1974). *See generally* 1993 N.D. LAWS 1378 (prior law limited the subsequent assessments to water and sewer projects). *See also* N.D. CENT. CODE § 40-23-20 (2021) (city may direct cancellation of uncollected installments of special assessments or direct a refund of installments that have been prepaid to equalize the original assessments with the subsequent assessments). *Cf.* N.D. CENT. CODE § 40-23-18 (2021) (cities may subsequently assess property that was in the corporate limits of the city at the time the original improvement was made, if a property was not originally assessed, but is later included within another improvement district created to finance an improvement that will be connected directly or indirectly with the original improvement); *Cf.* N.D. CENT. CODE § 40-22-09 (2021) (city may omit from a water or sewer district properties within the corporate limits which are benefited by the improvement, but do not abut upon a water or sewer main; city retains the authority to subsequently assess such properties).

79. N.D. CENT. CODE § 40-22-10 (2021). *See* 2003 N.D. LAWS 1244 (requiring cost estimate to contain separate statements of the estimated cost of the work for which proposals must be advertised for bids and of all other items of estimated cost not to be bid but which will be assessed, such as administrative, legal and engineering costs).

80. 2021 N.D. LAWS 1232 (codified at N.D. CENT. CODE § 40-22-10(2) (2021)).

81. N.D. CENT. CODE § 40-22-15 (2021); *see* Mitchell v. City of Parshall, 108 N.W.2d 12, 15 (N.D. 1961) (adoption of resolution of necessity "is mandatory and an absolute prerequisite" to further proceedings) (citing Kvello v. City of Lisbon, 164 N.W. 305 (N.D. 1917)).

82. The map requirement was imposed in 1975. *E.g.* 1975 N.D. LAWS 1058.

the proposed improvement district. The resolution and map are published once each week for two consecutive weeks in the city's official newspaper.[83] The resolution of necessity contains a notice that owners of property in the district have the opportunity to protest[84] against the making of the proposed improvement.[85]

Owners of property in the improvement district have thirty days after the first publication of the resolution of necessity to file written protests with the city auditor.[86] The protest must describe the property which is the subject of the protest.[87] Beyond including a description, protests can and do come in all manner of expression.[88] If any protests are filed, at the first meeting following the expiration of the protest period, the governing body "shall hear and determine" the sufficiency of the protests.[89] If the protests represent the

83. *See* Serenko v. City of Wilton, 1999 ND 88, ¶ 18, 593 N.W.2d 368 (errors in publishing resolution and map not a constitutional due process violation). *Compare* City of Lidgerwood v. Michalek, 97 N.W. 541, 543 (N.D. 1903) (publication requirement does not apply to eminent domain proceedings); Village of Reeder v. Hanson, 213 N.W. 492 (N.D. 1927).

84. Political subdivision borrowing statutes generally provide for one of three levels of approval depending on the type of debt: referendum with up to 60% super majority (general obligation bonds), reverse referendum, i.e. a protest or remonstrate requirement (certain special assessments), and governing body action only (revenue bonds among others). Wegner, *supra* note 52.

85. *See* H.B. 1508, 60th Legis. Assemb. (N.D. 2007) (bill would have required notice and ballot by mail to the owner of each affected parcel of property within a special improvement district). A complaint city leaders hear on occasion is that the public was not aware of the improvement project and that a protest period was running.

86. N.D. CENT. CODE § 40-22-17 (2021); *see* Gallaher v. Fargo, 64 N.W.2d 444, 451 (N.D. 1954) (protest may be withdrawn prior to action on the protest).

87. *See* 1983 N.D. LAWS 1414 (adding language to require that protests describe the property); *Testimony of Maurice Cook: Hearing on H.B. 1156 Before the H. Political Subdivisions Comm*., 48th Legis. Assemb. (N.D. 1983) ("Requiring the description of the property will make it easier for auditor to file protests.").

88. *See generally* Protest Brief, City of Bottineau, N.D., St. Improvement Dist. No. 1-1984 (Oct. 18, 1984) ("To be facetious, can you imagine your own reaction to the state deciding that you need an International Airport in Bottineau, that they have decided to build against your wishes for the sum of 50 million dollars, to paid [sic] by the city of Bottineau in installments over the next 25 years? Surely, someone would benefit, but precious few, and you would be in an uproar. The thought is absurd, of course, but the principal is the same. We are being asked to fund a project that we do not want, and do not need, and therefore we protest the action that was taken, and the assessment that has been levied.").

89. N.D. CENT. CODE § 40-22-17 (2021). The meeting to determine the sufficiency of the protests is not a public hearing although public participation is often allowed; *see also* Rybnicek v. City of Mandan, 93 N.W.2d 650, 657 (N.D. 1958) (governing body may delegate to city engineer, city auditor and city attorney power to examine the protests and report results to governing body); *see generally* Jones v. City of Hankinson, 186 N.W. 276 (N.D. 1921) (plaintiff has the burden of establishing that a sufficient protest was filed).

majority of the area of the property[90] within the proposed district (on the basis of square footage[91]), the project is barred.[92]

If the protests are found to be insufficient or invalid,[93] the project may proceed with approval of plans and specifications,[94] advertisement for bids[95]

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90. The protest requirement has changed over time from "majority of the owners of property" (REV. CODES OF N.D., 1905, § 2778), to "owners of a majority of the property" (COMPILED LAWS OF N.D., 1913, § 3704) to "owners of a majority of the area of the property" (1959 N.D. LAWS 529). *Cf.* N.D. CENT. CODE § 40-22-26 (2021) (petition for certain type of paving, still uses the "owners of a majority of the property" language). *See also* H.B. 1220, 62nd Legis. Assemb. (N.D. 2011) (bill would have changed protest requirement to "owners of property that will be subject to a majority of the proposed costs"). *Cf.* N.D. CENT. CODE § 40-22-06 (2021) (improvements made in cooperation with, and contract for work let by, local, state or federal government, other than the city, the protest requirement is 75% if the cost to be assessed does not exceed 25% of the total project cost). *See* Nandan, LLP v. City of Fargo, 2015 N.D. 37, 858 N.W.2d 892 (resolution of necessity under section 40-22-06 required only if governmental entity other than the city contracts for the work). *See generally* Hector v. City of Fargo, 2012 ND 80, ¶ 32, 815 N.W.2d 240 (stating that N.D. Op. Att'y Gen. Letter to Ingstad (Nov. 5, 1985), discussing section 40-22-06 is not persuasive).

91. Gallaher v. Fargo, 64 N.W.2d 444, 448 (N.D. 1954) ("The determination of what constitutes 'a majority of the property liable to be special assessed', can, it seems to us, be best accomplished on a fair and equitable basis by determining the square footage area of the whole improvement district.") (decided prior to 1959 amendment). Typically, the engineer along with city staff make the calculation as to whether the property described in the protests represents a majority of the area. *Cf.* N.D. CENT. CODE § 47-01-16 (2021) (owner of land bounded by road or street presumed to own to the center although not typically counted as private property for protest purposes).

92. *See* N.D. CENT. CODE § 40-22-18 (2021). If separate property areas were included, it is possible that some areas may be protested out while others remain. If proceedings for an improvement district are terminated, whether by protest or otherwise, the municipality must pay any costs incurred such as engineering. Should funds on hand be insufficient, the city may levy a tax on all taxable property to cover the cost. *See also* 2015 N.D LAWS 1182 (sufficient protests do not bar the project if the council or commission funds the project other than with special assessments). *See generally*, COMPILED LAWS OF N.D., 1913, § 3704 (prior law provided that the governing body could overrule sufficient protests by a two-thirds vote). *E.g.* Will v. City of Bismarck, 163 N.W. 550, 554 (N.D. 1917) ("The more reasonable interpretation of the statute is that where the owners of a majority of the property protest it will require a vote of two-thirds of the council to determine the insufficiency of the protests and to proceed with the work.").

93. *See* N.D. Op. Att'y Gen. 2004-L-40 (June 1, 2004) (to be valid, the protest must be written and must describe the property which is the subject of the protest; description of the property must be clear enough to allow the governing body to determine which property is the subject of the protest; "[a]t 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 also* N.D. Op. Att'y Gen. 2003-L-13 (Feb. 25, 2003) (one cotenant has the implied authority to sign a protest objecting to an improvement district, unless a non-signing owner expresses a contrary intent). *See also* City of Fargo v. Fahrlander, 199 N.W.2d 30, 35 (N.D. 1972) (holders of leasehold interests are not owners entitled to protest). *See also* N.D. Op. Att'y Gen. 52-55 (June 10, 1952) (in the context of drain assessments, purchaser under contract for deed is entitled to vote as the owner).

94. N.D. CENT. CODE §§ 40-22-11 to -14 (2021). *See* 1971 N.D. LAWS 888 (eliminating requirement that plans and specifications be approved before a resolution of necessity is adopted), *Explanation of Senate Bill No. 2389*, 42nd Legis. Assemb. (N.D. 1971) ("This will permit a municipality to defer the expense of having detailed plans and specification prepared until after the governing body has considered the views of property owners and determined that protests against the improvement are not sufficient to bar further proceedings.").

95. N.D. CENT. CODE § 40-22-19 (2021); N.D. CENT. CODE CH. 48-01.2 (2021).

and contract award.[96] The governing body may not award the contract to any bidder if the bid exceeds the engineer's cost estimate by forty percent or more.[97] Unlike other financing methods, the special assessment chapters detail the process of advertising for construction bids. The advertisement for bids must be published once each week for two consecutive weeks in the city's official newspaper, with the first publication at least 14 days before bid opening.[98] The exception from the public bidding requirement in cases of emergencies[99] does not apply to special assessment improvement projects.[100] The same rationale applies to the bidding requirement exception if the cost estimate is not more than $200,000.[101] One potential problem arises with the advertisement for bids on state or federal projects. A prime reason to proceed with improvements in connection with a state project relates to the cost savings by having the city's project bid as part of, for example, a state highway project. While an entire project will be bid together, a city will actually enter into its own contract for its own improvements. However, a city is still required to follow the particulars as to the advertisement for bids specified in section 40-22-19. So, either the city must independently advertise or the North Dakota Department of Transportation advertisement must track with the requirements of section 40-22-19 and chapter 48-01.2.[102]

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96. *See* N.D. CENT. CODE §§ 40-22-35 (execution and filing of contract), -37 (contractor payments, retainage) (2021). *See also* N.D. CENT. CODE § 40-22-36 (2021) (while work is in progress, the city may, without advertising for bids, order additional work by the contractor "of the same character as that which was contracted for, whether within or without the improvement district" provided the total price for the additional work does not exceed twenty percent of the original engineer's estimate).

97. *See* N.D. CENT. CODE § 40-22-29 (2021). While the statute requires a comparison of the engineer's preliminary cost estimate to the engineer's estimate prepared at the time of bid opening, in practice some cities compare the preliminary estimate to the bids. *See* Hector v. City of Fargo, 2012 ND 80, ¶ 34, 815 N.W.2d 240 (second sentence of the provision added in 1985 to address the problem of costs greatly exceeding the amounts estimated in the engineer's report.). *Cf.* N.D. CENT. CODE § 61-35-64 (2021) ("A contract or contracts may not be awarded which exceed, by forty percent or more, the estimated cost of the project as presented to and approved by the affected landowners."); N.D. CENT. CODE § 61-16.1-24 (2021) (same provision).

98. N.D. CENT. CODE § 40-22-29 (2021). *Cf.* N.D. CENT. CODE § 48-01.2-04 (2021) (for other than special assessment projects the requirement is three publications plus publication in a trade publication or other industry-recognized method of general circulation among contractors). *See also* N.D. Op. Att'y Gen. 96-L-30 (Mar. 1, 1996) (all provisions other than the placement of the advertisement (official newspaper) and its timing or frequency (once each week for two consecutive weeks) are governed by Chapter 48-01.2). *See generally* Will v. City of Bismarck, 163 N.W. 550, 553 (N.D. 1917) ("The purpose of the advertisement is to secure competition in bidding for the work, and certainly this purpose is well served whether the advertisement is run concurrently with the resolution of necessity or whether it is later published by itself.").

99. N.D. CENT. CODE § 48-01.2-04(2) (2021).

100. N.D. Op. Att'y Gen. Letter to Ficek (Dec. 20, 1983).

101. N.D. CENT. CODE § 48-01.2-04(1) (2021).

102. *See* N.D. Op. Att'y Gen. 96-L-66 (Apr. 8, 1996) (common bid and contract between a city and NDDOT does not release the city from complying with the special assessment bidding process). *See generally* N.D. CENT. CODE § 1-06-06 (2021) (validation for state related projects for cities with a population of over ten thousand).

City improvement districts frequently include property owned by the city and other political subdivisions, such as school districts and park districts. Consequently, it was often difficult if not impossible for private property owners to overcome the large amount of land owned by political subdivisions in reaching the majority of the area of property protest threshold.[103] The legislature addressed the issue providing that property owned by a political subdivision is not included when determining whether protests are sufficient unless the political subdivision files a protest.[104]

Notably, a resolution of necessity and the corresponding right to protest is not required for water or sewer[105] improvements due to the essential nature of the service.[106] In addition, a resolution of necessity is not required if written petitions for the improvement are submitted by the owners of a majority of the area of the property within the district.[107]

A statute of repose restricts actions based upon defects in the proceedings.[108] Any action regarding defects and irregularities in the basic proceedings must be commenced within thirty days of the adoption of the resolution awarding sale of warrants to finance the improvement.[109] An exception exists if the proceedings are fraudulent or violate a constitutional provision.[110]

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103. *See* Matt Mullally, *Street Work Ahead*, PIERCE CNTY. TRIB., Oct. 18, 2008, at 1 (Rugby officials received over 400 protests against street project which amounted to only 9.7% of the total area in the district); Matt Mullally, *Still a Sore Subject*, PIERCE CNTY. TRIB., Nov. 8, 2008, at 1 (40% of the property in the City of Rugby is owned by political subdivisions making it virtually impossible for individual property owners to meet the protest threshold).

104. 2019 N.D. LAWS 1154 (codified at N.D. CENT. CODE § 40-22-18 (2021)). In other words silence on the part of a school board regarding school district property within a city improvement district results in removal of the school district property for purposes of the protest calculation.

105. *See generally* N.D. Op. Att'y Gen. 70-59 (May 13, 1970) (hydrants and manholes are water and sewer improvements and thus not subject to protest).

106. N.D. CENT. CODE § 40-22-15 (2021); *contra* 1985 N.D. LAWS 1619 (amending section 40-22-15) (prior law provided that if part of the cost was to be paid by service charges then a resolution of necessity was required). *See generally* N.D. Op. Att'y Gen. 56-27a (Sept. 26, 1956) (resolution of necessity not required for sewer and watermain assessment district). The legislature could eliminate a protest requirement altogether. *See* Serenko v. City of Wilton, 1999 N.D. 88, ¶ 14, 593 N.W.2d 368 (holding there is no constitutional right to notice when city initially undertakes an improvement; constitutional due process rights require only notice and an opportunity to be heard at some point before the individual assessment becomes final) (citations omitted).

107. N.D. CENT. CODE § 40-22-15 (2021); *see* 1971 N.D. LAWS 888 (adding landowner petition).

108. N.D. CENT. CODE § 40-22-43 (2021); *see Testimony of Robert Birdzell, Bank of North Dakota: Hearing on S.B. 220 Before the H. Judiciary Comm*., 36th Legis. Assemb. (N.D. 1959) ("Notice of assessments (special) should be properly given in the legal newspaper and if not so done should the assessment be void when no fraud involved?") (posing a question as to the reason for enacting the statute). *E.g.*, Paving Dist. 476 Grp. v. Minot, 2017 ND 176, ¶ 16, 898 N.W.2d 418 (VandeWalle, C.J., concurring) (noting the distinction between a statute of repose and a statute of limitation); Serenko v. City of Wilton, 1999 N.D. 88, ¶ 16, 593 N.W.2d 368 ("Having created the procedure, the legislature can also limit the remedies for violating its statutory procedure.").

109. *See* 1977 N.D. LAWS 478 (statute changed from 60 days to 30 days to conform to bond market practice).

110. N.D. CENT. CODE § 40-22-43 (2021).

B. PROPERTY SUBJECT TO ASSESSMENT

In general, all real property is subject to special assessments.[111] Since special assessments are distinguished from general taxes, property that is exempt from ad valorem taxes[112] are still subject to special assessments.[113] Once a lot or tract is assessed, it is unlawful to remove a building from the property until after the special assessments have been paid, unless a new building is erected of equal or greater value.[114] If a building is moved without payment of the specials, the assessment is a lien on the building regardless of its removal as well as upon the lot or tract from which the building was moved.[115] In addition, in some instances the occupant or beneficial user of property may be assessed if the property is exempt from special assessments or cannot be assessed for some reason.[116]

City, county, school district, park district and township properties are explicitly subject to assessment.[117] The law allows these political

111. N.D. CENT. CODE § 40-22-09 (2021) (improvement district shall include all properties which will be benefited).

112. *See* N.D. CONST. ART. X, § 5 (exempting from taxation "property used exclusively for schools, religious, cemetery, charitable or other public purposes."); N.D. CENT. CODE § 57-02-08 (2021) (property exempt from taxation); *see generally* LEG. COUNCIL, PROPERTY TAX EXEMPTIONS CHRONOLOGY, 62nd Legis. Assemb., Tax'n Comm. (May 2012).

113. *See* N.D. Op. Att'y Gen. Letter to Crane (July 5, 1955) (nonprofit corporation lot subject to special assessment).

114. N.D. CENT. CODE § 40-01-08 (2021) (violation is a class A misdemeanor). *See also* N.D. Op. Att'y Gen. 2000-L-104 (June 28, 2000); N.D. Op. Att'y Gen. 90-L-90 (Aug. 6, 1990) ("remove" includes the destruction of a building*; see also* N.D. CENT. CODE § 40-23-07.2 (2021) (common area in a townhouse development is to be assessed against each lot or tract whose owner has a right to the common area in a proportional amount).

115. N.D. CENT. CODE § 40-01-08 (2021).

116. N.D. CENT. CODE § 40-23-08 (2021). *See* N.D. Op. Att'y Gen. 2000-L-72 (May 5, 2000) (interpreting section 40-23-08 rather narrowly as applying only to exemptions granted by title 40; section 40-23-08 does not allow a city to assess an occupant of an Indian housing authority as the housing authority is granted an exemption under title 23); N.D. Op. Att'y Gen. 58-180 (Oct. 30, 1958) ("Actually the statute both before and after the enactment of the amendment appearing in the 1957 Supplement would appear to be merely a codification of a part of the general legal rule, i.e., 'It is generally held that an exemption from special or local assessments, where enjoyed by governmental bodies with respect to lands owned by them does not extend to the leasehold interest of a tenant of those lands.') (quoting 48 AM. JUR. 639, *Special or Loc. Assessments,* § 83). *Cf* N.D. CENT. CODE § 57-02-26 (2021) (certain property taxable to lessee or equitable owner).

117. N.D. CENT. CODE § 40-23-07 (2021); 1947 N.D. LAWS 450 (allowing special assessments against political subdivision property). *Accord* N.D. Op. Att'y Gen. 47-57 (Oct. 25, 1947). *Cf.* N.D. CENT. CODE § 40-23.1-06 (2021) (same provision). Presumably property belonging to other political subdivisions is also subject to special assessments although it is not clear. *See e.g.,* N.D. CENT. CODE § 61-35-19 (2021) (facilities of a water district are not taxable in any manner by the state or a political subdivision). *See also* N.D. CENT. CODE § 23-11-29 (2021) (property of city or county housing authority used for low-income housing is exempt from special assessments; in lieu of special assessments the authority may agree to make payments for improvements; property of an authority used for moderate income housing is subject to special assessments but the city may exempt the authority from paying special assessments). *Accord* N.D. CENT. CODE § 23-18.2-26 (2021) (repealed 2015) (same provision, nursing home authority). *See also* City of Sw. Fargo Urban Renewal Agency v. Lenthe, 149 N.W.2d 373, 378 (N.D. 1967) (urban renewal property under chapter 40-58

subdivisions to pass on the annual assessment amount through general taxation, i.e. an unlimited excess mill levy against all taxable property within the political subdivision.[118] Political subdivisions are also authorized to issue general obligation bonds for the purpose of prepaying outstanding special assessments levied against property owned by the political subdivision.[119] The excess mill levy is only against taxable property as opposed to a special assessment which would include tracts exempt from general property tax. On occasion special assessment districts consist entirely of city property, which means the general public cannot stop the project through protests. In the case of city owned property, the city assesses itself, and as noted above, passes on the assessment as an excess mill levy on all taxable property. Improvement districts composed entirely of political subdivision property have been of particular concern in the case of park districts. In reliance on an attorney general opinion, park districts have created improvement districts consisting of only park district property.[120] With no private property in the improvement district there is no possibility of protests. The legislature acted by authorizing general obligation bonds, subject to protest, to finance park improvements thereby eliminating the need for use of park property only improvement districts.[121]

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subject to special assessments). *See also* N.D. Op. Att'y Gen. 79-1 (Mar. 9, 1979) (if county airport authority property annexed into city, property is likely subject to city special assessments). *See generally* United Pub. Sch. Dist. No. 7 v. City of Burlington, 196 N.W.2d 65, 69 (N.D. 1972) ("We take judicial notice of the fact that, in a city of 247 population, with little commercial activity and no industrial activity, the school – with its 208-pupil enrollment and its many activities which include inviting the attendance of the public – would be the greatest recipient of the benefits of a sewer and water system.").

118. N.D. CENT. CODE § 57-15-41 (2021). *See also* N.D. CENT. CODE § 61-21-52 (2021) (drain assessment made against a city shall in turn be extended against all taxable property in the city). *See generally* N.D. Op. Att'y Gen. 56-100 (Feb. 17, 1956) (school district may pay city assessment out of school building fund); N.D. Op. Att'y Gen. 63-260 (Dec. 13, 1963) (park district tax levy to pay city special assessment). *See also* N.D. Op. Att'y Gen. Letter to Day (Jan. 15, 1955) (advising school district to use section 57-1541, North Dakota Revised Code of 1943 (1953 Supp.) to levy taxes to redeem property sold for delinquent special assessments).

119. 1993 N.D. Laws 856 (codified at N.D. CENT. CODE § 21-03-07(10) (2021)); *Testimony of Marvin Leidal: Hearing on S.B. 2463 Before the H. Fin. and Tax'n Comm*., 53rd Legis. Assemb. (N.D. 1993) ("The West Fargo School District presently has about $1,290,000.00 in Special Assessments to pay at interest rates ranging from 6.5% to 11.25%. Our bond consultant has estimated that if we were able to sell bonds at a rate of approximately 5% (present market) and use the proceeds to pre-pay our special assessment obligations, we could save our taxpayers about $213,800.00 in interest costs over the next 15 years.").

120. *See* N.D. Op. Att'y Gen. 82-71 (Oct. 15, 1982).

121. 2019 N.D. LAWS 716 (codified at N.D. CENT. CODE § 21-03-07(11) (2021)). *But cf*. N.D. CENT. CODE §§ 40-49-14, 21-03-06(6) (2021) (while special assessment bonds do not count against the debt limit, general obligation bonds do count against park district's debt limit of 1% of assessed valuation, meaning small districts can only use the general obligation bond option to a small extent before running up against the debt limit). *See also* N.D. CENT. CODE § 21-03-02(1) (2021) (chapter 21-03, general obligation bonds, is not applicable to special assessment warrants and bonds "which do not constitute, at the time of their issuance, a general obligation or fixed liability of the municipality issuing the same…". There is an argument that the amount a political subdivision assesses against itself is debt for purposes of the constitutional debt limit).

Prior to 1959, state property could not be specially assessed.[122] Today, property belonging to the state, other than for highway right-of-way purposes, is subject to special assessments when benefited by the improvement.[123] While a city is authorized to assess state property, there must be an appropriation from the legislature for the payment.[124] Property belonging to the United States is not subject to assessment unless the United States has provided for payment of any assessment.[125] More particularly, special assessments can be levied against property owned by the United States which will result in a lien running with the land.[126] However, there is no means to enforce the lien without the consent of the United States.[127]

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122. *E.g*. N.D. Op. Att'y Gen. 59-191 (Oct. 23, 1959). *See* N.D. Op. Att'y Gen. 50-138 (Aug. 23, 1950) (citing general rule that absent constitutional or statutory authorization public property is not subject to special assessment). *Accord* N.D. Op. Att'y Gen. 58-179 (Aug. 19, 1958) (state highway department land not subject to special assessment); N.D. Op. Att'y Gen. 58-262 (Sept. 12, 1958) (state school land not subject to assessment); N.D. Op. Att'y Gen. 61-22 (Sept. 6, 1961) (drain assessment against state land board invalid); N.D. Op. Att'y Gen. Letter to Johnson (Sept. 19, 1991) (ND Game and Fish Department not subject to a drain assessment). *But cf*. N.D. Op. Att'y Gen. 54-69 (Oct. 25, 1954) (state liable for special assessments since not specifically exempt). Prior to 1959 the legislature did at times provide for payment of special assessments on state property. *E.g*., 1953 N.D. LAWS 3 (appropriation to pay city of Bismarck special assessments levied against state property).

123. 1959 N.D. LAWS 758 (codified at N.D. CENT. CODE § 40-23-22 (2021)). *See also* N.D. Op. Att'y Gen. 2012-L-02 (Mar. 2, 2012) (common schools trust land cannot be included in city assessment district unless agency agrees that the property is benefited to the extent of the assessment); N.D. Op. Att'y Gen. 59-191 (Oct. 23, 1959) (legislature can consent to pay for specially assessed benefits affecting its lands and institutions). *But cf.* N.D. CENT. CODE §§ 40-23-22.1(1) (state property exempt from special assessment in the case of flood control projects, in recognition of state financial assistance for such projects; upon request, exemption may be partially or completely waived by the legislature or budget section), -22.1(2) (2021) (flood control exemption does not apply to privately owned structures located on state-owned land if the structure is used for commercial purposes). *See* N.D. LEGIS. COUNCIL, PREVIOUS INTERIM COMMITTEE STUDIES OF SPECIAL ASSESSMENTS, 65th Legis. Assemb., Tax'n Comm. (July 2018) ("The bill did not allow assessments against a structure if the net profit was dedicated to the state institution, which was intended to exempt the Engelstad Arena at the University of North Dakota from assessments.").

124. City of Fargo v. State, 260 N.W.2d 333, 340 (N.D. 1977) ("We must recognize that neither NDSU nor the State of North Dakota has any funds to pay special assessments without first obtaining an appropriation from the Legislature. If the Legislature refuses to appropriate funds to pay the special assessment we are not aware of any constitutional method whereby the Legislature can be compelled to make the appropriation."). *Cf.* 2005 N.D. LAWS 126 ("The state board of higher education may authorize North Dakota state university to request of the city of Fargo creation of a $1,025,000 special improvement district to finance necessary repairs and improvements to seventeenth avenue located on the North Dakota state university campus."). *See also* 1951 N.D. LAWS 2 (appropriation to pay city of Bismarck assessments against capitol grounds). N.D. Op. Att'y Gen. Letter to Sherman (Feb. 8, 1951) (approving the appropriation).

125. N.D. CENT. CODE § 61-16.1-21 (2021) ("Property belonging to the United States shall be exempt from such assessment, unless the United States has provided for the payment of any assessment which may be levied against its property for benefits received."); N.D. CENT. CODE § 61-35-61 (2021) (same provision). *See* N.D. REV. CODE OF 1943 (1953 Supp.) § 40-2307 (property belonging to the United States exempt from assessment); 1957 N.D. LAWS 544 (exemption repealed).

126. Berger Levee Dist. v. United States, 7 S.W.3d 15 (Mo. App. 1999).

127. *See* United States v. City of Aberdeen, 1990 U.S. Dist. LEXIS 17820 (D. S.D. Dec. 13, 1990).

The question of whether property is subject to special assessment also arises in regard to improvement projects in cities located on Indian reservations. Since cities on reservations are municipal corporations under North Dakota law they have the authority to make improvements by special assessment method and assess property owned by non-Indians.[128] However, such cities do not have the power to levy special assessments against property owned by Indians or by the United States in trust.[129] Consequently, the issue is one of security for the bonds issued to finance the improvements.

Beginning in 1895, the legislature exempted cemetery property from taxation.[130] In 1959, the legislature repealed the relevant section as part of the Nonprofit Corporation Act.[131] In a declaratory judgment action, the North Dakota Supreme Court held that the 1959 repeal notwithstanding, the legislature did not intend to break with long-established public policy protecting burial places from all intrusion.[132] In spite of the *City of Bismarck v. St. Mary's Church* decision, some communities levied special assessments against cemetery property. A cemetery assessment in Grand Forks prompted the legislature to act; a 2009 amendment provides that property owned by a nonprofit entity and used exclusively as a cemetery is exempt from collection of special assessments.[133]

Railroads and public utilities are generally subject to special assessments.[134] Railroad property, including the railroad tracks and right-of-way, is subject to assessment even though such assessment cannot be enforced by sale of the property.[135]

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128. N.D. Op. Att'y Gen. Letter to Beyer (Aug. 18, 1976).

129. N.D. Op. Att'y Gen. 56-64 (Feb. 17, 1956).

130. REV. CODES OF N.D. 1895, § 3199 (property of cemetery corporation "shall be exempt from taxation, assessment, lien, attachment and from levy and sale").

131. 1959 N.D. LAWS 175.

132. City of Bismarck v. St. Mary's Church, 181 N.W.2d 713 (N.D. 1970).

133. 2009 N.D. LAWS 1308 ("It is the intent of the sixty-first legislative assembly by the enactment of this Act to provide for the payment of special assessments against nonprofit cemetery property, including outstanding unpaid obligations, through levy of general property taxes within the city in recognition of the public benefit provided by operation of nonprofit cemeteries."). *See also* N.D. Op. Att'y Gen. 2009-L-06 (Mar. 18, 2009) (discussion of special assessments on nonprofit cemetery).

134. EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 38:53 (3rd ed. 2019). *See also* N.D. Op. Att'y Gen. 55-130 (Apr. 20, 1955) (telephone company lot subject to special assessment).

135. Soo Line R.R. Co. v. City of Wilton, 172 N.W.2d 74, 82 (N.D. 1969). *See also* Minneapolis, St. P. & S.S.M. Ry. Co. v. City of Minot, 199 N.W. 875, 878 (N.D. 1924) (overruling No. P.R.C. v. Richland Cnty., 148 N.W. 545 (N.D. 1914)). *See generally* Robert K. Severson, *Special Assessments – Railroads-Right of Way Assessment Liability Depends on Present or Future Benefits* 53 N.D. L. REV. 3, 12 (1959).

C. WARRANTS AND BONDS

If protests are insufficient (or were not permitted) the municipality may proceed to issue warrants[136] or improvement bonds to finance the project.[137] The 1905 act provided for the issuance of warrants.[138] The use of warrants tends to cause confusion. In the 1930's, cities paid bills with warrants that had to be discounted if the warrant holder needed the money right away, such as those sold to the Bank of North Dakota, which were held until the city collected enough tax money to redeem them.[139] At one time it was common for a city to pay a contractor for the improvement district work with a warrant issued on the special assessment fund[140] and it is still an option today.[141]

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136. N.D. CENT. CODE § 21-01-01(2) (2021) (the term warrant "means an order drawn by the proper taxing district officials on the treasurer . . . the warrant or order to be so drawn that when signed by the treasurer . . . in an appropriate place it becomes a check on the taxing district depository."). *See generally* Charles Burke Elliott, Note, *Municipal Warrants*, 21 AM. L. REV. 578 (1887).

137. N.D. CENT. CODE §§ 40-24-19 to -20 (2021) (warrants or bonds may be issued at any time after making a contract for construction or prior thereto, but in any event after protests have been determined to be insufficient). *See also* COMPILED LAWS OF DAKOTA, 1887, § 997; REV. CODES OF N.D., 1895, § 2309 (the financing instruments for special assessment improvements were originally known as Internal Improvement Bonds).

138. REV. CODES OF N.D., 1905, § 2786 ("Such warrants may be used in making payments on contracts for making such improvements or may be sold for cash . . . .").

139. *See* FISHER, *supra* note 69, at 28 ("In some municipalities contractors are paid in special-special bonds rather than cash. As a result of the default in the 1930's, there were areas in the country where such bonds could be sold only at deep discounts. As a result, contractors greatly inflated their bid in order to allow for losses on the sale of bond."). *See also* Letter from Carl A. Berg, President, First Merchants & Farmers Bank, to Mr. C. Christie Bantz, Vice President, Bank of North Dakota (June 11, 1970) (Bank of North Dakota, Series 31427, State Historical Society of North Dakota) ("Enclosed please find five registered warrants on Drain number 30, Walsh County, North Dakota totaling $12,209.55 which are payable to Mike Austford Construction Company. These warrants are registered for lack of funds. As per out telephone conversion of this afternoon, you agreed to purchase these warrants at two percent discount.").

140. *See* Pine Tree Lumber Co. v. City of Fargo, 96 N.W. 357 (N.D. 1903); Red River Valley Nat'l Bank v. City of Fargo, 103 N.W. 390 (N.D. 1905); State *ex rel.* Bithulitic & Contracting, Ltd. v. Murphy, 128 N.W. 303 (N.D. 1910). *See generally* N.D. Op. Att'y Gen. 61-264 (Nov. 28, 1961) (state water conservation commission may not accept special assessment warrants in lieu of cash as payment of the cost of improvements); N.D. Op. Att'y Gen. 46-207 (June 12, 1946) ("It is my opinion that warrants should be issued directly to the person to whom payment is due and that they should not be issued to a bank or any other loaning agency as evidences of a loan.") (discussing N.D. CENT. CODE § 21-01-04). *See generally* Letter from Robert A. Birdzell, Bank of North Dakota, to Bosard & McCutcheon, Attorneys at Law, Minot, North Dakota (March 1, 1951) (Bank of North Dakota, Series 31427, State Historical Society of North Dakota) ("As I read it, the last sentence of Section 40-2219, Supra, is intended to sanction sale of the warrants through competitive bidding by the contractors themselves.") (referencing North Dakota Revised Code of 1943 (1949 Supp.)). *See generally* N.D. CENT. CODE § 40-33-12(1) (2021) (surplus in the municipal utilities fund may be invested in special improvement district warrants of the municipality). *See generally* N.D. Op. Att'y Gen. 96-L-126 (June 26, 1996) (regarding section 40-33-12(1)).

141. *See* N.D. CENT. CODE § 40-24-21 (2021) ("Special improvement warrants may be used in making payments on contracts for the improvements for which the special improvement fund was created . . . ."). *See also* Beck & Bohlman, *supra* note 33, at 489 ("When issued as a demand instrument to the payee (for example, the contractor who constructed the drain) the warrant is much like a check or draft on an ordinary bank account."). *See also* N.D. CENT. CODE § 40-24-23 (2021) (a property owner which purchases a special assessment warrant may use the matured warrant or

Some cities also sold warrants directly to local investors.[142] Many cases involved claims over special assessment warrants not paid for want of funds.[143] Warrants not paid for want of funds are required to be registered by the treasurer of the taxing district.[144]

Given the baggage associated with warrants, and because bonds are a more commonly recognized debt instrument, purchasers of special assessment obligations decided that they did not want an instrument called a "warrant," but rather preferred a bond.[145] So, the practice became that a city would issue a warrant to finance a special assessment improvement project and then immediately exchange the warrant for a bond[146] even though the security for each instrument is the same.[147] The end result is that the purchaser gets a bond rather than a warrant. Sometimes, a city will proceed with multiple improvement districts that are financed collectively through one bond issue.[148] In that event, a warrant is issued against each individual improvement district to evidence that district's amount owing on the bond issue.[149] As noted, the

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interest coupon to pay his assessment levied for the payment of the improvement for which the warrant was issued).

142. *E.g.*, Interview with Dennis Schlenker, retired city Investment/Finance Officer in Bismarck, N.D. (Aug. 31, 2021) (City of Bismarck sold 10-year sidewalk and streetlight warrants directly to local investors).

143. *E.g.*, Grand Lodge v. City of Bottineau, 227 N.W. 363, 364 (N.D. 1929) ("It is a matter of common knowledge that most cities and towns are heavily in debt, aside from various kinds of warrants made payable out of special assessment funds."); Bankers' Trust & Savings Bank v. Village of Anamoose, 200 N.W. 103 (N.D. 1924); *In Re* Cunningham, 245 N.W. 896 (N.D. 1932); G.W. Jones Lumber Co. v. City of Marmarth, 272 N.W. 190 (N.D. 1937); First Nat'l Bank of Buffalo v. Ford, 293 N.W. 789 (N.D. 1940); City of Beach v. Goepfert, 147 F.2d 480 (8th Cir. 1945). Of course, it was not only special assessment warrants that went unpaid. *See* Osage Farmers Nat'l Bank v. Van Hook Special Sch. Dist. No. 8, 263 N.W. 162 (N.D. 1935) (school district warrants for salaries and for driving school bus not paid for want of funds).

144. N.D. CENT. CODE § 21-01-06 (2021) ("Whenever the law authorizes the officers of any taxing district to issue warrants in excess of the amount of cash available in any fund upon which warrants are drawn for payment, the treasurer of that taxing district, when any warrant is presented to the treasurer for payment, if not paid for want of funds, shall endorse the same 'Presented for payment on _____, _____, and not paid for want of funds', and thereupon shall enter the warrant in the treasurer's warrant register in the order of presentation for registration.").

145. *See* 1983 N.D. LAWS 1415 (amending section 40-24-19 to allow issuance of improvement bonds in addition to warrants); *see Testimony of Maurice Cook: Hearing on S.B. 2210 Before the H. Pol. Subdivisions Comm.*, 48th Legis. Assemb. (N.D. 1983) ("Nobody wants to buy anything called a warrant. Changing name to special improvement bonds.").

146. *See* N.D. CENT. CODE §§ 40-27-06, to -12 (2021) (process of exchanging warrants for bonds).

147. *See* N.D. Op. Att'y Gen. 87-7 (May 21, 1987) ("Therefore, the security granted to holders of refunding improvement bonds is the enforcement of all obligations for the original refunded debt, which in this instance were definitive warrants, including the deficiency levy granted in N.D.C.C. § 40-26-08.").

148. *E.g.,* Official Statement for City of Fargo, North Dakota, ELEC. MUN. MKT. ACCESS (July 29, 2019), https://emma msrb.org/ES1295278-ES1013638-ES1414978.pdf (one bond issue to finance projects in various improvement districts of the city).

149. *Id.* at 3 (improvement warrants issued by the city against the funds of the various improvement districts).

warrants are then immediately exchanged for bonds.[150] Thus, most city special assessment bonds are styled as "refunding improvement bonds."[151] The warrants remain outstanding and are held by the city as security for the refunding bonds.[152] The exchange of warrants for bonds generally takes place even if there is only one improvement district, and so, a single warrant.

The issuance of warrants or bonds constitutes a representation and covenant binding upon the city that the aggregate benefits to be derived from the making of the improvement by the properties assessed, are not less than the aggregate amount of special assessments to be levied.[153] Governing body resolutions detail the terms of sale of the warrants and bonds, such as principal amount, interest rate, maturity date, prepayment provisions and source of payment.[154] Special assessment warrants and bonds may be issued for a term of up to thirty years[155] and are payable in equal annual amounts, or in such annual amounts as will permit the annual increase in payment of principal to approximate the annual decrease in the interest on amounts remaining unpaid.[156] The city covenants to levy and collect special assessments against benefited property in amounts sufficient to pay principal and interest on the warrants.[157] A depression era law allows cities to issue general obligation bonds for the purpose of purchasing outstanding special assessment warrants

150. Consolidating warrants from multiple improvement districts into one bond issue may provide comfort to bondholders. Purchasers of the bonds own a pro rata share of each improvement district warrant. Investors don't have to worry about the credit quality of individual improvement districts and warrants issued on such districts, regardless of the deficiency levy.

151. N.D. CENT. CODE § 40-27-08 (2021) ("Refunding warrants or bonds issued pursuant to this chapter may be designated as 'refunding improvement warrants' or 'refunding improvement bonds' as the governing body shall determine . . . ."); *see also* N.D. CENT. CODE § 40-27-06 (2021) (purposes for which refunding improvement bonds may be issued).

152. N.D. CENT. CODE §§ 40-24-22, -27-11 (2021).

153. N.D. CENT. CODE § 40-24-19 (2021).

154. *See* N.D. CENT. CODE §§ 40-24-19, -27-08 (2021) (warrants and bonds are negotiable instruments).

155. N.D. CENT. CODE §§ 40-24-04 to -07 (2021). *See also* N.D. CENT. CODE § 40-27-08 (2021) (30-year maximum maturity for refunding warrants and bonds); *see also* N.D. CENT. CODE § 40-24-19 (2021) (cities are authorized to issue temporary warrants or bonds maturing in not more than three years, which are to be repaid with interest from the proceeds of definitive warrants and bonds).

156. N.D. CENT. CODE §§ 40-24-04 to -08 (2021). The law was amended in 1983 to allow the option of level debt service on warrants and bonds. 1983 N.D. LAWS 1415.

157. *See generally* N.D. CENT. CODE §§ 40-25-06, -07 (2021) (city may be liable to the holder of special assessment warrants for any negligence, such as action which results in the loss of any special assessment lien upon real property). *See generally* N.D. CENT. CODE § 40-43-05 (2021) (compromised judgment regarding city liability for negligence in levy or collection of special assessments). The law allowed cities to issue bonds to compromise a judgment, bearer bonds could be issued directly to the judgment creditor and were payable in annual installments over a period of up to twenty-five years, at the time of the issuance of the bonds the city was required to levy a direct, annual, and irrepealable tax sufficient to pay the bonds. However, while section 40-43-05 remains, the bonding and levy authority was repealed in 2015. 2015 N.D. LAWS 1554.

which either have or are about to default.[158] Finally, warrants and bonds may be refunded or refinanced, usually for interest rate savings.[159]

Cities may elect to pay for up to one-fifth of the cost of a special assessment improvement with general taxation on all taxable property.[160] The one-fifth share is spread citywide as an excess mill levy to account for the general benefit to the wider community from a local improvement project.[161] The general tax portion counts against the city's debt limit.[162]

At times cities utilize a statute that allows water, sewer, or parking lot special assessment projects to be paid in part from revenues of the system being improved.[163] The city is authorized to establish an assessment reserve

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158. 1935 N.D. LAWS 286 (codified at N.D. CENT. CODE §§ 40-27-01 to -05 (2021)). General obligation bonds issued pursuant to these sections are debt for debt limit purposes. These sections have rarely if ever been given breath. *See* Haugland v. City of Bismarck, Civ. No. 39575, at *35-36 (N.D. Mar. 22, 1988) (transcript on appeal) (plaintiff incorrectly arguing that pursuant to Section 40-27-04 the city's refunding improvement bonds were general obligations and as such counted against the city's debt limit) (likely the most recent time Sections 40-27-01 through 40-27-05 have been referenced), *aff'd* 429 N.W.2d 449 (N.D. 1988). *Cf.* N.D. CENT. CODE §§ 21-03-06(2)(g), -25 (2021) (general obligation bonds for the payment of a special assessment fund deficiency). *See also* Schieber v. Mohall, 268 N.W. 445, 455 (N.D. 1936) (bonds issued pursuant chapter 206 of the Session Laws of 1935 are subject to constitutional debt limit).

159. N.D. CENT. CODE § 40-27-13 (2021) (refunding bonds and warrants, i.e., a second set of refunding bonds usually for interest rate savings).

160. N.D. CENT. CODE § 40-24-10 (2021); N.D. CENT. CODE § 57-15-10(1) (2021) (but excluding projects involving the opening and widening of streets or the laying of sewer or water connections from the main to the curb line). Prior law also excluded sidewalks. COMPILED LAWS OF N.D., 1913, § 3723. The one-fifth public share concept apparently originated in 1897 with the requirement that street improvement districts be assessed four-fifths upon lots in the district with one-fifth paid by the city, "such payment by the city shall be in satisfaction of all claims against such city on account of paving or otherwise improving alley crossings and street intersections.". *E.g.* 1897 N.D. LAWS 48. *See also* N.D. Op. Att'y Gen. 65-44 (June 10, 1965) (opening and widening of streets and the laying of sewer or water connections from the main to the curb line specifically excepted since such improvements would apparently not be of benefit, either directly or indirectly, to property outside of the improvement district)*; see also* N.D. CENT. CODE § 40-56-03 (2021) (for residential paving projects city's share may exceed 20%); N.D. Op. Att'y Gen. 69-61 (June 9, 1969) (city's share not subject to regular levy limitations); N.D. Op. Att'y Gen. 84-2 (Jan. 6, 1984) (application to county special assessment projects). *Cf.* N.D. CENT. CODE § 40-33-06 (2021) (municipal utilities assessments, city may pay "any portion of the cost of the improvement by general taxation upon all taxable property in the municipality.").

161. N.D. Op. Att'y Gen. 65-44 (June 10, 1965) ("The apparent basis for such a statute is that the improvement will be of indirect benefit to the entire municipality."); N.D. Op. Att'y Gen. 69-61 (June 9, 1969) (the basis for this provision "is that the improvement, while it may not directly benefit all of the property in the municipality, will be of indirect benefit to such property.").

162. N.D. CENT. CODE § 40-24-10 (2021). *See* discussion *supra*, notes 16-22 and accompanying text.

163. N.D. CENT. CODE § 40-22-16 (2021). *See* 1941 N.D Laws 301, § 2 ("It is hereby found and declared that may (many) cities and villages are in need of sewer and water improvements, which they are unable to obtain by any of the methods presently permitted by law, and that there is immediate need of this law to protect the health and safety of the people."). The revenue option together with using general taxation for up to one-fifth of the project cost, permits a combination special assessment, general tax and revenue warrant. To utilize this provision the city must state its intent in the resolution creating the district (water or sewer improvements) or in the resolution of necessity (parking lot). *See* N.D. Op. Att'y Gen. 56-84 (May 22, 1956). While revenues can be used

fund into which are deposited net revenues of the utility or system to pay debt service on the bonds.[164] Prior to November 1 of any year, the city council or commission determines the amount on deposit in the assessment reserve fund and reduces by a proportionate amount the amount certified to the county auditor for the next special assessment installment. A city has the same powers in regard to service charges as it has in the case of revenue bond financing.[165] If a property owner has prepaid a special assessment installment which is later reduced or cancelled due to the use of utility revenues, the city may but is not required to refund to the property owner, out of the assessment reserve fund, the principal amount of the installment, excluding interest.[166]

Special assessment warrants and bonds are backed by a general obligation deficiency levy.[167] Whenever special assessment collections are

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to pay debt service on special assessment bonds, conversely special assessments cannot be used to support revenue bonds. *See generally* N.D. Op. Att'y Gen. 84-20 (Apr. 11, 1984) (city may not refinance a revenue bond with special assessments).

164. N.D. CENT. CODE § 40-22-16 (2021).

165. *E.g.*, N.D. CENT. CODE CH. 40-35 (2021). *See generally* N.D. Op. Att'y Gen. Letter to Anderson (Nov. 28, 1980) (question whether a city could create an assessment district but use coal severance tax revenue to pay debt service on the bonds).

166. N.D. CENT. CODE § 40-22-16 (2021).

167. N.D. CENT. CODE §§ 40-26-08, 57-15-10(2) (2021). *See also* N.D. CENT. CODE § 40-27-12 (2021) (authorizing basically a second deficiency levy imposed at the maturity date of the last maturing warrant or bond for any deficiency in the special assessment fund); *see also* N.D. Op. Att'y Gen. Letter to Holm (Oct. 3, 1985) (deficiency levy not limited to one year within an ongoing bond amortization, applies when an entire special assessment warrant becomes due); *see also* N.D. Op. Att'y Gen. Letter to Bohlman (Oct. 19, 1976); N.D. Op. Att'y Gen. Letter to Bohlman (Sept. 27, 1976) (park district duty to impose deficiency levy); *see also* N.D. CENT. CODE §§ 21-03-06(2)(g), -25 (2021) (as an alternative to the deficiency levy a city is authorized to issue general obligation bonds without an election for the purpose of covering any deficiency in the fund of any special improvement district whenever the special assessments are insufficient to pay the bonds issued for the improvement)*; see also* 1985 N.D. LAWS 1625 (amending sections 40-27-06 and 40-27-11 to permit refunding of warrants and bonds that are due or about to become due, and avoid imposing a deficiency levy, requested by the City of Williston). *See Testimony on H.B. 1244 Before the H. Political Subdivisions Comm*., 49th Legis. Assemb. (N.D. 1985) (in 1983 statewide cities levied $893,929 for special assessment deficiencies). *See generally* N.D. CENT. CODE §§ 61-16.1-36 (deficiency in a water resource district special assessment district, such deficiency is a general obligation of the water resource district), -25 (county wherein the water resource district lies is required to advance an amount sufficient to pay the deficiency), -55 (2021) (same provision). *See also* N.D. CENT. CODE § 2-06-10(9) (2021) (airport authority revenue bonds issued after July 31, 2015 are required to have city deficiency tax levy backing)*; see also Official Statement for Minot City, North Dakota,* ELEC. MUN. MKT. ACCESS, A-14 (Nov. 7, 2016) https://emma msrb.org/ES987906-ES773295-ES1174613.pdf (home rule city can provide deficiency levy backing to revenue bonds). *But cf*. N.D. CENT. CODE §§ 61-35-86 (deficiency in a water district special assessment district, such deficiency is a general obligation of the water district, however a water district has no authority to levy taxes), 61-24.8-36 (same provision, garrison diversion conservancy district), 23-11-24(23)(b) (2021) (housing authority may pledge the general obligation of the city to the payment of housing revenue bonds, however the legislature did not provide a tax levy for this purpose); N.D. Op. Att'y Gen. 2011-L-12 (Dec. 21, 2011) (section 23-11-24(23)(b) creates a contingent liability not subject to debt limit which will ripen into current liability subject to debt limit in the event the housing authority has insufficient revenues to pay debt service); 2015 N.D. LAWS 1554 (repealing section 57-15-59 which provided that payments on city and county leases of correctional facilities are a general obligation backed by the full faith and credit of the city or county, but providing no excess levy authority).

insufficient to pay principal and interest, the city is required to levy a tax upon all taxable property in the city for the payment of the deficiency.[168] Further, if a deficiency is likely to occur within one year for the payment of principal and interest the city may levy a deficiency tax.[169] The modern version of the deficiency levy was added in 1923.[170] Prior to 1923, a deficiency levy was authorized but only after all special assessments had been collected.[171] Until a 1961 amendment, the deficiency levy only applied upon the maturity of the last special assessment warrant.[172] The deficiency levy is a contingent liability and as such is not debt for debt limit purposes.[173] The deficiency levy is the backbone of special assessments and any possible limitation of the levy receives the highest concern.[174] Even so, at some level the deficiency levy will exceed the city's ability or willingness to pay it.[175]

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168. N.D. CENT. CODE § 40-26-08 (2021).

169. *See* 1955 N.D. LAWS 410 (legislature added the ability to levy for anticipated deficiencies).

170. 1923 N.D. LAWS 181. *See* Marks v. Mandan, 296 N.W. 39, 45 (N.D. 1941) ("The statute we are considering broadens the liability from one of a special contingency to that of a general contingent liability for any deficiency whatever the cause . . . . The fact that the city has determined that certain benefits have accrued to private property, does not preclude the existence of general benefits or their recognition in the form of a contingent liability.").

171. COMPILED LAWS OF N.D., 1913, § 3716. *See also* Schieber v. Mohall, 268 N.W. 445 (N.D. 1936); Stutsman v. Arthur, 16 N.W.2d 449 (N.D. 1944). *Cf.* Pine Tree Lumber Co. v. City of Fargo, 96 N.W. 357 (N.D. 1903) (city has power to render itself generally liable upon its contract for paving); Dakota Tr. Co. v. City of Hankinson, 205 N.W. 990 (N.D. 1925); State *ex rel.* Kistler v. City of Hankinson, 205 N.W. 995 (N.D. 1925).

172. 1961 N.D. LAWS 442. *See Testimony of Arthur Whitney: Hearing on H.B. 711 Before the H. Political Subdivisions Comm*., 37th Legis Assemb. (N.D. 1961) (purpose of bill is to make a true guaranteed obligation).

173. Marks v. Mandan, 296 N.W. 39, 48 (N.D. 1941) ("Where the obligation of the municipality rests wholly upon a contingent liability, there is no debt created until the contingency occurs.") (citing Bismarck Water Supply Co. v. City of Bismarck, 137 N.W. 34 (N.D. 1912)).

174. *See generally* 2013 N.D. LAWS 1679 (initiated constitutional measure would have abolished property tax). The measure would have eliminated the special assessment deficiency levy. Special assessment bond offerings during the period prior to the vote disclosed to purchasers the potential impact of Measure No. 2. *E.g.*, *Official Statement*, City of Bismarck Park District, ELEC. MUN. MKT. ACCESS (Mar. 1, 2012), 5 https://emma msrb.org/ER583762-ER452270-ER854938.pdf ("In June of 2012, North Dakota voters will vote on Measure 2 which proposes to retroactively eliminate the ability of North Dakota Political Subdivisions to levy general real property taxes. The retroactive date is January 1, 2012. The measure does not affect the ability of North Dakota Political Subdivisions to levy and apportion special assessments for municipal improvements and to pledge the revenue generated by special assessment warrants, but may affect the ability of North Dakota Political Subdivisions to levy a property tax unlimited as to rate or amount to make up a deficiency in the sinking fund pursuant to N.D.C.C. § 40-26-08 for new issues sold after January 1, 2012."). *See generally* Caitlin Devitt, *North Dakota To Put Gos On Hold*, THE BOND BUYER, Dec. 6, 2011. Some property tax reform bills would have likewise impacted the deficiency levy. *E.g*. H.B. 1361, 65th Legis. Assemb. (N.D. 2017) (bill would have limited dollar increases in property taxes levied by political subdivisions to 3% per year absent voter approval). *See also* Dave Thompson, *Initiated Measure Would End Local Property Taxes*, BISMARCK TRIB., Mar. 5, 2020, at B1 (second attempt at initiated measure to abolish property tax, which never got off the ground).

175. The 1980s oil bust saw some communities struggle to pay special assessment bonds for new developments. *E.g*., Karl Oxnevad, *North Dakota Town, Bondholders Agree on Settlement to*

Cities frequently look for ways to lessen the impact of specials. Examples include use of sales tax, tax increments, utility revenues and state and federal grants.[176] In the 2019 session, a bill provided that legislative management shall consider studying options for replacing revenue generated by special assessments.[177] The topic was selected for study by the Taxation Committee during the 2019-20 interim.[178] Resulting legislation permits the use of infrastructure taxes on residential and commercial utility bills in lieu of special assessments.[179]

III. SPECIAL ASSESSMENT COMMISSION

Special assessments involve two distinct proceedings,[180] the improvement district procedure followed by the work of the special assessment commission ("SAC").[181] The city is responsible to the holders of the warrants and

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Prevent Chapter 9 Filing, THE BOND BUYER (Aug. 9, 1991) (City of Belfield defaulted on special assessment bonds) ("There came a point when town council members said they wouldn't increase the deficiency levy any higher; they would all quit before they'd do it again, and you wouldn't have found anyone to serve on the council who would increase the levy. The town would have died.") (quoting city attorney Al Hardy). The title of the story notwithstanding, bankruptcy is not an option as the legislature has not granted North Dakota cities the authority to file for bankruptcy protection, *i.e.* 11 U.S.C. § 109(c). *See also Testimony of Warren Vranna, Director, Energy Development Impact Office: Hearing on H.B. 1019 Before the H. Appropriations Comm*., 50th Legis. Assemb. (N.D. 1987) ("Belfield's deficiency levy would be pushing 200 mills if it were not for grants we made to the city to reduce its deficiency levy."); *see also* LeAnn Eckroth, *City pays off $26M bad debt*, WILLISTON HERALD, (Apr. 30, 2002) (City of Williston makes final payment on special assessment debt from the oil bust of the early 1980s); *see also* N.D. Op. Att'y Gen. Letter to Luptak (Aug. 17, 1987) (Energy Development Impact Office grant to City of Belfield to pay off special assessment debt); 1989 N.D. LAWS 118 (oil and gas impact grants to help cities with unpaid special assessments). In addition to Belfield, the cities of Williston, Dickinson and Gladstone received state assistance. *See also* 1987 N.D. LAWS 51 (the state issued bonds to pay special assessments on the old Dickinson experiment station) (North Dakota Building Authority, Lease Revenue Bonds, 1988 Series C). *Cf.* H.B. 1443, 66th Legis. Assemb. (N.D. 2019) (bill would have helped pay special assessments levied against ND Horse Park by dedicating breakage or what's rounded off a gambler's winnings).

176. 24 C.F.R. § 570.200(c). One source is the Community Development Block Grant (CDBG) program. The CDBG program was established by Congress in 1974. *Id*. Each state receives an allocation and North Dakota's allocation is divided among the eight regional planning councils. If special assessments are used in connection with a CDBG, the amount of the grant must be allocated to pay the assessments for low and moderate income property owners. *Id.*

177. 2019 N.D. LAWS 1621.

178. *See* N.D. LEGIS. COUNCIL, SPECIAL ASSESSMENT REVENUE REPLACEMENT STUDY – BACKGROUND MEMORANDUM, 66th Legis. Assemb., Tax'n Comm. (July 2019).

179. 2021 N.D. LAWS 1226-29 (codified at N.D. CENT. CODE §§ 40-22-01.3, 40-23-21(2), 40-05.1-06(4) (2021)).

180. *See* Serenko v. City of Wilton, 1999 N.D. 88, ¶ 13, 593 N.W.2d 368 ("This statutory scheme essentially creates two separate processes.").

181. N.D. CENT. CODE CH. 40-23 (2021). The SAC made its debut in 1899. *E.g.* 1899 N.D. LAWS 52 (codified at REV. CODES N.D. 1899, § 2327) (the SAC was originally known as the special paving assessment committee). Prior to 1899, the city engineer determined the assessment. *See* Pickton v. City of Fargo, 88 N.W. 90, 93 (N.D. 1901) ("In the case at bar the legislative assembly, after the contract for the construction of the improvements was entered into, so modified the original

bonds for the valid and final levy of special assessments upon all benefited property and covenants in the financing resolutions to take whatever action is necessary to cause a final levy to be made. At any time after the contract for the work has been executed and the total costs have been estimated as nearly as practicable the city may proceed to make the assessment.[182] The executive officer[183] of the city appoints three "reputable residents and freeholders" as members of the SAC,[184] whose appointments are subsequently confirmed by the governing body.[185] SAC members are entitled to compensation as determined by the city council or commission.[186] While serving, no SAC member may hold any other municipal office.[187] A SAC member is not disqualified for owning property in the improvement district.[188] Upon appointment and confirmation each commissioner files with the city auditor written acceptance and takes the oath or affirmation required of other municipal officers.[189]

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mode of assessing the tax as to abrogate all the power or authority given thereunder to the city engineer, and in lieu thereof made provision for the assessment of the tax through other agencies created by the amendatory act, viz. through a 'special assessment paving committee,' composed of three citizens, who are required to make the original assessment, and before whom taxpayers had a right to be heard as to grievances."). In 1967, the legislature added an alternate procedure for assessment of benefits that does not utilize a special assessment commission. 1967 N.D. LAWS 773. *E.g.*, N.D. CENT. CODE CH. 40-23.1 (2021) (a lightly used alternative method for assessing properties which allows the city auditor to determine the assessment without the need for a special assessment commission using a mathematical formula (square foot formula) based upon the distance the property is away from the improvement; legislative history states that the alternate procedure was meant to help smaller municipalities that have very little experience in spreading special assessments and is an adaptation of the Washington State method). *See* Buehler v. City of Mandan, 239 N.W.2d 522 (N.D. 1976) (Chapter 40-23.1 does not prohibit use of square foot rate in determining benefits under chapter 40-23, SAC may elect to use the chapter 40-23.1 method); N.D. Op. Att'y Gen. 96-L-47 (Mar. 26, 1996) (citing *Buehler*). *See generally* N.D. Op. Att'y Gen. Letter to Ruemmele (Dec. 29, 1975) (city SAC is required to perform assessment function for park district (citing City of Fargo v. Gearey, 156 N.W. 552, 554 (N.D. 1916))).

182. *See* N.D. CENT. CODE § 40-23-05 (2021); *see also* N.D. CENT. CODE § 40-23-06 (2021) (exception where work is done by the municipality in separate sections or work units, special assessments may be made as the work in such separate sections or work units is completed).

183. N.D. CENT. CODE § 40-01-01(2) (2021) (executive officer means the mayor in council cities or the president of the board of city commissioners in commission cities).

184. N.D. CENT. CODE § 40-23-01 (2021). Initially, terms are staggered and thereafter are set for six-year terms. The member of the SAC having the shortest term to serve acts as chairman.

185. N.D. CENT. CODE § 40-23-02 (2021). *See also* N.D. CENT. CODE § 40-23-03 (2021) (members may be removed from office by the executive officer, with the consent of a majority of the governing body, for neglect or refusal to perform the duties and for misconduct in office).

186. *Id.*; *see also* N.D. CENT. CODE §§ 40-23-07 (SAC per diem), 40-24-13 (2021) (SAC entitled to suitable compensation).

187. N.D. CENT. CODE § 40-23-02 (2021). *E.g.* N.D. Op. Att'y Gen. 71-48 (Feb. 11, 1971) (city policeman may not serve on special assessment commission).

188. *See* State *ex rel.* Dorgan v. Fisk, 107 N.W. 191, 193-94 (N.D. 1906) (acts of the board of drain commissioners cannot be avoided because one of the drainage commissioners owned land within the drainage district).

189. N.D. CENT. CODE § 40-23-02 (2021). *See also* N.D. CENT. CODE § 40-13-03 (2021) (oaths of municipal officers). *See generally* N.D. CONST. ART. XI, § 4 (oath of members of

Following action by the council or commission, the city auditor certifies the items of the total cost to be assessed to the SAC chairman.[190] Thereafter, "the chairman immediately shall call a meeting of the commission, which shall proceed as expeditiously as possible to make and return the special assessment."[191] The items of costs to be assessed include all items which are part of the cost of the improvement project.[192]

The SAC is charged with determining the amount in which each of the lots and parcels of land will be especially benefited by the project and assessing against each the sum necessary to pay its just proportion of the total cost of the work.[193] The assessment must not exceed the benefit to the property.[194] The SAC could determine that a particular property is not benefited even though the governing body included the property in the improvement district.[195] The SAC may not, however, modify the form or size of the improvement district. A special assessment list must be compiled providing by legal description[196] or street address or both, each lot or tract of land assessed, the amount each lot or tract is benefited by the project and the amount

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legislative assembly and judicial department). *See also* N.D. CENT. CODE §§ 40-13-03 (refusal to take oath of office is deemed a refusal to serve and thus a failure to qualify for the office), 44-02-01(6) (2021) (failure to take oath of office causes a vacancy).

190. N.D. CENT. CODE § 40-23-05 (2021).

191. N.D. CENT. CODE § 40-23-05 (2021). *See also* N.D. Op. Att'y Gen. 2005-O-20 (Dec. 5, 2005) (SAC meetings must be held in accordance with the state's open meeting law).

192. N.D. CENT. CODE § 40-23-05 (2021) (items of cost include: estimated construction cost under the terms of the contract, reasonable allowance as determined by the governing body for extra work which may be authorized under the plans and specifications, engineering, fiscal agent fees, attorney fees, cost of publication, cost of printing improvement warrants, per diem of the special assessment commission, and all expenses incurred in the making of the improvement and the levy of assessments). *See also* Hoffman v. City of Minot, 77 N.W.2d 850 (N.D. 1956) (capitalized interest is a proper item of cost to be assessed); Mandan News v. Henke, 184 N.W. 91 (N.D. 1921) (publication expense part of cost of improvement). *But cf.* Mandan News v. Bd. of City Comm'rs of City of Mandan, 193 N.W. 608 (N.D. 1923) (publication of special assessment notice, newspaper published more print than instructed so no recovery). *See also* N.D. CENT. CODE § 40-23-24 (2021) (if costs of an improvement exceed the costs of the work as estimated in the preliminary engineering report by 70% or more, an audit is required which must detail each separate item of expense, unless the reason for exceeding the cost estimate is due to a petition to enlarge the district or a request for additional work by the owners of a majority of the area in the district).

193. N.D. CENT. CODE § 40-23-07 (2021). *See also* N.D. CENT. CODE § 40-22-01.2 (2021) (requiring cities with a population over 10,000 to adopt written policies, after a public hearing, to be applied for cost allocation among properties benefited by a special assessment project, which policy needs to address the method for residential, commercial, and agricultural property and any other property subject to separate assessment rates) (the 2015 bill originated over concern about special assessments against mobile home parks); Holter v. City of Mandan, 2020 ND 202, 948 N.W.2d 858, *cert. denied*, 141 S.Ct. 1515 (2021).

194. *See* Bateman v. City of Grand Forks, 2008 ND 72, 747 N.W.2d 117.

195. *See* N.D. CENT. CODE § 40-22-09 (2021) (property in a district may subsequently be determined not to be benefited by an improvement).

196. *See generally* 1973 N.D. LAWS 1068 (codified as N.D. CENT. CODE § 46-05-08, repealed by 1975 N.D. LAWS 1167). For a short time all legal notices containing a legal description of real property were required to contain in addition: (1) a description of the property by its common name; (2) the address of the property involved, if an address existed; or (3) a map detailing the property involved.

assessed against each.[197] The assessment list includes the several items of expense and must be confirmed by a majority of the SAC.[198]

There is no authority to levy an assessment until the benefits have been first ascertained.[199] Benefit is not defined.[200] "There is simply no precise formula for quantifying benefits."[201] The special assessment commission is given great latitude in determining how much a particular property is benefited. The assessment may be apportioned according to: frontage, area (based upon square footage of lots), value of,[202] "or estimated benefits to, the property assessed, according to districts or zones, usage, any other reasonable basis that is fair, just, and equitable",[203] including a guideline or formula.[204] In a case involving special assessments against property owned by Soo Line Railroad Company for street, curb and gutter improvements, the district court found in favor of Soo Line, finding that the Railroad had not received a

197. N.D. CENT. CODE §§ 40-23-09, -04 (2021) (officers and employees of the municipality shall give the SAC such information, advice, and assistance as requested); N.D. CENT. CODE § 40-22-39 (2021) (use of abbreviations in the special assessment list). Often the project engineer provides substantial assistance in suggesting a methodology and preparing the assessment list.

198. N.D. CENT. CODE § 40-23-09 (2021); *see also* N.D. CENT. CODE § 40-23-25 (2021) (in the process of preparing the assessment list the SAC is required to prepare and file a report with the city auditor listing estimated future assessments on property located outside the corporate limits, but which is potentially benefited by the improvement and is likely to be annexed to the city).

199. 1905 N.D. LAWS 134. Prior to 1905, there was no requirement that the SAC first determine benefit. *See* Robertson Lumber Co. v. City of Grand Forks, 147 N.W. 249, 251 (N.D. 1914) ("There is, in fact, no authority to levy an assessment until the benefits have been first ascertained."); *see also* McKenzie v. City of Mandan, 147 N.W. 808, 810 (N.D. 1914) ("No matter what may have been the rule prior to the passage of chapter 62 of the Laws of 1905, there can be no doubt that the legislature in that act put itself clearly on record as requiring all assessments to be made on the basis of benefits, and of benefits alone.").

200. *See Robertson Lumber Co.*, 147 N.W. at 251 ("Although § 2801, Rev. Codes, 1905, requires special assessments for improvements, such as those in the case at bar, to be levied in proportion to the benefits conferred, and in no case to be in excess of such benefits, there is no provision in the statute as to how such benefits shall be measured and ascertained.").

201. Haman v. City of Surrey, 418 N.W.2d 605, 608 (N.D. 1988). Benefit does not need to be expressed in dollars but can be stated in other units of measurement. *See also* Louisville & Nat'l R.R. Co. v. Barber Asphalt Paving Co., 197 U.S. 430, 433 (1905) ("There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist.").

202. Wang & Hendrick, *supra* note 59, at 182. *Cf.* 64 C.J.S. Municipal Corporations § 1620 ("While the legislature may provide for apportionment of an assessment according to the value of the property assessed, this method may not be employed where apportionment according to benefits is required."). Assessments based on the value of the property assessed are typically distinguished from assessments based on benefit. North Dakota does not seem to distinguish between special assessments that are ad valorem and those that are non-ad valorem.

203. Cloverdale Foods Co. v. Mandan, 364 N.W.2d 56, 61 (N.D. 1985) (quoting 63 C.J.S. Municipal Corporations § 1423) (currently at 64 C.J.S. Municipal Corporations § 1618); *see also* Farmers Union Cent. Exch., Inc. v. Grand Forks Cnty., 443 N.W.2d 907 (N.D. 1989).

204. D&P Terminal, Inc. v. City of Fargo, 2012 N.D. 149, ¶ 14, 819 N.W.2d 491 ("this court has, in a long line of cases decided after *Robertson*, approved the use of 'formulas' such as front footage, area or value to determine the benefit to the assessed property.") (citations omitted).

special benefit in addition to the general benefit enjoyed by the entire city.[205] Testimony before the district court revealed the following benefits to the Railroad's property: "(1) that persons could drive on paved streets; (2) that the streets were beautified; (3) that there was control of storm and sewer waters; and (4) that paved streets resulted in greater cleanliness and less dust, with no rocks being thrown from passing vehicles upon the boulevards or lots."[206] The North Dakota Supreme Court reversed the district court, holding that even though the current use of the property might not give rise to a special benefit, there was a benefit nonetheless.[207] Present use of a property is not a paramount consideration in determining benefit.[208] North Dakota does not require that an increase in market value result from the improvement. The legislature has rejected efforts to follow Minnesota in this regard and measure benefit to property by the increase in market value.[209]

The assessment list must be published[210] along with a notice of hearing on the list before the SAC.[211] A 2021 amendment requires the notice to be published on the city's website.[212] At the hearing, the SAC may make adjustments in the assessment list, increasing or decreasing any assessment so long

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205. Soo Line R.R. Co. v. City of Wilton, 172 N.W.2d 74 (N.D. 1969).

206. *Id.* at 81.

207. *Id.* at 83-84.

208. *See* Haman v. City of Surrey, 418 N.W.2d 605, 608 (N.D. 1988) ("Evidence in the instant suit that Landowners have in fact received the benefits attributed to them is not overwhelming. The water improvement enhances fire protection and facilitates moderate commercial and residential growth. These benefits were not separately valued but they are significant."); *see also* Chernick v. City of Grand Forks, 210 N.W.2d 73, 81 (N.D. 1973) ("The benefit is presumed to inure not to the present use, but to the property itself.") (citation omitted).

209. *See* H.B. 1307, 66th Legis. Assemb. (N.D. 2019) (property must receive a special benefit, meaning increase in market value). *See generally* HAROLD F. KUMM, L. OF SPECIAL ASSESSMENTS IN MINN. 52 (League of Minn. Muns. 1927) ("The general rule is to consider the effect of the improvement upon the market value of the property.") (citation omitted). *See also* De Forest Spencer, Jr., *The New Minnesota Improvement Assessment Procedure,* 38 MINN. L. REV. 582 (1954). *See also* Terry Novak, *Politics, Policy and Participation: The Case of Special Assessment Financing in American Cities*, Bureau of Gov't Affairs, Univ. of N.D. (1970) (regarding Minnesota special assessment statutes, "the law which most closely corresponds to expert opinion in the field.").

210. N.D. CENT. CODE § 40-23-10 (2021) (assessment list published once each week for two consecutive weeks with a hearing date not less than fifteen days after the first publication, published list does not need to contain the amount each lot or tract is benefited, just the amount assessed against each property). If the assessment list includes more than 5,000 lots or tracts, a notice may be published referring to the list on file and available for public inspection. A second alternative allows notice by mail to each property owner on the assessment list in lieu of publication of the list, which may be less expensive. In cases involving notice by mail, the city is still required to publish a map of the assessment district along with a notification alerting property owners that a letter should have been received. *See* 1989 N.D. LAWS 1276-77.

211. N.D. CENT. CODE § 40-23-10 (2021). A copy of the notice must be mailed to each public utility having property on the assessment list at least ten days before the hearing to its address shown on the tax rolls. 1971 N.D. LAWS 897. *See generally* N.D. CENT. CODE § 49-01-01(3) (2021) (public utility is any entity listed in Title 49, which would include, for example, railroads which are covered by chapter 49-10.1).

212. 2021 N.D. LAWS 1232 (codified at N.D. CENT. CODE § 40-23-10(7) (2021)); N.D. CENT. CODE § 40-23.1-08 (2021).

as: (1) the aggregate amount of all assessments equals the total amount required to pay the entire cost of the work and (2) no assessment exceeds the benefit to the particular parcel of land as determined by the SAC.[213] The list is confirmed with any changes and certified to and filed with the city auditor.[214] Thereafter the city auditor publishes a notice stating that the list is confirmed and on file with the auditor and advising when the governing body will act on the list.[215] Any aggrieved person may contest the SAC action by filing a written appeal with the city auditor prior to the city hearing, stating the grounds upon which the appeal is based.[216] It is not necessary to have appeared before the SAC prior to appealing to the city council or commission.[217]

At the city meeting, the property owner who has appealed may appear and object to the confirmation of the assessment.[218] The governing body can increase or decrease any assessment as it determines just or necessary to correct any error in the assessment list.[219] However, the aggregate amount of all the assessments may not be changed and no parcel may be assessed in an amount that exceeds the benefit.[220] "This latter provision puts significant restraints on the discretion of the governing body since it may not change the aggregate amount of the assessments nor may it shift assessments to any other parcel if the result is to exceed the benefits to that parcel."[221] The confirmed assessment list is certified by the city auditor and filed in the office of the city auditor.[222] If a property owner does not appeal to the city council or commission, the determination of benefits is final and absent grounds such as fraud will not be disturbed.[223]

At the time of the final determination by the governing body, the assessment becomes a lien on the property until paid.[224] Special assessments may

213. N.D. CENT. CODE § 40-23-11 (2021).

214. *Id.* § 40-23-12.

215. *Id.* § 40-23-13 (notice must be published at least once in the official newspaper and more than fifteen days after publication city council or commission can act on the assessment list at a regular or special meeting).

216. *Id.* § 40-23-14.

217. Soo Line R.R. Co. v. City of Wilton, 172 N.W.2d 74, 77-78 (N.D. 1969).

218. N.D. CENT. CODE § 40-23-15 (2021).

219. *Id.*; *see* N.D. Op. Att'y Gen. 2004-L-38 (May 26, 2004) (absent home rule ordinances, the governing body may not reduce special assessments based upon ability to pay or the value of the particular property).

220. N.D. CENT. CODE § 40-23-15 (2021).

221. N.D. Op. Att'y Gen. 2004-L-38 (May 26, 2004).

222. N.D. CENT. CODE § 40-23-16 (2021).

223. *See* Reed v. City of Langdon, 54 N.W.2d 148, 153-54 (N.D. 1952).

224. N.D. CENT. CODE § 40-24-01 (2021). *But cf.* N.D. CENT. CODE § 40-24-03 (2021) ("as between a vendor and vendee", unless the purchase contract provides otherwise, the assessment becomes a lien upon the real property on December 1st following their certification to the county

be paid without interest within ten days after council or commission approval of the assessment list and thereafter bear interest at an annual rate not exceeding 1.5% above the average net annual interest rate on the warrants and bonds.[225]

The city auditor is required to make an annual certification of all uncertified assessment installments[226] in accordance with certain timing requirements.[227] The annual certification must stop when sufficient money is on deposit to pay all principal and interest on the bonds.[228] Moneys remaining in

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auditor); City of Sw. Fargo Urban Renewal Agency v. Lenthe, 149 N.W.2d 373, 376 (N.D. 1967) (section 40-24-03 applies to condemnation proceeding); Halverson v. Boehm, 76 N.W.2d 178, 180 (N.D. 1956); Murray Bros. v. Buttles, 156 N.W. 207, 208 (N.D. 1916). *See also* N.D. CENT. CODE § 57-02-08.3 (2021) (qualifying persons may claim a homestead credit for a portion of any special assessment levied against their property, not to exceed $6,000, adjusted annually; state treasurer pays the county the amount of the credit and the state then has a lien against the property for the amount of the credit plus six percent interest).

225. N.D. CENT. CODE § 40-24-02 (2021). The 1.5% offers cities some protection from delinquencies, late payments and the interest rate risk if property owners prepay assessments but the city cannot in turn prepay the bonds. If a city refunds or refinances special assessment bonds the interest rate is lower, but the lower rate isn't always passed on to property owners. Prior law authorized individual assessments to have an interest rate of the greater of 8% or the rate on the warrants or bonds. In 1981 the legislature amended section 40-24-02 twice; in one act setting the rate at 1.5% above the bond rate (1981 N.D. LAWS 679) and in another setting the rate at 2.0% above the bond rate (1981 N.D. LAWS 1165). Given the conflict between the two amendments, the 1.5% amendment controls as it is later in date of enactment. *E.g.* N.D. CENT. CODE § 1-02-09.1 (2021). *Cf.* N.D. CENT. CODE §§ 40-33-05 (1.5% spread on municipal utility assessments); 40-29-11 (2% spread for sidewalk assessments); 40-54-08 (2021) (2% spread on gravel street assessments).

226. N.D. CENT. CODE § 40-24-11 (2021); *see also* N.D. CENT. CODE § 40-16-03(13) (2021) (duty of city auditor to keep list of special assessment obligations and the corresponding assessments).

227. N.D. CENT. CODE § 40-24-12 (2021) (not later than August 20th, the city auditor must notify the county auditor of the pending assessments, and the county auditor is required to make and deliver to the city auditor by September 20th of each year a copy of the real estate assessment book, city auditor shall certify the special assessments to the county auditor by November 1st for placement on real estate tax statements). Property taxes and special assessments appear on the same tax statement. *Cf.* N.D. CENT. CODE § 40-24-15 (2021) (city may certify installments of special assessments for multiple years rather than just the following year). *See also* N.D. CENT. CODE §§ 40-24-14 (county auditor duty to collect assessments as general taxes are collected), -16, -17 (2021) (county auditor duties in regard to special assessments); *see also* N.D. Op. Att'y Gen. 59-210 (Oct. 6, 1959) (county treasurer was not paying over to city interest and penalties which had been added to special assessments contrary to section 40-24-17). *See generally* N.D. CENT. CODE §§ 57-20-01 (installments of special assessments become due January 1 but do not become delinquent until after March 1, and thereafter are subject to interest penalties), -09 (2021) (discount for early payment of property tax does not apply to special assessments); N.D. Op. Att'y Gen. 95-L-8 (Jan. 25, 1995); N.D. Op. Att'y Gen. 71-49 (Feb. 17, 1971); N.D. Op. Att'y Gen. 54-120 (June 3, 1954).

228. N.D. Op. Att'y Gen. 76-19 (Nov. 15, 1976). *Accord* N.D. Op. Att'y Gen. Letter to Gregg (Apr. 20, 1988) (assessment levy must be terminated if the bonds are satisfied from other sources). *See also* N.D. Op. Att'y Gen. 96-L-243 (Dec. 20, 1996) (discussing N.D. Op. Att'y Gen. 76-19). *Cf.* N.D. CENT. CODE § 40-24-11 (2021) (city may continue to assess after the bonds are paid if the final assessments are for the purpose of reimbursing the city for advances made to cover deficiencies); *Cf.* N.D. Op. Att'y Gen. 56-27 (Dec. 18, 1956) (assessment proceedings to reimburse city after construction is completed). *Accord* N.D. Op. Att'y Gen. 87-15 (July 15, 1987) ("city is permitted to contract for the payment of special improvements from money in its treasury, relying for its reimbursement upon the special taxes when collected.") (quoting Pine Tree Lumber Co. v. City of Fargo, 96 N.W. 357, 365 (N.D. 1903)).

the special assessment fund after bonds are paid can be transferred to the general fund.[229] Property owners may prepay their special assessments at any time in full or in part by paying the outstanding principal and accrued interest to the date of payment.[230] If the county treasurer receives less than the full amount of taxes and special assessments due at any time, the payment must be allocated between taxes and special assessments proportionally.[231]

Statutes also address the correction of errors and reassessments.[232] The governing body may direct a supplemental assessment if necessary to correct any errors or mistakes.[233] If a special assessment is set aside or declared void by a court for any cause, the governing body must cause a reassessment or a new assessment to be made in order to defray the cost of the improvement.[234] Errors and omissions in the proceedings of the city council or commission or the SAC do not vitiate or in any way affect the assessment.[235]

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229. N.D. CENT. CODE § 40-24-18 (2021); N.D. CENT. CODE § 40-26-08 (2021); N.D. CENT. CODE § 40-27-05 (2021); *see* N.D. Op. Att'y Gen. 76-19 (Nov. 15, 1976) (language added in 1975 to give "a practical solution to small overages, where the amount does not justify the paperwork necessary to arrive at a better solution."). *See also* N.D. Op. Att'y Gen. 2005-L-13 (Apr. 29, 2005) (excess funds may not be used to repair system financed with the special assessments); N.D. Op. Att'y Gen. 85-27 (Aug. 1, 1985) (remaining surplus may be either transferred to the city's general fund or refunded to property owners). *Cf.* N.D. Op. Att'y Gen. 79-289 (Feb. 12, 1979) (special assessment installments collected in error must be refunded to the individual taxpayers). *Cf.* N.D. CENT. CODE § 40-23-21(1) (2021) (collection of assessments used for payment of bonds and warrants issued for the improvement, but "if no such obligations are outstanding, to such fund as the governing body may direct.").

230. N.D. CENT. CODE § 40-24-09 (2021) (payments are made to county upon all installments that have been certified and to the city auditor upon all portions that have not been certified). An abstract of title will not include special assessments which have not been certified to the county auditor for collection. *See also* N.D. Op. Att'y Gen. 53-116 (June 4, 1953) (park district may prepay assessments in whole).

231. N.D. CENT. CODE § 40-24-16 (2021). *See also* N.D. Op. Att'y Gen. Letter to Gallagher (Dec. 16, 1991) (city cannot abate or suspend the procedures governing the collection of delinquent special assessments); N.D. Op. Att'y Gen. 67-257 (Jan. 20, 1967) (1965 amendment provides that county treasurer allocate payment between taxes and special assessments). *See generally* N.D. CENT. CODE §§ 40-25-01 to -03 (2021) (property may be sold to enforce collection of special assessments at the same time and in the same manner as is provided in Title 57 for the sale of real property for delinquent general taxes); N.D. Op. Att'y Gen. 80-143 (Mar. 13, 1980); N.D. Op. Att'y Gen. 45-255 (Oct. 11, 1945). *See also* N.D. Op. Att'y Gen. 81-104 (Oct. 6, 1981) (vacating portion of platted addition does not prevent collection of unpaid special assessments on affected lots); *see also* Regstad v. Steffes, 448 N.W.2d 203, 207 (N.D. 1989) (disposition of real estate subject to special assessments). *See generally*, City of Fargo v. Cass Cnty., 160 N.W. 76, 79 (N.D. 1916) (county treasurer retaining 1% of city special assessments collected as a fee). *See generally*, N.D. Op. Att'y Gen. 53-117 (Dec. 16, 1953) (property owner may pay either general taxes or special assessments without paying both).

232. *See* N.D. CENT. CODE §§ 40-26-01 to -06 (2021).

233. N.D. CENT. CODE §§ 40-23-05, 40-26-02 (2021).

234. N.D. CENT. CODE §§ 40-26-03 to -05 (2021).

235. N.D. CENT. CODE § 40-26-06 (2021).

IV. JUDICIAL REVIEW

The 1905 act,[236] which is the underpinning for current special assessment structure, provided that courts had the power of review in special assessment proceedings.[237] However, courts did not review benefits and assessments unless equitable grounds existed.[238]

> It has been repeatedly held by this court that the owners of property affected by a special assessment are precluded on the question of benefits by the action of the special assessment commission as reviewed by the city council or commission, and that there is no relief from their determination unless there exists some one of the usual grounds for equitable interference, such as fraud or mistake, or some defect in the proceedings rendering the special assessment invalid. Equity does not grant relief to correct the errors of judgment of the body created by the Legislature to determine the question of benefits.[239]

The 1905 law required that an action for judicial review be commenced within six months after the special assessment was approved.[240]

In 1919, the legislature broadened the scope of review.[241] In 1989, the legislature enacted North Dakota Century Code section 28-34-01 "which explicitly governs [procedures for] any appeal provided by statute from the

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236. 1905 N.D. LAWS 91.

237. REV. CODES OF N.D., 1905, § 2790 (codified at N.D. CENT. CODE § 40-26-07 (2021)).

238. Bismarck Home Builders' Co. v. City of Bismarck, 198 N.W. 553 (N.D. 1924) (decided on the basis of the laws that existed in 1917).

239. *Id.* at 553-54 (citations omitted).

240. *See generally* Nissen v. City of Fargo, 338 N.W.2d 655, 657 (N.D. 1983) ("As previously discussed, Section 40-26-07, N.D.C.C., provides that a person has six months to petition for review of special assessments. Section 1-02-15, N.D.C.C., prescribes the method for computing a period of months. The period began on the date of approval of assessment, as specified by 40-26-07, and concluded six months later, as computed under Section 1-02-15."); Chernick v. City of Grand Forks, 210 N.W.2d 73, 82 (N.D. 1973) (action not brought within six months of date of confirmation of assessment by city council); Hufford v. Flynn, 182 N.W. 941, 943 (N.D. 1921) ("There can in no event be a judicial review of the acts of the commission until the commission has acted; for it is well settled that under ordinary conditions a court of equity cannot properly interfere with or in advance restrain the discretion of a municipal body while, in the exercise of powers conferred by the charter of the general laws, it is considering a matter of this nature."); Ellison v. City of LaMoure, 151 N.W. 988, 990 (N.D. 1915) ("If any ground for equitable interference existed, plaintiff was required to institute his action within six months after the assessment was approved; otherwise the action is barred."); McKenzie v. City of Mandan, 147 N.W. 808, 810 (N.D. 1914) (action "brought within the period of six months prescribed by" § 2790, Rev. Codes 1905); McKone v. City of Fargo, 138 N.W. 967, 969 (N.D. 1912) ("It is sufficient to set this statute of limitation running when two requisites exist: (1) A special assessment; and (2) its approval. With these existing, a lapse of six months bars the commencement of an action to assail the assessment.").

241. 1919 N.D. LAWS 475 ("Whereas an emergency exists in that the courts do not now review the levy and apportionment of special assessments, and whereas, it is necessary for the immediate preservation of public peace, health and safety, that immediate relief be given . . . .") (codified at N.D. CENT. CODE § 40-26-01 (2021)). *See* Foss Methodist Church v. City of Wahpeton, 157 N.W.2d 347, 351 (N.D. 1968).

decision of a local governing body."[242] The statute provides that the notice of appeal must be filed within thirty days after the decision of the local governing body.[243] In 1989, section 40-26-01 was amended to provide that appeals under the section must be in accordance with section 28-34-01.[244] In 2011, the legislature further amended section 40-26-01 to provide that, in the case of special assessments on agricultural property, the decision of the special assessment commission is not entitled to deference. The court is to consider assessments against agricultural property de novo.[245]

Today, the standard for judicial review of special assessments has been stated as follows:

> "[T]he assessment of benefits made by the special assessment commission and confirmed by the city commission for street, curb, and gutter improvements which involve judgment and discretion will not be reviewed by the court, and it is not the province of the court to substitute its judgment for that of the commission making such decision, but merely to determine whether the commission was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and to determine whether there is substantial evidence to support or justify the determination."[246]

The SAC is in essence a legislative tribunal[247] and assessments are presumed valid with the burden to show otherwise on the party attacking the assessment.[248] "Judicial review is limited to assuring that local taxing authorities do not act arbitrarily, capriciously, or unreasonably."[249] "Courts are not to act as a super grievance board, and we do not try special assessment cases anew or reweigh the evidence."[250]

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242. Brandt v. City of Fargo, 2018 ND 26, ¶ 9, 905 N.W.2d 764 (quoting *Hector,* 2014 ND 53, ¶ 20, 844 N.W.2d 542).

243. *Id*. ¶ 10 ("We clarify that, while N.D.C.C. § 28-34-01 provides the procedure and a time-limit for vesting appellate jurisdiction in the district court, a separate statutory basis must authorize a right to appeal from a particular city decision."). No statute exists authorizing an appeal from a city's resolution of necessity.

244. 1989 N.D. LAWS 236.

245. 2011 N.D. LAWS 1028.

246. Cloverdale Foods Co. v. City of Mandan, 364 N.W.2d 56, 60 (N.D.1985) (quoting Soo Line R.R. Co. v. City of Wilton, 172 N.W.2d 74, 75 (N.D. 1969)).

247. *See* Bateman v. City of Grand Forks, 2008 ND 72, 747 N.W.2d 117. *See also* Haman v. City of Surrey, 418 N.W.2d 605, 607 (N.D. 1988) ("Deference for decisions of special assessment commissions stems, in part, from the constitutional doctrine of separation of powers.") (citing *Cloverdale Foods Co.*, 364 N.W.2d at 59).

248. *See* Reed v. City of Langdon, 54 N.W.2d 148, 149 (N.D. 1952).

249. Serenko v. City of Wilton, 1999 ND 88, ¶ 20, 593 N.W.2d 368 (citations omitted).

250. D&P Terminal, Inc. v. City of Fargo, 2012 ND 149, ¶ 5, 819 N.W.2d 491 (quoting Hector v. City of Fargo, 2010 ND 168, ¶ 5, 788 N.W.2d 354). *See also* Holter v. City of Mandan, 2020 ND 202, ¶ 29, 948 N.W.2d 858 (Tufte, J., dissenting) ("To avoid becoming a 'super grievance board,' … this Court has incrementally reduced its review of special assessments.").

The relationship between section 40-26-01 (1919 act) and section 40-26-07 (1905 act) was discussed by the North Dakota Supreme Court in *Hector v. City of Fargo*.[251] The Court stated that an appeal generally provides an adequate remedy for challenging special assessments (section 40-26-01), and a separate action for equitable relief (section 40-26-07), will not lie for issues that were or could have been part of the appeal.[252] The very limited review of special assessments might explain why Justice Tufte's dissent in *Holter v. City of Mandan*[253] is the first dissent in a special assessment case in half a century.[254]

V. THE FADING CONCEPT OF BENEFIT

A. CITYWIDE IMPROVEMENT DISTRICTS

The theory of special assessments posits that certain properties in a city enjoy a special benefit that is not shared by other properties.[255] In the case of *Murphy v. City of Bismarck*,[256] the court stated:

> The foundation of the power to lay a special assessment for a local improvement of any character, including the widening, paving, and otherwise improving a city street, is the benefit which the object of the assessment confers on the owner of the abutting property, or the owners of property in the assessment district, which is different

251. 2014 ND 53, 844 N.W.2d 542.

252. *Id.* ¶ 24 ("[W]e construe N.D.C.C. § 40-26-07, in conjunction with N.D.C.C. § 40-26-01 and the other provisions of N.D.C.C. ch. 40-26 for judicial involvement, to mean proceedings in which an assessment is held void for noncompliance with the special assessment statutes in the context of an appeal from an assessment decision.").

253. 2020 ND 202, 948 N.W.2d 858 (Tufte, J. dissenting) (previously Holter v. City of Mandan, 2020 ND 152, 946 N.W.2d 524, the case was republished to include Chief Justice Jensen's dissent on the denial of the petition for rehearing, which was omitted in the first version).

254. *E.g.* City of Bismarck v. St. Mary's Church, 181 N.W.2d 713, 716 (N.D. 1970) (Teigen, C.J. dissenting). *Cf.* Pamida, Inc. v. Meide, 526 N.W.2d 487, 494 (N.D. 1995) (Meschke, J. dissenting) (involving special assessments, but in the context of a private land purchase agreement).

255. Prior to 1905 and the requirement that assessments not exceed benefits, North Dakota did not differentiate between special assessments and general taxes. *See* Rolph v. City of Fargo, 76 N.W. 242, 243 (N.D. 1898) ("What is it that distinguishes a local assessment from a general tax? Their points of resemblance are numerous. Each is an exercise of the taxing power, pure and simple . . . . The only marked point of difference between a tax and a local assessment is that the former is spread over a permanent taxing district, while the latter is to be collected from a special and temporary taxing district, created for that single purpose . . . ."). Some early opinions refer to improvement districts as special taxing districts. *See* McLauren v. City of Grand Forks, 43 N.W. 710 (Dakota 1889); Webster v. City of Fargo, 82 N.W. 732 (N.D. 1900), *aff'd* 181 U.S. 394 (1901); Murray Bros. v. Buttles, 156 N.W. 207 (N.D. 1916); Rolph v. City of Fargo, 76 N.W. 242 (N.D. 1898).

256. 109 N.W.2d 635 (N.D. 1961).

> from the general benefit which the owners enjoy in common with the other inhabitants or citizens of the municipal corporation.[257]

Conversely, "[a] public improvement is general in character, and thus does not allow for a special assessment, if it confers a substantially equal benefit and advantage on the property of the whole community or benefits the public at large."[258] For this reason, special assessments should not be applied on a citywide basis. To do so is contrary to the idea of special assessments.[259]

Many public improvements bestow both general or public benefits and special or private benefits. "Such improvements as streets, sewers, water mains, and sidewalks normally benefit nearby properties but also create diffuse, general benefits which accrue to those who occasionally use the facilities and to properties which are far from the project."[260] In North Dakota, the expectation of general benefits is built into the structure of special assessments. A city is allowed to pay for up to one-fifth of the cost of an improvement with general taxation on all taxable property, in recognition of general benefits.[261] Likewise, the rationale for the deficiency levy is that the entire

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257. *Id*. at 646 (citing MCQUILLIN, *supra* note 134). *See also* Gunderson v. Maides, 3 N.W.2d 236, 238 (N.D. 1942) ("While a general benefit to all property of the city no doubt results from a sewer system or a waterworks system, that benefit is more remote than that which accrues to the property found to be especially benefited."); N. Pac. Ry. Co. v. City of Grand Forks, 73 N.W.2d 348, 350 (N.D. 1955) (the issue is whether property in the improvement district "derives a special benefit from the improvement in addition to the general benefit in which the whole city shares."). *See also* S.B. 2041, 66th Legis. Assemb. (N.D. 2019) (version 19.0166.01003) (bill draft rejected by the House Pol. Subd. Committee relating to park district special assessments) ("For purposes of this section, an especially benefited property is a property that will receive a benefit from the improvement that is to be paid by special assessment which is different from the general benefit that will be conferred on properties located outside of the special assessment improvement district.").

258. MCQUILLIN, *supra* note 134, at § 38:6.

259. *See* Renzo D. Bowers, *Special Assessment v. Mortgage Lien in Event of Conflict, Which Holds Priority*, 32 YALE L. J. 460, 461 (1923) ("That specific property receives a greater benefit than that accruing to the public in general, is but an incident to the public improvement. Yet, incidental as it is, the fact of this special benefit must exist in order to render valid the assessments for which a lien is given against the specific property for its proportion of the cost of the improvement."); *see also* Diamond, *supra* note 1, at 201 (special assessments "are usually imposed on a designated area that is not coextensive with any existing political boundary…"). *Accord* Chester J. Antieau, *The Special Assessments of Municipal Corporations*, 35 MARQ. L. REV. 315, 316 (1952) ("To justify a special assessment upon nearby property owners the improvement must be 'local,' that is, it must benefit the adjoining property owners in a way and to a degree not enjoyed by the community as a whole."). *See also* Wang & Hendrick, *supra* note 59, at 186 (special assessments "are different than charges and general taxes in that SAs are not levied on the entire jurisdiction of the parent government. Rather, SAs only apply to a designated geographic area within the jurisdiction.").

260. *See* GLENN W. FISHER, FINANCING LOCAL IMPROVEMENTS BY SPECIAL ASSESSMENT 10 (Mun. Fin. Officers Ass'n 1974).

261. *See* N.D. Op. Att'y Gen. *supra* note 161 and accompanying text. *See also* FISHER, *supra* note 69, at 10 ("Few, if any, projects fail to benefit the general public to some extent, and the theory of special assessments requires that a portion of the cost be allocated to the city at large and be paid from general revenue sources."). *Accord* 64 C.J.S. Municipal Corporations § 1560, p. 311-12

community receives some general benefit from improvement districts.[262] However, legislative recognition of general benefits has not resulted, as would be expected, in a special benefit requirement in the drawing of improvement district boundaries. The statutory requirement is only benefit, not special benefit, with no limit on the size of an improvement district.[263]

It is true that the SAC is directed to determine the property which will be especially benefited and can determine not to assess property even though included in the improvement district.[264] But, as a practical matter the SAC tends to assess all property in the improvement district as defined by the city. If special benefit was required and actually followed in drawing improvement district boundaries, citywide districts would seem unlikely. Yet, citywide districts are common in smaller cities and are occasionally found in larger cities.[265]

A citywide improvement district, and thus without special benefit, is a special (ad valorem) taxing district, acting similar to an excess mill levy imposed to pay debt service on a general obligation bond.[266] Proposed legislation acknowledged the general obligation nature of citywide improvement districts.[267] "Enlarging the benefit district to include the entire municipality

("…must first separate the general benefit from the special benefits conferred on a parcel and impose the assessment only for the special benefits."). While possible, it does not seem logical, for other than the appearance of lowering assessments, to have a citywide improvement district and still spread one-fifth of the cost citywide as an excess mill levy.

262. *See supra*, notes 167-68 and accompanying text.

263. N.D. CENT. CODE § 40-22-09 (2021). *But cf.* N.D. CENT. CODE § 40-23.1-01 (2021) (statute permitting alternate method of assessment without a SAC, "[a]ll property included within the limits of a local improvement district shall be considered to be the property specially benefited by the local improvement and shall be the property to be assessed to pay the cost and expense thereof.").

264. N.D. CENT. CODE § 40-23-07 (2021).

265. *See, e.g.,* Appeal of Cunningham, 245 N.W. 896 (N.D. 1932) (City of Hankinson special improvement district "including the whole of the city"); Schieber v. City of Mohall, 268 N.W. 445 (N.D. 1936) (involving citywide improvement districts); *see also* Cloverdale Foods Co. v. Mandan, 364 N.W.2d 56 (N.D. 1985) (costs assessed over the entire city, which apparently was of no particular interest in the litigation). Large cities normally do not use citywide improvement districts. *See* FARGO, N.D., HOME RULE CHARTER, Amend. #1 (1992) ("No city-wide special assessment district shall be established" absent a vote by the electors and approval by a sixty percent majority); *Testimony of Erik Johnson, Fargo City Attorney: Hearing on H.B. 1341 Before the H. Fin. & Tax'n Comm*., 64th Legis. Assemb. (N.D. 2015) ("This charter provision is, actually, quite consistent with the theoretical concept of allocating assessments to benefiting properties."); *see also* Jeffrey Olson, *Street Repairs Are Special*, BISMARCK TRIB., Nov. 10, 1998 (prior to a pending citywide district for First Street reconstruction, last City of Mandan citywide district was in 1986 for water treatment plant); Interview with Dennis Schlenker, City Investment/Finance Officer, in Bismarck, N.D. (Nov. 28, 2005) (in past 37.5 years, Bismarck has never done a citywide improvement district).

266. *E.g.*, N.D. CENT. CODE § 21-03-15 (2021).

267. *E.g.,* H.B. 1508, 60th Legis. Assemb. (N.D. 2007) (in cities of five thousand population or more, if more than fifty percent of the area of property of the city is within an improvement district, a 60% supermajority approval of the electorate is required, i.e. treating a large improvement district like a general obligation bond). *See also* H.B. 1341, 64th Legis. Assemb. (N.D. 2015) (applying presumption that improvement district will be citywide absent clear and convincing evidence that the benefit is confined to a smaller area); *Testimony of Vice Chairman Owens: Hearing on H.B.*

destroys the rationale upon which the special assessment is based. A special assessment levied over such a district is really not a special assessment at all. It is a special tax."[268]

The North Dakota Supreme Court's statement in *Murphy v. City of Bismarck* is cited for the proposition that special benefit is required.[269] However, in several other instances the North Dakota Supreme Court has been at best ambiguous on whether special assessments and special benefit are properly limited to an area less than the entire jurisdiction.

> Under the special assessments the payer is merely paying for a *special benefit* which he himself received and it is his property which is pledged for the payment of the obligation. This distinction must be kept in mind even if all the territorial limits be included in the one improvement district and therefore *all of the real property of the city is presumed benefited*.[270]

North Dakota blurs the line between special taxes and special assessments without carefully distinguishing between the two. The court's reference to special benefit in *Murphy* notwithstanding, the prevailing view is that citywide improvement districts are permissible under existing statutes and caselaw.[271] Section 40-22-09 requires that each improvement district "shall

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1341 Before the H. Fin. & Tax'n Comm., 64th Legis. Assemb. (N.D. 2015) ("If it's applied across the entire district, the assessment would be very small for each property owner, and could be deducted on Schedule A . . . . Just to clarify, this bill is step one to eliminating special assessments in the state of North Dakota.") (again treating a special assessment more like a special taxing district).

268. WILLIAM O. WINTER, THE SPECIAL ASSESSMENT TODAY WITH EMPHASIS ON THE MICHIGAN EXPERIENCE 26 (Univ. of Mich. Press, 1952) (emphasis added). "As one court noted, refusing to expand the special benefit standard: 'If everything is special, then nothing is special.'" Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 401 (2004) (quoting Ventura Group Ventures, Inc. v. Ventura Port Dist., 16 P.3d 717, 727 (Cal. 2001)).

269. 109 N.W.2d 635, 646 (N.D. 1961).

270. Schieber v. City of Mohall, 268 N.W. 445, 450 (N.D. 1936) (emphasis added). *See also* City of Fargo v. Gearey, 156 N.W. 552, 554 (N.D. 1916) (park district may specially assess property for benefits "over a considerable extent of the surrounding private property, if not throughout all the city"); Pine Tree Lumber v. City of Fargo, 96 N.W. 357, 364 (N.D. 1903) ("but if the whole city had been made such district, the character of the work, its use and proprietorship, so far as there can be said to be any, would have been the same as now."); Merchants' Nat'l Bank of Fargo v. City of Devils Lake, 173 N.W. 748, 749 (N.D. 1919) (cities have wide discretion in determining the area of improvement districts); Rolph v. City of Fargo, 76 N.W. 242, 245 (N.D. 1898) ("The cost of paving a street may be levied upon an entire city…."). *See generally* TAX SURVEY COMMISSION, DIGEST OF TAX LAWS OF NORTH DAKOTA 1936, 24 ("In order to make the property so benefitted liable, there must be in fact a benefit to the property. Of course, the courts are rather liberal in their interpretation of benefit but do not depart from the primary underlying principle.").

271. *See* N.D. Op. Att'y Gen. 49-97 (Aug. 24, 1949) ("Such assessments might be spread over the entire village if the water mains are vital to the water system."); N.D. Op. Att'y Gen. 48-42a (Jan. 12, 1948) (although a slender opinion, sanctioning citywide improvement districts); N.D. Op. Att'y Gen. 76-19 (Nov. 15, 1976) (an improvement district "may constitute the entire city though normally does not."); *See also* N.D. CENT. CODE § 40-33-05 (2021) (assessment district "may include the entire municipality or a portion thereof."). *Cf.* Reynolds, *supra* note 268, at 400 ("Finally,

be of such size and form" as to contain all property which in the governing body's judgment, after consulting with the engineer, will be benefited by the improvement.[272] A city's jurisdiction to make, finance and assess project costs is not impaired by the fact that some properties in the improvement district are subsequently determined not to be benefited and are not assessed. Accordingly, it seems doubtful a property owner could successfully argue that an improvement district is too large.[273] To date, the legality of citywide improvement districts has not been challenged. Legislation in 2021 seems to confirm that citywide improvement districts are acceptable. The new legislation allows cities to levy and collect an infrastructure fee to replace special assessments.[274] The fee is to "replace a general special assessment on all property" and the definition of "general special assessments" anticipates that special assessments might be used for arterial roads and infrastructure "that provide a benefit to the entire community."[275]

Small cities in particular use citywide assessment districts because there is no real alternative to financing basic infrastructure. However, citywide improvement districts by definition are not special assessments based on special benefit. Rather, citywide improvement districts resemble general or special taxing districts, but without statutory authority. Special and general taxes must have statutory authority and be within mill levy and debt limits.[276] The end result to a property owner of a citywide assessment district and a special or general tax is not quite the same. The assessment is measured by special benefit while the tax is measured by mills against taxable valuation.[277] The

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courts have loosened limits on the ways government can define the territory subject to the assessment. While originally a special assessment could only be levied against a subset of the taxing body's population, modern examples frequently involve assessments across the entire jurisdiction."); Friends of Rahway Business, L.L.C. v. Rahway Municipal Council and City of Rahway, No. A-1335-15T1, slip op. (N.J. Super. Ct. App. Div., July 5, 2017) (no prohibition against a municipality adopting a citywide special improvement district).

272. *Cf.* REV. CODES N.D. 1899, § 2326 (originally paving districts were to be in "a compact form as nearly as practicable"). The "compact form" constraint was removed in 1949. 1949 N.D. LAWS 341.

273. *See* Robertson Lumber Co. v. City of Grand Forks, 147 N.W. 249, 255 (N.D 1914) ("It would seem by these statutes that the size and form of the district is a matter to be decided entirely by the council after consultation with the city engineer, and the only question in which the property owner is interested or has a right to be heard in a court of law is upon the question of benefits and whether the assessment upon his property is a just proportion of the total benefits conferred upon all property owners.").

274. N.D. CENT. CODE § 40-22-01.3 (2021).

275. *Id*.

276. *E.g*. Schedule of Levy Limitations, State of N.D. Office of State Tax Comm'r (July 2021) (listing of tax levy authority by political subdivision) https://www.tax nd.gov/sites/www/files/documents/guidelines/property-tax/levy-limitations.pdf.

277. In North Dakota property taxes have always been expressed in mills. *E.g.* N.D. CENT. CODE § 57-15-02 (2021) ("The rate of all taxes must be calculated by the county auditor in mills, tenths, and hundredths of mills.") (for example, 5 places, i.e. 11.48 mills = .01148). One mill is

legislature should provide alternatives to citywide improvement districts.[278] Of course, trading a special assessment for a property tax does not do much for a property owner, but establishing a proper legal foundation is a start.

B. VIEWING THE PROPERTY

For one hundred years, beginning in 1899, the SAC was required to inspect the property that was subject to special assessment.[279] The statute mandated that the SAC "personally shall inspect any and all lots and parcels of land which may be subject to such special assessment and shall determine from such inspection the particular lots and parcels which, in the opinion of the commission, will be especially benefited" by the improvement project.[280] In 1999, the requirement for the SAC to view the property was repealed.[281] The minimal testimony offered stated that inspecting property is an archaic requirement. And, given the technology and information available today, "such a simplistic approach is no longer necessary or reliable."[282]

The North Dakota Supreme Court stated similarly:

> While it may have been feasible and practical in the *Robertson* Court's day to require the members of the special assessment commission to personally inspect each and every lot within an improvement district and independently determine the benefits to each

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equal to one-tenth of one cent ($0.001) (one-thousandth of a currency unit, also referred to as the millage rate; or $1 for each $1,000 of taxable value). *Cf.* H.B. 1055, 64th Legis. Assemb. (N.D. 2015) (attempt to replace mills with cents throughout the North Dakota Century Code with respect to property tax).

278. The legislature might consider the example of S.B. No. 2041 (2019). 2019 N.D. LAWS 716 (codified at N.D. CENT. CODE § 21-03-07(11) (2021)). Rather than essentially spread a special assessment citywide, the legislature authorized park districts to use general obligation bonds subject to protest. The mechanics of the park district citywide assessment at issue were a little different, but the concept is the same as relates to a municipal citywide improvement district. *See Testimony of Steve Vogelpohl: Hearing on S.B. 2041 Before the S. Fin. & Tax'n Comm*., 66th Legis. Assemb. (N.D. 2019) ("the objective is to move away from the use of special assessments and move to the repayment source as directly general taxes."). Further, the legislature could authorize cities to bond against the capital improvements fund levy in lieu of using a citywide improvement district. N.D. CENT. CODE §§ 57-15-38, -10(8) (2021). Amendments would be necessary but a path is in place in the form of 2021 N.D. LAWS 779 (expanding permitted uses and authorizing borrowing against county capital projects levy). Debt limit issues would have to be addressed. For cities that do not use citywide improvement districts, the permitted 20% general tax for the public share or general benefit should be greatly increased. N.D. CENT. CODE § 40-24-10 (2021).

279. 1899 N.D. LAWS 52 (codified at REV. CODES N.D. 1899, § 2327) ("It shall be the duty of such committee personally to inspect any and all lots and parcels of land within such improvement district….").

280. N.D. CENT. CODE § 40-23-07 (2021) (repealed in part 1999). *See also* Buehler v. City of Mandan, 239 N.W.2d 522, 526 (N.D. 1976) ("If the members of the Special Assessment Commission wish to avoid personally inspecting any and all lots and parcels of land within the improvement district, they apparently may do so by utilizing Chapter 40-23.1, N.D.C.C.").

281. 1999 N.D. LAWS 1445.

282. *Testimony of Howard Swanson, Grand Forks City Attorney: Hearing on H.B. 1247 Before the S. Political Subdivisions Comm*., 56th Legis. Assemb. (N.D. 1999).

> individual lot on a case-by-case basis, such a process would be wholly impractical and unmanageable today. The legislature recognized the impracticality of such a process in modern special assessment proceedings when it amended the statutory scheme to eliminate the requirement of personal inspections.[283]

The court further remarked:

> The legislature has amended the statutory scheme several times since the decision in *Robertson*, most significantly by eliminating the requirement that the commission members personally inspect each lot in the improvement district before determining benefits. The legislature's omission of the commissioners' duty to personally inspect each lot clearly signals a relaxation of any requirement that they individually assess benefits on a lot-by lot basis rather than using a guideline or formula, such as frontage or area, to all properties uniformly.[284]

During the 100-year period the requirement was in effect the legislature never specified what was required in the way of an inspection.

> We believe that what the statute contemplates in this respect is that the commission shall have a personal knowledge of the physical characteristics and conformation of the property; that such knowledge must be gained by the members of the commission by a view of the property; that it is immaterial when or how such knowledge be acquired if the members, in fact, have such personal knowledge. The purpose of the statute is met if they have such knowledge of the physical property based on what they themselves have seen, and not on the report of others.[285]

In most cities, a negligeable amount of time is required to view the property in an improvement district. Viewing the property brings familiarity to the determination of benefit and does not preclude use of a guideline or formula. "The need to actually view the premises when the assessment to be levied represents an exercise of the taxing power is crucial."[286] While perhaps

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283. D&P Terminal, Inc. v. City of Fargo, 2012 ND 149, ¶ 17, 819 N.W.2d 491.

284. *Id*. ¶ 15 (internal citations omitted). While true that the statutory scheme has been amended several times over the years, the basic structure remains remarkably similar to the 1905 law. *Cf.* REVISED CODES OF N.D., 1905, §§ 2771 to 2818 *and* N.D. CENT. CODE CHS. 40-22 to 40-26 (2021).

285. Hale v. City of Minot, 201 N.W. 848, 850 (N.D. 1924) (viewing the property consisted of "riding up and down the various streets in an automobile, whence they viewed the whole district, taking, as they said a birdseye view of it. This required something less than an hour in time.").

286. LEAGUE OF WISCONSIN MUNICIPALITIES, SPECIAL ASSESSMENTS IN WISCONSIN 4 (League of Wis. Muns. 2001). *See also* Ramon A. Klitzke and Jerry A. Edgar, *Wisconsin Special Assessments,* 62 MARQ. L. REV. 171, 182 (1978) ("The municipal official making the statutory

more practical and streamlined, eliminating the requirement to view the property "signals a relaxation" in determining benefit and further blurs the distinction between special assessments and general taxation.

The relaxation has been ongoing. In 1965, the legislature decided the published assessment list need contain only the amount of the assessment and not the amount of benefit.[287] It is safe to assume that large numbers of property owners are not aware their specially assessed property has, supposedly, been assigned an amount of benefit.

C. DISSENTING OPINION IN HOLTER V. CITY OF MANDAN

In the recent case of *Holter v. City of Mandan*[288] the North Dakota Supreme Court considered special assessments on three undeveloped lots for street improvements. Each lot was assessed $15,928.40 for a total of $47,785.20 pursuant to the City's special assessment policy.[289] The owner claimed the assessments exceeded the value of the benefits received. While expressing concern for how the SAC determined benefit, the court in a 3-2 decision nevertheless affirmed the district court, holding that the City did not act arbitrarily, capriciously or unreasonably in determining the benefits and assessments.

Justice Tufte's dissent, joined by Chief Justice Jensen, noted that under the City's assessment policy the benefit determination for a lot is defined as the unit cost allocation. "Here, by defining the benefit in terms of the lot's unit costs, the City has eliminated part of the statutory protection for property owners."[290]

> On the issue of whether assessed costs exceed benefits, the majority now applies our increasingly limited standard of review to approve the City's *ipse dixit* that benefit equals cost and thereby avoid review under a statute designed to protect against uncompensated takings. Under the City policy, it is impossible to arrive at a finding that costs exceed benefits. That should be a clear warning there is something amiss. The rule announced by the majority reduces the

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report should inspect each parcel of property subject to the assessment and develop documentation of the net benefit so as to prevent the possibility that the property owner could claim he was not benefited by the improvements).

287. 1965 N.D. LAWS 551. *Cf.* Robertson Lumber Co. v. City of Grand Forks, 147 N.W. 249, 251 (N.D. 1914) ("The assessment roll contains no list or finding of the amount each particular lot or parcel of land was benefited, as required by section 2801, R.C. 1905. It merely gives the amounts of the assessments, and states that they were 'levied according to the benefits'").

288. 2020 ND 202, 948 N.W.2d 858 (Tufte, J. dissenting) (Jensen, C.J., dissenting on denial of rehearing), *cert. denied*, 141 S.Ct. 1515 (2021).

289. *Holter,* 2020 ND 202, ¶ 5, 948 N.W.2d 858.

290. *Id.* ¶ 29.

> standard of review, limited though it may be, to something that is neither a standard nor provides any review.[291]

The North Dakota Supreme Court has identified three requirements under North Dakota Century Code section 40-23-07:

> The special benefit accruing to each lot or parcel of land from the improvement must be determined. The special assessment levied against each lot must be limited to its just proportion of the total cost of the improvement. The assessment against any lot or parcel of land must not exceed the benefit which has been determined to have accrued thereto.[292]

The dissent reasoned that by merging the measure of benefits with costs, the City satisfied only the requirement that assessments against each lot are limited to its just proportion "and only because it ensures they are identical and so always at a 1:1 ratio."[293] The City "is essentially comparing the assessed amount with itself. In every instance, A = A. Costs will never exceed benefits where benefits by definition equal costs."[294] "But because N.D.C.C. § 40-23-07 requires the benefit to be compared to the allocated cost, the benefit determination may not be calculated by the same formula that allocates cost. To do so misapplies the law."[295] Justice Tufte makes a fundamental point; one that is widely overlooked. As one commentator stressed, "[i]n order to understand the procedures usually followed, it is important to distinguish between the allocation of costs and the allocation of benefits."[296] How many special assessment districts lack a benefit calculation, or simply present a benefit calculation which matches, dollar for dollar, the cost allocation?[297]

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291. *Id.*

292. Bateman v. City of Grand Forks, 2008 ND 72, ¶ 11, 747 N.W.2d 117 (citations omitted). *See also* McKenzie v. City of Mandan, 147 N.W. 808, 810 (N.D. 1914) ("[The legislature] required that assessments should not be arbitrarily made, but that the actual benefits, as well as the apportionment of the assessment, should be found and given, to the end that the assessment might not only be in proportion to the benefits, but that the owners and the public might know the actual and proportional basis on which the assessments were levied."). *Accord* N.D. CENT. CODE § 40-24-19 (2021) (the issuance of warrants and bonds constitutes a representation and covenant binding on the city that the aggregate benefits to the assessed properties are not less than the aggregate amount of the special assessments).

293. *Holter*, 2020 N.D. 202, ¶ 31, 948 N.W.2d. 858.

294. *Id.* ¶ 32.

295. *Id.* ¶ 35. "By approving the use of a single formula to calculate both benefits and costs, the majority allows the City to shortcut the statutory process and avoid the requirement to ensure the benefit to each lot does not exceed the costs." *Id.* ¶ 34.

296. FISHER, *supra* note 69, at 29.

297. *Cf.* N.D. CENT. CODE § 40-23-09 (2021) (assessment list must list separately the amount of benefit and the amount assessed against property). Conflating cost and benefit is long-running. As one example, a city was advised in the 1970s that the amount assessed and the amount benefited should be the same as both are based on the actual cost of the project. Letter RE: Special Assessments (sender and addressee redacted) (June 14, 1978) (on file with author).

The majority opinion specifically found that the SAC "did more than simply take the total cost of the project and divide it by using the formula. It first deducted $225,000 from the costs and expenses. In doing so, it determined the benefits for all properties assessed was less that the total cost of the work."[298] However, the statement confuses the allocation of public costs by the city with the role of the SAC. The first step in allocating improvement district costs is made by the governing body. The city council or commission decides what part of the total project cost will be paid by the public at large rather than assessed against property owners.[299] The second step in allocating improvement district costs is made by the SAC. The SAC is directed to determine benefit and allocate to each property its just proportion of the amount of project cost to be paid by special assessments (i.e. after the governing body determines the amount of the public share). The amount of the public share is not relevant to the SAC's task of determining benefit.

The dissent provides an example supposing that project costs double, under the City's policy the benefits have also doubled. "But the benefit is not necessarily the same as or connected to the cost of the project. It is one thing to say property along a street will benefit from new pavement by an amount proportional to its area or frontage. It is quite another to say that if the cost of paving doubles, the benefit also doubles."[300] The dissent noted how significant it is to diminish the concept of benefit:

> This case appears to represent the first instance where this Court, in the absence of any satisfactory explanation of how a political subdivision determined the amount of benefit to each lot resulting from a special assessment project, engaged in its own search of the record to invent an explanation on behalf of a political subdivision. While great deference should be afforded to the legislative function of a political subdivision, this Court should not be satisfied by any

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298. *Holter*, 2020 N.D. 202, ¶ 21, 43 948 N.W.2d. 858 (Chief Justice Jensen dissenting on denial of the petition for rehearing) (opining that rehearing should be granted to allow an opportunity to address the majority's rationale of the $225,000 as part of the benefit determination).

299. N.D. CENT. CODE §§ 40-24-10 (cities can spread up to one-fifth of the project cost as a citywide excess mill levy), 40-22-16 (2021) (the resolution creating a water or sewer district may provide that a portion of the cost will be paid by utility revenues). In addition, some cities use sales tax or other sources to pay a portion of the improvement costs. *See* City of Fargo, *2021 Fargo Infrastructure Funding Policy*, https://download fargond.gov/0/2021_infrastructure_funding_policy.pdf.

300. *Holter*, 2020 ND 202, ¶ 36, 948 N.W.2d. 858. *See also* Will v. City of Bismarck, 163 N.W. 550, 557 (N.D. 1917) (Robinson, J. dissenting) ("It is true that according to law no special assessment can be laid against any lot in excess of the actual benefits to the lot. In a lot which is 50x150, worth $700, the cost of a pavement at $7 a front foot is $1,400, or twice the value of the lot. If the pavement would not add more than $100 to the sales price or value of the lot, in such a case the special assessment would be limited to $100. And who is to pay the balance of $1,300? The statute expressly limits the amount of any special assessment to the special benefits.").

> conceivable justification that the Court can imagine, in the absence of a rational explanation being provided by the political subdivision.[301]

VI. CONCLUSION

Special assessments are a voluminous topic touching many types of improvements and services involving a dozen political subdivisions. Beginning in 1905, the legislature required that city assessments be made on the basis of benefits.[302] While special assessments are used on an immense scale, with some $1.5 billion in outstanding debt in North Dakota, the concept of benefit has weakened over time and faded into the background. Special assessments, especially when imposed on a citywide basis, function too much like special taxes.[303] The *Holter* dissent exposes the dangers of merging benefit with cost. Maybe benefit is not rigorously applied in North Dakota because the legislature does not require it.[304] The result is a somewhat casual approach to benefit. The legislature has spent decades working around the edges of special assessment law. A bolder approach is called for.[305] It is worth observing that just because special assessments have been in use for so long does not necessarily mean it is the best system. "The longevity of the special assessment gave it legitimacy. The strongest argument for continuing the special assessment was that it had been used in the past."[306] In any event, as Chief Justice VandeWalle conceded in a special assessment case, "[i]f a remedy . . . is to be found, the Legislature must find it."[307]

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301. *Holter*, 2020 N.D. 202, ¶ 39, 948 N.W.2d. 858.

302. *See* Robertson Lumber Co. v. City of Grand Forks, 147 N.W. 249, 251 (N.D. 1914) ("In 1905, however, the Legislature put itself on record … as requiring all assessments to be made on the basis of benefits and benefits alone. It was specific in the matter, so that there could be no evasion or dispute.").

303. *See* Harris v. Wilson, 693 So.2d 945, 949 (Fla. 1997) (Wells, J., dissenting) ("The majority opinion completely obliterates the distinction between ad valorem taxes and special assessments. The majority has effectively erased from 'special assessment' the word 'special.' When there is nothing special about an 'assessment' logic and common sense dictate that the assessment is a tax.").

304. *See* Dean J. Misczynski, *Special Assessments in California: 35 Years of Expansion and Restriction* VALUE CAPTURE AND LAND POLICIES 97, 109-10 (Gregory Ingram and Yu-Hung Hong ed., 2012) (discussing Proposition 218, constitutional amendment approved by California voters on Nov. 5, 1996 imposing new burden on cities to demonstrate special benefits) ("Because of their previous legal invulnerability, cities and other agencies that created assessment districts mostly had not developed the notion of 'benefit' or how it might be measured beyond the blunt-instrument level. Finesse is unlikely to be developed when mere assertion will do. This is a weakness that undermines the apparent legitimacy of assessments, at least in the eyes of the assessed.").

305. One approach would be a state level study of special assessments similar to a previous study of property taxes. *See* Exec. Order No. 2013-25, Task Force on Property Tax Reform (Dec. 2, 2013); 2015 N.D. LAWS 1554 (implementing recommendations from the task force).

306. Diamond, *supra* note 1, at 238.

307. Paving Dist. 476 Grp. v. City of Minot, 2017 ND 176, ¶ 30, 898 N.W.2d 418 (VandeWalle, C.J., concurring) (context of a special assessment case discussing the statute of repose). *See*

also Price v. City of Fargo, 139 N.W. 1054, 1061 (N.D. 1913) (regarding whether competitive bidding required of special assessment projects should be applied to other municipal contracts) ("If the statute needs amendment, it is for the Legislature, and not for us, to provide the remedy.").