Prepared by the North Dakota Legislative Council staff for the Taxation Committee
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SPECIAL ASSESSMENT IMPOSITION AND CHALLENGES

This memorandum was requested to examine methods of imposing and challenging special assessments by cities and counties.

The North Dakota Century Code does not clearly identify the legal effect of county ordinances or resolutions. A great deal of statutory authority exists in the North Dakota Century Code for city ordinance power, including power to adopt, amend, initiate, and refer ordinances, as well as procedural requirements which must be met in any of these actions. Initiative and referendum powers regarding city ordinances are provided by Chapter 40-12. No corresponding initiative or referendum authority exists with regard to resolutions of city governing bodies or ordinances or resolutions by county governing bodies.

Although almost all county power is exercised by resolution, several sections of the North Dakota Century Code imply that making an ordinance is a power possessed by a county. Section 11-09.1-13 provides that a home rule county may impose a penalty for a violation of an ordinance. Several sections (Sections 11-09.1-21, 11-10-27, and 11-11-05) provide for counties to act by "resolution or ordinance." The impression given by the Century Code usage of the terms "ordinance" and "resolution" is that the terms are clearly different when applied to city authority but are sometimes used interchangeably when applied to county authority.

Because county authority for improvements by special assessments adopts the city provisions of Title 40 by reference (Section 11-11-55.1), it is necessary to examine the provisions of Title 40 for references to use of an ordinance or resolution for special improvement district purposes. A special improvement district may be created by "ordinance or resolution" adopted by the governing body by a majority vote, except a two-thirds vote of the governing body is required to establish a sewerage system (Sections 40-22-08 and 40-22-02). After filing and approval of the engineer's report, the governing body may adopt a resolution declaring the necessity of the improvements (Section 40-22-08). A resolution of necessity is not required for a water or sewer improvement, an improvement paid by service charges, or when a petition signed by owners of a majority of area of property in the district has been received. The resolution of necessity must be published once each week for two consecutive weeks in the official newspaper (Section 40-22-15). Within 30 days after the first publication of the resolution of necessity, owners of property in the proposed improvement district are entitled to file written protests against adoption of the resolution (Section 40-22-17). If protests are filed, the city governing body must consider the protests at its next meeting after the expiration of the time for filing protests. If the protests received contain the names of owners of a majority of the area of property within the improvement district, the protest is a bar against proceeding further with the improvement project (Section 40-22-18). If the protests contain the names of owners of a majority of any separate property area included within the district, the protest is a bar against proceeding with the portion of the improvement to be assessed in whole or in part upon property within that area.

At the meeting of the governing body at which the final assessment list is to be acted upon, any person who has filed an appeal may appear and present reasons why an assessment should be changed. The governing body may increase or diminish any assessment. After any challenges have been resolved, the governing body shall "confirm" the assessment list (Section 40-23-16). Under the alternative method of assessing benefits for a special assessment project, the governing body shall hear and determine appeals and objections and make changes in assessments but the statute does not require the governing body to confirm, adopt, or enact an ordinance or resolution to finalize the assessments.

It appears both cities and counties may complete a special assessment project without enacting an ordinance. In fact, it appears that because cities are given the option of creating a special improvement district by ordinance or resolution, it would be a poor decision to act by ordinance because the ordinance creating the district would be subject to referral under Section 40-12-08, and the later adoption of the resolution of necessity for the project would be subject to the right of challenge by petition of property owners under Section 40-22-17.

Under Section 40-26-01, it is provided that courts shall review levy and apportionment of special assessments. However, North Dakota Supreme Court decisions (*Soo Line R. R. v. City of Wilton*, 172 N.W.2d 74 (N.D. 1969); *United Public School District v. Burlington*, 196 N.W.2d 65 (N.D. 1972); *Cloverdale Foods Co. v. City of Mandan*, 364 N.W.2d 56 (N.D. 1985)) have concluded that it is not the province of the court to substitute its judgment for that of the commission making the assessment, 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. Enactment of 2011 House Bill No. 1322 provided by amendment to Section 40-26-01 that if an action challenges the determination of benefits and special assessments imposed for agricultural property, the decision of the special assessment commission regarding agricultural property is not entitled to deference by the court, and the court shall consider the determination of benefits and special assessments imposed for agricultural property de novo.