

2009 SENATE FINANCE AND TAXATION

SB 2441

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No.SB 2441

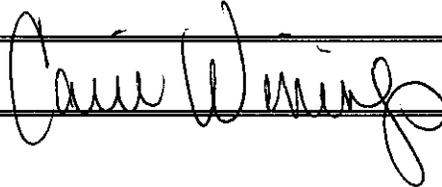
Senate Finance and Taxation Committee

Check here for Conference Committee

Hearing Date: 03/30/2009

Recorder Job Number: 11556

Committee Clerk Signature



Minutes:

**Chairman Cook:** Opened the hearing on SB 2441.

**Gordon Iseminger, President, Grand Forks Cemetery Association:** See Attachments #1 and #2 for testimony in support of the bill. (9.26-11.24 reads an opinion from the Attorney General)

**11.45 Chairman Cook:** If this bill passes as it is, are you under the understanding that the money you have paid would be paid back to you?

**Gordon Iseminger:** We have been requested by our attorney to not answer that question. I don't believe we would demand it. We recognize that we use the streets and water in our business. I would say that it would be a contentious issue and it would put us in a bad light in the city of Grand Forks.

**Chairman Cook:** Somebody has to pay the special assessments, so if you are not assessed them then others would have to pay them. If you don't pay them, then the city would have to take it over the cemetery. Does the city want to own it?

**Gordon Iseminger:** No. There is a distinction between taxes and special assessments. By law, cemeteries are exempt from taxes. There is specific legislation for that. We are pretty sure that cemeteries cannot be seized for nonpayment of special assessments. That is seizing property in which the dead lay. The city does not want to own it and I don't believe by law they

can take it. It is unfortunate that now that the assessments have been levied, that they are going to have to find the money. However if they had followed the law when they assessed them to begin with there would not have been an issue. If it was spread over the entire city of Grand Forks it would amount to a can of pop a year.

**16.16 Senator Hogue:** Can you give us some background on the financial balance sheet of this nonprofit? If you are nonprofit, I assume the Attorney General can take over any nonprofit that becomes insolvent. What other assets does the association own?

**Gordon Iseminger:** We have reviewed many court cases on this and in many instances the courts have ruled the money has to be there when the graves have to be maintained years in the future. As for our balance sheet, we are closely maintained in our finances, the only way we get revenue is the sale of lots and services. We about break even.

**Senator Hogue:** What is the net worth of the nonprofit corporation?

**Robin Purcell, Administrator, Grand Forks Cemetery Association:** It is just over \$1million. We have no savings. We have a perpetual cares trust fund and we have some (inaudible) funds as well. The only other funds are from pre-paid lots.

**Senator Hogue:** What was the Attorney General opinion number?

**Gordon Iseminger:** 2009-L-06 March 18, 2009.

**Senator Anderson:** If this were the first assessment that your association ever had, would you volunteer to pay a small portion for the benefits the cemetery gets?

**Gordon Iseminger:** In the 1997 flood the cemetery was covered by water. We had only one casket floating in that flood because it was 2 weeks before the flood. We had no damage. We asked for it to be levied on the office building only. Every other city treats cemeteries

differently, uniquely. Most of the cities provide these kinds of things because of the services they provide.

24.15 **Senator Dotzenrod:** Are there curb and gutters around the cemetery and have you had to pay special assessments?

**Gordon Iseminger:** Yes, but we have never had to pay special assessments prior to the 1997 flood. As far as we can tell we are the only cemetery that has had to pay special assessments in the state of North Dakota.

**Senator Dotzenrod:** Can you envision a time in the future that a cemetery would want to be included in a special assessment for improvements?

**Gordon Iseminger:** No, I cannot conceive of that.

**Senator Dotzenrod:** But this law would affect all cemeteries, do you understand that?

**Gordon Iseminger:** I cannot conceive that a cemetery would want to do that.

29.10 **Senator Hogue:** I cannot imagine that the city would want to take the cemetery over.

What are the reasons they are citing for not wanting to exempt you?

**Gordon Iseminger:** If I comment on that, I would be commenting on their personalities.

**Chairman Cook:** You believe that they would not take it over, correct?

**Gordon Iseminger:** Yes. The south cemetery was taken over after poor management and non payment of taxes. I contend the city took it over, but I understand that the county collects the taxes. One way or the other it became public property. I was sold to a private individual and then we purchased it from them. The city did not want to own it. There is not a city administration that could manage it as well as a nonprofit.

32.10 **Senator Anderson:** There are certain cemeteries that might want to petition to have a special assessment to benefit from it. It looks like the bill is just agreeing with the 1970 court ruling that cemeteries are exempt. Why do we do anything?

**Chairman Cook:** Closed the hearing on SB 2441.

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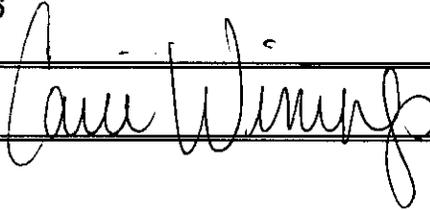
Senate Finance and Taxation Committee

Check here for Conference Committee

Hearing Date: 04/01/2009

Recorder Job Number: 11596

Committee Clerk Signature



Minutes:

**Chairman Cook:** Reopened discussion on SB 2441.

**Senator Anderson:** What is this doing? We are saying yes that we do recognize that the North Dakota Supreme Court did issue a ruling in 1970.

**Senator Triplett:** I think it is always a good idea that when the Supreme Court makes laws by filling in the gaps and interpreting things that it is not a bad idea for a legislature to confirm that so that the next person doesn't have to find it.

**Chairman Cook:** We need to amend this. First off when they did the special assessment districts they taxed residential properties in linear feet and they taxed commercial at square footage. They cannot legally do that. The cemetery should go back and file a lawsuit over that to reduce the taxes. Secondly, I found out that there was another situation like this in the city of Langden. The city special assessed two cemeteries, but then the city did not make them pay in the end. It has happened before. I also know if we pass this, on line 22, we have to add at the end of that new language or chapter 40-23.1. Then I question the legislative intent language. I also question the section 3 language, whether that should be in there or not. I

have no problem declaring this an emergency. In regards to the effective date, are we intending the city to give the money back?

**3.50 Senator Triplett:** I think they want to be excused from the rest at this point.

**Chairman Cook:** I would suggest taking section 3 out.

**Senator Triplett:** If we leave the legislative intent piece in saying that the Supreme Court decision is what it is, then I think the effective date is not necessary.

**Chairman Cook:** We had a discussion of improvements a city could make that truly would benefit a cemetery; I don't know if we need to put language in there to make sure that that is an avenue.

**Senator Hogue:** I was thinking about Senator Dotzenrod's point about future special assessments they might want for improvements. I thought we should add language on lines 20 to 22 as a second section/ exception to this section of the law that gives the state an exemption for special assessments related to flood control. It would be specifically for flood control projects. It would solve their problems.

**Senator Triplett:** The 1970 case was not about flood control.

**Senator Hogue:** I doubt it.

**Chairman Cook:** you are saying that if we did it that way, they would be exempt from flood control special assessments if they rebuild the street in front of the cemetery they would have to pay for that.

Senator Hogue: Potentially.

**Senator Anderson:** What about the fact that they could certainly petition and be a part of it and not get out of it?

**Senator Hogue:** I don't know. I am not sure that you can agree with the legal conclusion that you can only do it one way. I think that as far as adding in, if they wanted their internal road paved, I don't know if they can do that. If the special assessment commission determines that they are not part of that benefited area, then there is no way for them to assess for that.

**Chairman Cook:** First off, I am confident that once they determine who benefits, they cannot say that each person is assessed differently. I think that here we have an issue of taxing the dead. With a cemetery you would only be able to tax an area that does not contain the dead.

**Senator Triplett:** I think that is true. I would prefer not to muddy this bill up with other issues. I think the two small amendments would fix the problem.

**Chairman Cook:** This is a Grand Forks bill.

10.50 **Senator Dotzenrod:** I think there is a method available whereby you can petition to be included in an assessment.

11.45 **Chairman Cook:** We don't have to get this out today. Special assessment law has many avenues and options for political subdivisions. I think the issue we have before us is whether or not the cemeteries can be assessed. The area that does not contain a grave could be, but maybe they should not be at all. Closed the discussion.

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 2441

Senate Finance and Taxation Committee

Check here for Conference Committee

Hearing Date: 04/01/2009

Recorder Job Number: 11604

Committee Clerk Signature



Minutes:

**Chairman Cook:** Reopened discussion on HB 2441.

**Senator Hogue:** See Attachment #1 for amendments proposed.

1.13 **Senator Oehlke:** Comment.

**Senator Hogue:** I took the language the proposed in their bill and put it where it made sense.

**Senator Dotzenrod:** Most cemeteries are not multi-use facilities.

**Chairman Cook:** Would the legislative intend allow them to ask for their money back?

**Senator Hogue:** I don't think so. They can protest the levying of assessments on their property, but once they go through that certification process, I don't think there is any provision that allows them to recoup those. The ones they haven't paid. That is a different question.

They can argue that this has been the law all along.

**Chairman Cook:** What do you think is the right solution for this cemetery in Grand Forks? Do you think they should be forgiven all of the special assessments?

**Senator Hogue:** Yes. I think they are performing a public function that would otherwise have to be performed by government. I don't have a problem exempting them from certain taxes.

**Chairman Cook:** This would solve their problem wouldn't it?

**Senator Hogue:** It would. But it isn't as broad as they would ask for.

**Senator Triplett:** I am wondering if we could look up the city of Bismarck vs. St. Mary's Church 1970 opinion. I think it is a little odd to narrow what a Supreme Court decision says and I would prefer to look at that.

**Chairman Cook:** We can do that and come back to this bill.

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2441

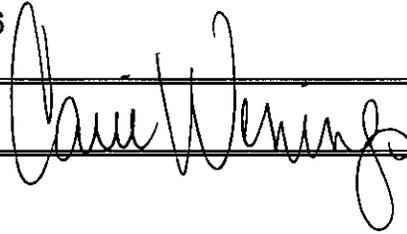
Senate Finance and Taxation Committee

Check here for Conference Committee

Hearing Date: 04/01/2009

Recorder Job Number: 11606

Committee Clerk Signature



Minutes:

**Chairman Cook:** Reopened discussion on SB 2441.

**Senator Triplett:** See attachment #1 for court case pertaining to the bill.

**Discussion:** A discussion occurred among the committee members on how to amend the bill.

Deleting Sections 2 and 3 was discussed, also referencing the other chapter 40-23.1 in code.

**Senator Triplett:** Moved to amend the bill by taking out section 3 and adding chapter 40-23.1.

**Vice Chairman Miller:** Seconded.

**Chairman Cook:** Discussion?

**Senator Dotzenrod:** This is on the original bill now, correct? I am not sure I understand why, what does that do?

**Senator Oehlke:** It prevents the entity from going back to the beginning of time and asking for taxes back.

**Senator Triplett:** Which is what they said they didn't want to do anyway.

**Vice Chairman Miller:** They still could go after that.

**Chairman Cook:** I think they were illegally assessed when they were assessed by square footage and I think they have an argument there. My only question is if they need the language in there as it is if what is unpaid yet doesn't have to be paid.

**Senator Triplett:** I thought about that, but I think the legislative intent piece takes care of that pretty well. I see section three as the section to go back and try and collect the ones that were paid. It seemed redundant to me.

**Chairman Cook:** Donnita Wald can you answer that question?

**Donnita Wald, Legal Council, Tax Department:** I think that it clarifies a little bit more to leave the effective date in there. That actually is the law. I would advise that.

7.02 **Chairman Cook:** Would you like to withdraw that part of the amendment.

**Senator Triplett:** I will withdraw that part.

**Vice Chairman Miller:** Seconded.

**Chairman Cook:** Discussion?

**Senator Hogue:** I am not comfortable with defaulting to the Supreme Court. They just inferred what the legislature would have done and I think it is incumbent on us to say what the law is and not defer to the Supreme Court. This is a stretch. Recognizing that cemeteries perform a public function, I am willing to look at exempting taxation on a case by case basis, but I hate to start creating exemptions that no one has asked for. The only exemption from special assessments appears to be the state for flood control. We don't exempt property owned by other political subdivisions. When we do it I think we should do it in a way that is always as narrow as possible to meet a specific objective. The bill is over broad.

9.14 **Senator Triplett:** In opposition to that, the rest of the communities have chosen to accept the law. We are codifying what the Supreme Court decided. I don't think we are being overly

broad. No one has challenged it for over 40 years except for one city who apparently was not aware or chose to ignore it. We are just restating it. It is the right thing to do.

**Senator Hogue:** The rationale that the courts used back in 1970 is that we don't want the levy process going forward on a cemetery that fails to pay their special assessment because that is antithetical to the fundamental purpose of a cemetery. Since this law was passed we have the Attorney General that was authorized to take over non-profit corporations if they become insolvent. That process would not involve any levying on the assets the cemetery land, but it would be to take over the non-profit corporation which is the owner of the cemetery. So there is a good reason why we should not follow what the North Dakota Supreme Court has done. I don't see a disruption of the cemetery that the Supreme Court saw back in 1970. I hate to give an exemption of any kind that is broader than necessary.

12.04 **Senator Oehlke:** If I understand what the tax department testified to, this is confirming the law, if we already know what the law is, why are we doing this bill? Also, if we do nothing and the cemetery refuses to pay, what is the city going to do?

**Senator Triplett:** I think that whenever the Supreme Court makes a decision the legislature should decide to codify that; even if it is 40 years later. We need to keep the law as clean and clear as possible. There is no point in narrowing it down from what the Supreme Court assumed. I disagree with the point that it is not a disruption for the Attorney General's office to take over a non-profit organization. I think that it would be an enormous one.

15.07 **Chairman Cook:** I would like to see the bylaws or the constitution of this non-profit company that owns a cemetery.

**Senator Triplett:** I think that the basic law in North Dakota states that if you chose to dissolve you have to give over your assets to another non-profit entity.

**Chairman Cook:** What I would like for us to do is remove the motions and think about it for a few days. I see two options here. I could go either way. One is to just take the bill we have and add the chapter reference in, or Senator Hogue's amendment without section 2. The real question I have is what the right policy in taxing cemeteries.

**Senator Triplett:** My concern about going with Senator Hogue's version of the amendment without saying more is that you are leaving it wide open in terms of what people will think our intent was.

**Chairman Cook:** I think that has to be an argument as to what our intent is.

**Senator Triplett:** We better rewrite that amendment if our intent is to overturn that decision.

**Chairman Cook:** I think that is accomplished by removing section 2 and adding it where it is.

**Senator Triplett:** No, I don't think so. It is ambiguous.

**Chairman Cook:** OK

**Senator Dotzenrod:** It says in this legal document that there was a failure to make special assessments and they believed that it was intentional. They do look at that and we need to be aware of that.

**Senator Triplett:** The point is that you have to let the Supreme Court what the intent is. We want to provide clarity.

**Chairman Cook:** What should we do?

**Senator Triplett:** I remove my motion.

**Vice Chairman Miller:** Seconded.

**Chairman Cook:** Closed the discussion.

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Bill/Resolution No. SB 2441

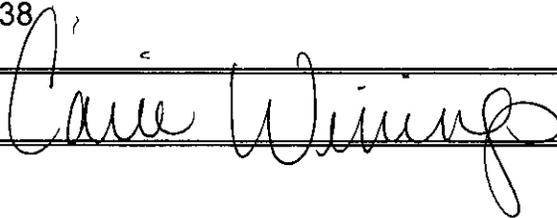
Senate Finance and Taxation Committee

Check here for Conference Committee

Hearing Date: 04/06/2009

Recorder Job Number: 11738

Committee Clerk Signature



Minutes:

1.05 **Chairman Cook:** Reopens discussion on SB 2441. There are some questions that I have in my mind. First is a policy question, I think would be if a cemetery owned by a non-profit should pay special assessments. Personally I come down on the side that they should not.

The second question then is if there is a road improvement project and there is a small assessment district and you live across the street from a cemetery and they don't pay, does that mean that their part of the benefit is all special assessed on the other property owners in that district. That causes me a little area of concern. Senator Hogue made a good point if a cemetery is owned by the city, I believe the city would special assess itself and the taxpayers of the city then would pay the assessment for the amount of that benefit through their property tax. If we are going to forgive the special assessments for a cemetery, especially for road improvements, then maybe it should be a responsibility of the entire city because the entire city has benefited by having a place to lay their departed. I visited with Mr. Walstad and I asked that of him. (Asks Mr. Walstad to come to the podium) If we decided to do this as a committee, could you offer them for this?

3.06 **John Walstad, Legislative Council:** Yes, I think it would be fairly easy to do. As you pointed out, if there is a city owned cemetery, in current law which is in the bill, it says that they

are not exempt from assessments however the payment is by the levy of taxes put into law, however the payment comes from levying of property taxes according to law. There is a provision 40-24 (the next section) that a city may levy up to one fifth of the cost of a special assessment project in property taxes against all the property in the city and that levy is an unlimited levy so it doesn't have to come out of the general fund. It is an additional amount that can be levied to make that special assessment payment for benefited city properties. It would not cover a non-profit cemetery but it wouldn't take too much to tweak the language to include that.

**Chairman Cook:** Can counties do that too?

**John Walstad:** Yes. They are included in that same language; school districts, part districts, etc.

**Senator Triplett:** I think that is a great idea. I encourage you to request that amendment.

**John Walstad:** It occurs to me there is an outstanding obligation for the cemetery in question in Grand Forks and I would think all of that obligation would also be spread in property tax.

**Chairman Cook:** You are correct on that. That is for a flood project, do you think that is how we should handle flood project assessments also?

**Senator Triplett:** They would be considered within the general term of special assessments wouldn't they?

**John Walstad:** The section of law we are dealing with here does not relate specifically to flood control special assessments. There is one section of law that does, but this is a general provision.

**Chairman Cook:** So we would have to do it to more than one chapter?

**John Walstad:** I don't think that would be necessary. If the committee's intention would be to limit this kind of treatment to flood control assessments, then I believe probably a new section

of law should be created. If the intention is that this would apply whenever special assessments are spread, then I think we are in the right section here.

**Senator Triplett:** My intent would be that it would be whenever special assessments are intended but to include flood protection. So that it would catch both.

**Senator Anderson:** So this then would be any assessments that are not spread on a non-profit cemetery then would go under the section of the code where it is a share of specials by the cities. Where everyone in the town gets a 1/8 of a mill or something like that. Not just 1/5 but whatever the cost would have been gets spread city wide.

**John Walstad:** That is correct... The full amount of that assessment for a non-profit cemetery would be spread as long as the cities levy for that and any other city property doesn't exceed 1/5 of the total cost of the special assessment project. I don't believe that limitation is very restrictive. That allows a city to pick up a pretty good part of the cost.

**Senator Anderson:** I got you.

**Senator Dotzenrod:** On the bottom of page 1, where it says counties, cities, school districts, park districts, and townships, what about property that belongs to the state and what about property that belongs to churches?

**John Walstad:** Churches are not exempt. The state is not exempt, however, with regard to flood control assessments in the city of Grand Forks there is a special provision that exempts the state in view of the fact that the state put a good chunk of money in the flood control effort.

**Chairman Miller:** As far as the churches go, would their cemetery be exempt?

**John Walstad:** No. A church cemetery would not be exempt from special assessments. It would be exempt from property taxes, but not specials.

**Vice Chairman Miller:** Would we be encouraging the church to reorganize?

**John Walstad:** I am speaking of current law. This bill would include a church owning a cemetery under non-profit would be exempt.

**Chairman Cook:** I think I would like you to do that amendment.

**John Walstad:** Just so I understand, we are not talking about flood control levies only, it would be any specials?

**Chairman Cook:** Yes. Then the only other question I think we are going to have is, how is this going to affect the non-profit cemetery in Grand Forks. My guess is the amount of special assessment they still owe, they would no longer owe. The city of Grand Forks would recover the remainder of the outstanding obligation through property tax. The amount that they have already paid, we are not giving them any mechanism in this bill that would change anything as far as their ability to get that money back.

**John Walstad:** I haven't thought this through but I think I will have to write some special provision relating to that outstanding obligation and that whatever has been paid is not refundable. If the city chooses to do that they can.

**Chairman Cook:** I wouldn't care if you were silent to what they have already paid, but I think you need to write something that makes it clear that what they haven't paid is no longer owed.

**John Walstad:** OK

**Chairman Cook:** Suspended the discussion. **Vice Chairman Miller:** I don't think that cemetery is bent on getting that money back.

**Chairman Cook:** I don't either, but if they are they can fight it in the court. (Committee takes a break to wait for amendments)

13.05 **John Walstad:** Returned with the amendments. See Attachment #1. (Explained the amendments)

17.05 **Senator Oehlke:** On Page 1, line 22, where you have "and the city in which such property is located" should that include county, school district, park district as well, or is that word OK in there?

**John Walstad:** Good question, I pondered on that myself, but special assessments levied under title 40 are only allowed to be assessed by a city. The definition of municipality in title 40 means city only.

**Chairman Cook:** So we could still have a problem somewhere out there with counties?

**John Walstad:** That is a potential. Counties do have limited authority for special assessments. I am not sure that that would ever be a problem, but I didn't try to address that.

**Vice Chairman Miller:** Don't fix what is not broke.

**John Walstad:** As far as I know, it isn't broken.

**Chairman Cook:** Any other questions? Your wishes?

**Senator Oehlke:** Moved the amendments 91027.0402

**Senator Anderson:** Seconded.

**Chairman Cook:** Discussion?

**A voice vote was taken: Yea 6, nay 0, Absent 1 (Senator Hogue)**

**Motion passed.**

**Vice Chairman Miller:** Moved a Do Pass As Amended.

**Senator Triplett:** Seconded.

**Chairman Cook:** Discussion?

**Senator Dotzenrod:** On section 2 where we have this intent, I know that when we talked about this bill earlier there was some question about whether should refer to what the Supreme Court did. That was part of what the original intent was to put that in our law and try to make it

conform to what the Supreme Court had said. It looks like by changing this we are leaving whatever they said on this out of our consideration. It is not what we are trying to do.

**Chairman Cook:** I would guess that is the right thing to do. I think the Supreme Court ruling that they refer to spoke to whether or not you could special assess a cemetery owned by a non-profit at all, and what we are setting in law now is that you do assess them, you just collect it from the entire taxing jurisdiction of the city.

**Senator Triplett:** When we discussed this matter before, someone from the tax department advised us to add a couple of words on the underlined sentence of the bill that would also incorporate chapter 40-23.1. Is that something we still need to do?

**John Walstad:** I think that would still be appropriate. I am not sure that this doesn't take care of that, but it certainly wouldn't hurt to add that and then we don't have that become an argument at some point.

**Senator Triplett:** OK.

**Chairman Cook:** We will consider that as a friendly amendment?

**Senator Triplett:** Sure that is fine.

**Chairman Cook:** I thought there were three chapters that dealt with that.

**John Walstad:** I will look.

**Chairman Cook:** Any further discussion?

**A Roll Call vote was taken: Yea 6, Nay 0, Absent 1 (Hogue)**

**Senator Triplett will carry the bill.**

April 1, 2009

PROPOSED AMENDMENTS TO SENATE BILL NO. 2441

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 40-23 of the North Dakota Century Code, relating to exemption of nonprofit cemetery property from special assessments levied for flood control purposes; to provide a statement of legislative intent; to provide an effective date; and to declare an emergency.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 40-23 of the North Dakota Century Code is created and enacted as follows:

**City flood control special assessment exemption for nonprofit cemetery property.** Property owned by a nonprofit entity and used exclusively as a cemetery is exempt from assessment or collection of special assessments levied for flood control purposes under this chapter or chapter 40-23.1.

**SECTION 2. LEGISLATIVE INTENT.** It is the intent of the sixty-first legislative assembly by enactment of this Act to confirm and continue the 1970 North Dakota supreme court decision holding that special assessments upon the property of a cemetery owned by a nonprofit corporation are void and that the supreme court decision has governed imposition of special assessments for flood control purposes, at a minimum, since the time of that decision.

**SECTION 3. EFFECTIVE DATE.** This Act is effective for assessment or collection of special assessments regardless of the date of the assessment.

**SECTION 4. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

Date: 04/01/09

Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. :

2441

Senate Finance and Taxation Committee

Check here for Conference Committee Amend

Legislative Council Amendment Number line 22 Add chapter

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Senator Triplett Seconded By Senator Miller

Senators	Yes	No	Senators	Yes	No
Sen. Dwight Cook - Chairman			Sen. Arden Anderson		
Sen. Joe Miller - Vice Chairman			Sen. Jim Dotzenrod		
Sen. David Hogue			Sen. Constance Triplett		
Sen. Dave Oehlke					

Total: Yes \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

PROPOSED AMENDMENTS TO SENATE BILL NO. 2441

Page 1, line 2, replace "exemption of" with "treatment of nonprofit", replace "from" with "for", and after "assessment" insert "purposes"

Page 1, line 21, remove "assessment or"

Page 1, line 22, after "chapter" insert "and the city in which such property is located shall provide for the payment of special assessments, installments, and interest against such property by the levy of taxes according to law"

Page 2, line 5, replace "confirm and continue the 1970 North Dakota supreme" with "provide for 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."

Page 2, remove lines 6 through 8

Page 2, line 9, remove "assessment or"

Renumber accordingly

Date: 04/06/09

Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.: 2441

Senate Finance and Taxation Committee

Check here for Conference Committee

Amendment 910270402

Legislative Council Amendment Number

+ add chapter 40

Action Taken

Do Pass

Do Not Pass

Amended

Motion Made By

Senator Oehike

Seconded By

Senator Anderson

Senators	Yes	No	Senators	Yes	No
Sen. Dwight Cook - Chairman	/		Sen. Arden Anderson	/	
Sen. Joe Miller - Vice Chairman	/		Sen. Jim Dotzenrod	/	
Sen. David Hogue	/		Sen. Constance Triplett	/	
Sen. Dave Oehike	/				

All in favor

Total: Yes

6

No

0

Absent

1 Hogue

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 04/06/09

Roll Call Vote #: 2

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. : 2441

Senate Finance and Taxation Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended <sup>As</sup>

Motion Made By Senator Miller Seconded By Senator Triplett

Senators	Yes	No	Senators	Yes	No
Sen. Dwight Cook - Chairman	✓		Sen. Arden Anderson	✓	
Sen. Joe Miller - Vice Chairman	✓		Sen. Jim Dotzenrod	✓	
Sen. David Hogue	✓		Sen. Constance Triplett	✓	
Sen. Dave Oehlke	✓				

Total: Yes 6 No 0

Absent 1 Hogue

Floor Assignment Senator Triplett

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**SB 2441: Finance and Taxation Committee (Sen. Cook, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2441 was placed on the Sixth order on the calendar.**

Page 1, line 2, replace "exemption of" with "treatment of nonprofit", replace "from" with "for", and after "assessment" insert "purposes"

Page 1, line 21, remove "assessment or"

Page 1, line 22, replace "chapter" with "title and the city in which such property is located shall provide for the payment of special assessments, installments, and interest against such property by the levy of taxes according to law"

Page 2, line 5, replace "confirm and continue the 1970 North Dakota supreme" with "provide for 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."

Page 2, remove lines 6 through 8

Page 2, line 9, remove "assessment or"

Re-number accordingly

2009 HOUSE FINANCE AND TAXATION

SB 2441

# 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2441**

House Finance and Taxation Committee

Check here for Conference Committee

Hearing Date: April 13, 2009

Recorder Job Number: 11831

Committee Clerk Signature



Minutes:

**Chairman Belter:** We will open the hearing on SB 2441.

**Senator Ray Holmberg: (Testimony 1) (3:52)** There are three interesting sidebars to this measure. (1) The law didn't seem to be a problem until the 1970 court case and hasn't been an issue since then until the matter arose in Grand Forks. I would suggest that if you people enter this issue, it will never come up again because as someone said, "What the legislature is doing is the commonsense approach to what the City of Grand Forks probably should have done in the beginning." (2) As you know, special assessments can be paid voluntarily or property can be attached. I always imagined that state law does not allow the attachment of cemeteries. (3) A third sidebar and a sad sidebar to this is that the non-profit cemetery association will have spent around \$20,000 to defend themselves on this particular issue over the past few years. I will quote from Senator Mac Schneider who said, "You can't get blood from a stone and you can't get money from a headstone." We would urge you to consider passing SB 2441. I don't have personal problems with the amendments as described by the League of Cities.

**Representative Drovdal:** You said it was amended in the Senate Finance and Tax. Can you explain what the amendment actually does?

**Senator Holmberg:** After the amendment was proposed in the Senate Finance and Tax, I ran that language by John Walstad, who had drafted the bill, and the Attorney General's Office, who had also been monitoring this and had helped on the drafting of the bill. They had no problem with that. They said it made it clearer and made it clear how the city could handle the situation in Grand Forks and how other cities could in the future. Keep in mind the number of non-profit cemeteries in the state is extremely small—two or three. Most of them are owned by cities or owned by churches and that is a separate issue. I have another meeting to go to if I could be excused.

**Chairman Belter:** Any other questions?

**Gordon Iseminger, Grand Forks Cemetery Association:** (07:35) **(Attachment 1)** Senator Holmberg indicated some of the issues we are bringing up. We are in favor of this bill with every fiber of our being. If I might just review what has happened in Grand Forks regarding the cemetery since 2001. The cemetery was established in 1878 as a non-profit cemetery. From what we could learn, there were no special assessments of any kind levied against the cemetery until 2001 and that was for flood protection. The assessments against the Grand Forks Cemetery to date would have been in excess of \$600,000 for a non-profit cemetery. 85-90% of Grand Forks Cemetery has already been taken with burials. We have no way of raising revenue for our cemetery except by the sale of lots and services. We get no city support and we have no church support. We are a non-profit, non-denominational cemetery. That means an 85-90% of the property of our cemetery will never generate another dime of income. We have to continue to care for it. We have a perpetual care fund that is mandated by law. When the cemetery is full, we still have to care for it and that is what the perpetual care fund is for. It is a trust fund; we cannot touch it. We have no way of raising revenue except selling lots and services. When the assessment was levied against the cemetery in

2001, we protested not only the excessive amount of the assessment, but also the way it was assessed. We were assessed the same way an implement dealer or a car dealer was assessed, by the square foot, 17 cents a square foot. We have 35 or 40 acres of land. The argument is that we must pay special assessments on the same basis as a car dealership or implement dealer, but there is a difference. The analogy breaks down because the lot of an implement dealer or a car dealer has inventory on it. The dealer intends to sell that inventory and make a profit on it. All our square feet will not generate any revenue. What we asked for in 2001, when we first protested, was that we be assessed in the same way homeowners were assessed by frontage at \$24 a square foot, a foot. Our assessment then would have been \$7,200 and we could have paid \$7,200 and we would have been willing to pay \$7,200. The city believed it was magnanimous in cutting the assessment by half to \$300,000 and something. It could just as well have been \$300 million and something as far as the resources we have to pay special assessments. The Memorial Park Cemetery paid by borrowing, by using every means we possibly could, we were able to make two payments of special assessments of about \$47,000. That last payment was in 2004. We have paid nothing since. We cannot pay anything; we do not have the resources to pay it and we have no intention of paying any more special assessments. Several times from 2001 to 2008, we went to the city and we asked for relief, but they turned a deaf ear. You are assessed; you have to pay. Then in April of 2008, we heard about the Supreme Court case that Senator Holmberg reminded you of. That case was brought because of an issue in Bismarck. The City of Bismarck had levied special assessments against St. Mary's Cemetery and the cemetery of law, practice, custom, you people all know that cemeteries are accorded special treatment in law in every state in the union. Cemeteries are exempt from taxes, assessments and liens and intrusion. Eventually that case went to the ND Supreme Court and the court ruled in favor of the cemetery. The City

of Bismarck does not have the authority to levy special assessments on a non-profit cemetery.

We got our attorney's opinion on that case and he believed it applied to our cemetery as well.

In May of 2008, we went to Hal Grishman, who was the president of the Grand Forks City Council. We gave him a copy of the Supreme Court decision and our lawyer's opinion and we told him that we will not be paying any more special assessments. There the matter rested.

We asked frequently for the city to do something, to let us know something. We got no response. Finally, in November of last year, we asked for a formal hearing before the city council. Again we heard nothing, a deaf ear. Not until February were we allowed to meet with the finance committee of the Grand Forks City Council. It was at that meeting that this issue really became clearer. We had asked for the assessment to be completely set aside and we asked if the city attorney knew about the Supreme Court case and he said he did. He had

known in 2001 and again in 2004 when the special assessments were levied against our cemetery and he knew about the Supreme Court case. I am going to ask you please to keep that in your minds. At that meeting there was nothing said about the Supreme Court case except that the city attorney said that he knew about the case; it was a 3-2 decision, it was a very odd case; it was a weak case; it had never been cited in another case and he decided to ignore it. He apparently did not tell any member of the city council about the Supreme Court decision. Five of the current seven members of the Grand Forks City Council were members of the city council in 2001 and 2004 when the assessments were levied. Rather at that finance committee meeting, the only discussion was that the city has no legal means by which to do away with the special assessments against our cemetery. We had to find the money to pay the special assessments. The suggestions were such suggestions as ask churches for money; ask for private donations; raise your fees. We are already higher than any other cemetery in the area. The last one and the most ludicrous one was to go to the funeral

directors and ask them to raise their fees and give you a portion of them. Have the people who are burying people in your cemetery help pay for your special assessments. There was nothing said about relaxing, reducing or forgetting our special assessments. Finally on February 23, we were allowed before the city council to protest. This was the committee as a whole (where no votes could be taken), only discussion. I pointed out that since territorial days and by law, cities cannot levy special assessments on non-profit cemeteries. We asked why, in the face of the Supreme Court decision, had the city levied special assessments and if there was a question as to whether or not the law was clear, why hadn't the city attorney (who knew about this case, he said, in 2001), why had he not sought clarification? Elliot Glassheim, who was a member of the city council and has been for as long as I can remember, and a member of the legislature, as long as I can remember, could very well have been asked to get a clarification through the legislature. That was not done. On March 2, 2009, at the next city council meeting, (a meeting where votes could be taken) and we had done some homework between those two sessions of the city council. We had asked cemeteries in the state whether or not they paid special assessments. I am going to read you an affidavit from Kathy Feist, CPA, and Special Assessment Analyst for the City of Bismarck. "The City of Bismarck exempts cemetery associations from special assessments due to the 1970 ND Supreme Court decision of Bismarck vs. St. Mary's Church." Sunset Memorial Gardens in Bismarck said, "We do not pay special assessments; we have never paid special assessments; we do not intend to pay any special assessments." The cemetery in Jamestown said, "We do not pay special assessments; we have no intention of paying special assessments." We also asked Senator Mac Schneider who represents the area in Grand Forks with the cemetery who is a senator and an attorney if he would look into the 1959 legislation that seemingly undid the exemption for special assessments on cemeteries, the exemption. This is what he wrote, "I believe the

legislature inadvertently repealed the exemption for special assessments for cemeteries when they adopted the non-profit section in 1959. In other words, they just messed up. The Supreme Court apparently drew the same conclusion in 1970 and the reason the exemption should remain in effect as a result. This is currently the law of the land. You can effectively argue before the city council that the Supreme Court's holding is the law and that it should be followed. "At that meeting, Doug Christianson, who is also a member of the city council and an attorney, had also done some homework. He had gone through the legislation since the territorial days and he had concluded that cemeteries were exempt from special assessments. He said the Supreme Court decision of 1970 is the law. These are his words, "It is the law. It is the law of the state. It the law of the land. We have to obey the law. No one is above the law." He said had he known of the 1970 Supreme Court decision in 2001, suggesting that the city attorney had not told him, he would never have voted for special assessments in 2001 or 2004. Another assessment is due in 2010. He said, "I will not vote for a special assessment in 2010 against the cemetery." Eliot Glasheim, a member of the legislature, said, "The Supreme Court decision is the law." I ask you please to keep in mind what attorney Howard Swanson said. I asked him, "If you knew in 2001 about the Supreme Court decision, why did you not inform the members of the city council?" My second question: "If you decided that the Supreme Court decision was a weak decision, an odd decision, a 3-2 decision, if you decided to disregard that decision, how many other Supreme Court decisions have you disregarded because you disagreed with them?" My third question is, "If the Supreme Court decision is the law in 2009, was it not the law in 2001 and in 2004? Does not disregarding the law constitute breaking the law?" There is one member of the Grand Forks City Council who is adamant that we will be forced to pay special assessments. At that session of the council, he said, "I don't care what the law is; I don't care what the law was, the Grand Forks Cemetery Association has

to pay special assessments.” The council voted unanimously to reject our protest. There the matter would have rested, except the city attorney Howard Swanson had recommended to the city council that they not ask for an Attorney General's opinion. He said it would be foolish to ask for an Attorney General's opinion because you would have to have ruled that the Supreme Court case stood. As an Attorney General, he could not rule against the Supreme Court. He said if the city council asked for an Attorney General's decision, their hands would be tied; they wouldn't be able to levy special assessments. Fortunately the Grand Forks Cemetery Association doesn't have to follow the advice of the city attorney and we asked Senator Holmberg to get an Attorney General's opinion and he did. He read you a portion of that opinion and I am going to read just a little bit more of it if I may. “The court noted the longstanding exemptions of special assessments for cemetery property, holding that in the court's view, the legislature did not intend to legislate contrary to that policy when it repealed the special exemption for cemetery property from taxation and assessment in 1959. The court noted the legislature also provided criminal sanctions against destruction or injury to a cemetery. The court concluded that it is inconceivable to us that the legislature put in this policy against disrupting a cemetery, would also contemplate permitting an intrusion upon cemeteries that would be possible if the property were not exempt from special assessment. The Supreme Court further cited with approval an 1885 Louisiana case that gives a similar analysis and a notation from America Law Reports. In the years since St. Mary's Church was decided, the legislature has neither enacted a law to preserve the majority opinion in that decision nor has it enacted a law to reverse or overturn that decision. It might be argued that because of the almost four decades that have passed since the court's decision in St. Mary's Church, that the legislature has acquiesced in the court's interpretation and a decision is consistent with legislative intent. Then the Attorney General declared because the case could

still be in litigation, we had the right to appeal, he chose not to rule but he did recommend that the best way to handle this, as Mr. Holmberg commented, was that a law giving direct and unequivocal statement of intent should be enacted. That is why you people are here. Senator Holmberg has introduced the bill as a delayed bill with an emergency measure. You are probably aware that the bill passed the Senate unanimously, not a single question, not a single objection. Mr. Holmberg alluded to this and I am going to emphasize it. In the eight or nine years since the assessment was levied against the cemetery, we have been treated shabbily by the Grand Forks City Council, the city administration and the city attorney. We have borne insults; we have been criticized. In the process we have incurred almost \$20,000 of legal fees doing what the city should have done in 2001 or our attempt to undo what the city should not have done in 2001. I thank you for your indulgence. If you have any questions, I can try to answer them.

**Representative Weiler:** There are not for profit cemeteries and there are for-profit cemeteries? Is that correct?

**Gordon Iseminger:** Yes.

**Representative Weiler:** Do for-profit cemeteries have to pay property taxes?

**Gordon Iseminger:** There was one for-profit cemetery in Grand Forks and the fellow was trying to sell it. We purchased it two years ago and it is now non-profit. When it was for-profit, it would probably be best if we did not look too carefully into that, sir, because somehow he was non-profit, except he was profitable, but he did not pay special assessments; he did not pay property taxes. But, yes, there is a national business that buys up cemeteries, for-profit cemeteries. When they do, they must pay special assessments and they must pay property taxes because they are for profit.

**Representative Weiler:** Has this happened in other parts of ND or is this a one...?

**Gordon Iseminger:** As Senator Holmberg pointed out, there are very few non-profit cemeteries in ND. As you must be aware, sir, because of the local nature of ND, many of the cemeteries are small rural cemeteries, church cemeteries and this is not an issue in any respect. Minot has a city-owned cemetery; Fargo has a non-profit cemetery. They do not pay and have never paid special assessments. They may and that is why this is going to be an issue to them if they put in a dike system as they should. They may assess that cemetery too, but there are very very few non-profit cemeteries in ND.

**Representative Weiler:** Does Bismarck have a non-profit and a for-profit cemetery? Do you know? We have St. Mary's Cemetery and...do you know what we have?

**Gordon Iseminger:** Yes, you have no cemetery paying special assessments, that's what you have.

**Representative Weiler:** This 1970 Supreme Court decision by a vote of 3 to 2, says that non-profit cemeteries don't pay property taxes, that they should not have to pay property taxes.

**Gordon Iseminger:** No, no, no. Special assessments.

**Representative Weiler:** Did you state in your testimony that you paid at one point \$47,000 not once but twice?

**Gordon Iseminger:** We made two payments. We had to pay \$20 something thousand a year in order to make the payments. We have paid in total now—with two payments, we have paid about \$47,000 in special assessments since 2001 and we had never paid any special assessments before then.

**Representative Weiler:** Not only are you fighting to not have to pay any more, but are you fighting to get that money back with interest because it seems to me like you sure as heck should? It seems to me like you sure as heck should get that money back. There was a Supreme Court decision in 2001 that says you don't pay special assessments and you paid

\$47,000 in special assessments. Should you not be entitled to get that money back plus interest?

**Gordon Iseminger:** Say it the way you said it before, sir. That you should get it back, you should get it back. I want that on the record.

**Representative Weiler:** Are you working to get that money back?

**Gordon Iseminger:** We have every right to have it back. There are court cases indicating that cities had to give it back. Cities have sometimes voluntarily have paid it back. Our lawyer advised us if we were asked that question not to answer it. I brought up the issue of the legal fees that we have absorbed. We have no way to pay almost \$20,000 in legal fees. If we could get our special assessment payments back, we could out of that pay our legal fees. Maybe the city would see fit to at least give back our legal fees if we did not ask for that money back.

Our lawyer advised us to hold that for a bargaining chip. (33:21)

**Representative Weiler:** Thank you for coming here and giving us this information. Stuff like this really bothers me.

**Gordon Iseminger:** (Comments on weather)

**Representative Weiler:** Rep. Elliot Glassheim, you said he was and is currently on the city council and had voted against you in this. Is that correct?

**Gordon Iseminger:** During our protest? Yes. It was unanimous.

**Representative Weiler:** You also made the comment that you spoke with him or somebody spoke with him regarding this legislation and this Supreme Court decision and Eliot Glassheim said that it is the law.

**Gordon Iseminger:** That's right and so did Bill Christianson. He said it is the law and we have to obey the law, I think.

**Representative Weiler:** So as a member of the legislature, he said to you it is the law and as a city council member, he said that you have to pay it?

**Gordon Iseminger:** No, no, no. I don't know why they voted what they do, but I can construe it this way, sir. They voted to deny our protests so that we now have to do something else. We have to go forward. If they had said they would take it under advisement or if there had been a 4-3 whatever, but it may be they voted the way they did because it can't be a dead issue. It can't stay dead center. It has to be resolved because in 2010, there is going to be another levy. The city is now assessing us for improvements in the city and this will go on and on and on forever unless we can get it stopped.

**Representative Froseth:** Do you, as a non-profit, pay property taxes?

**Gordon Iseminger:** No, we don't.

**Representative Froseth:** Representative Weiler, according to this sheet, you have a total of \$356,817 worth of proposed assessments. I imagine you pay interest and penalties on that. You have paid \$45,309 and you owe \$311,505.89 plus penalties and interest. According to this bill, the way I read it, all that money would be spread across the taxable property and tax exempt property, including counties, cities, school districts, park districts and townships.

**Gordon Iseminger:** If you do the calculations, you would discover that it is a minimal amount per taxable unit, minimal.

**Representative Froseth:** Your \$.17 a foot; is that a linear foot or a square foot?

**Gordon Iseminger:** A square foot.

**Representative Drovdal:** I would like to have Senator Cook explain why the amendment was put on, how it will affect the current practices, how it changes it.

**Senator Dwight Cook:** District 34, Mandan. Let me just briefly explain how we dealt with this bill and got to the point we did. First off, I don't think we put a whole lot of weight in that 1970

Attorney General's opinion. We looked at simply what was the right thing to do. We did not believe that non-profit cemeteries should be assessed for flood projects or for street improvements. The next question that came to the table is if you are in a special assessment district and there is a street improvement that is going to benefit your property, but also is going to benefit the property at the cemetery and if they are not special assessed, their special assessment would be put back onto the other people in that special assessment district. We certainly did not want to go down that route either; we felt that any special assessment or any benefit that was associated with a cemetery should be passed on to all the people of the community. I think that led to a question of whether we had political subdivisions, cities, townships, counties that own cemeteries. Yes, they do. Then we asked how they get special assessed and that is exactly how they special assess them. If there is a project that is going to benefit a cemetery that is owned by a political subdivision, there is a statute in law that simply says that they will levy the amount of the benefit on all of the property owners in that political subdivision. So a lot of amendments that we put on here simply make it clear that they do not get special assessed and it sets up the mechanism on how that benefit is assessed by everybody. I understand there is a question about the levy of the law, taxes according to the law. That was just a reference to existing language in code that says that political subdivisions can actually levy (I forget what the amount of the mill is; I think it is a half mill or something like that) for paying off special assessments on cemeteries. I think the city has got some concern that that is their only option and we don't want that to be their only option so it is a friendly amendment. Then, if I can, let me make just two other statements. We heard church-owned cemeteries. A church owned cemetery, my understanding is, a not-for-profit so whether it is a not-for-profit that is not connected to a church or a not-for-profit that is connected to church, it is a not-for-profit. The other statement I should make, I think, if you look at the testimony from

the city of Grand Forks, the cemetery in Grand Forks, you heard reference to the fact that he was taxed by square footage and that residential property was taxed by linear frontage foot. My understanding of special assessment law and you might have this question presented to council, but my understanding of special assessment law is that it is one or the other. When you have a special assessment district, I believe it was against the law to special assess commercial property by square footage and residential by linear footage. I can't believe Grand Forks did it. I may be wrong. The last statement I want to make is we did some research and we did find out that this was an issue that came to the front in another town, Langdon, where they special assessed two cemeteries, one owned by the Protestants and one owned by the Catholics. We all know which ones have the money so the Catholics paid their special assessments and the Protestants couldn't afford them and said they couldn't pay them. Then the Protestants came up with this 1970 Supreme Court ruling and they said, not only that we can't, but we shouldn't. Then the city said you are right; you shouldn't and they forgave the taxes with special assessments that were owed by the Protestants and sent the check back to the Catholics. Cemeteries should not be assessed. We support the bill.

**Representative Froseth:** In your Senate hearing on this, this bill calls for reimbursement of or forgiveness of special assessments from Day 1. In your Senate hearing on this, did you make any legislative intent to reimburse the non-profit association for the money they paid?

**Senator Cook:** No, we did not. We got the same answer that you received earlier this morning, it is a bargaining chip. I definitely think the city ought to reimburse them, but we didn't put anything in the law.

**Representative Froseth:** Would it have any effect, do you think, if we made legislative intent if this bill passes?

**Senator Cook:** I think that is a question you are going to have to deal with. I think they were done wrong. I think there is a judicial system they should take that issue to. I think our job here is we draft the legislation and I think we have put together a piece of legislation that probably should have been done many years ago.

**Representative Pinkerton:** Are non-profit cemeteries the only property holder that doesn't pay special assessments? Do other kinds of non-profits pay special assessments?

**Senator Cook:** I think that could be correct.

**Representative Pinkerton:** Is there any chance we are getting ourselves into an area...is a cemetery pretty well defined? I am thinking of a church and cemetery together. Is there any way that cemetery could suddenly include the church and they could be absolved of special assessments as part of the cemetery? Is that clear in law?

**Senator Cook:** I would guess it is. I can tell you this. The church I belong to has 14 acres of property. The only thing that they would allow attached to the church was four acres. The extra ten acres that is vacant, the church pays property tax and special assessments on.

**Chairman Belter:** Any other questions? Any other testimony in support of 2441? Any opposition to SB 2441?

**Bill Wocken, Bismarck City Administrator:** The City of Bismarck understands the court decision that was cited; the city does not assess cemeteries. I can't speak to other city practices, but the affidavit from our special assessment person, Kathy Feist, is correct. We had no problem with the original bill 2441. The Senate amendment we had no problem with the way it clarified the language except that we would like to see a slight amendment. I think it was referred to earlier as a friendly amendment. On page 1, line 24 and page 2, line 1, I would like to suggest to you that we take out eight words, "by the levy of taxes according to law".

What that would do would be to leave the intention, the principle here, that there are no special

assessments assessed to cemeteries. It would not limit it to having to do a levy. If there were grants or other resources that the city had available, those resources could be used to pay the special assessment. With that amendment, we could then support the engrossed SB 2441. I would be happy to answer any questions you might have.

**Chairman Belter:** Do you have any copies of the amendment now?

**Bill Wocken:** No, Mr. Chairman, I do not, but I can certainly provide them to you.

**Representative Wrangham:** Can you give us an example of what grants or other monies may be available?

**Bill Wocken:** We have a project right now we are thinking about doing and that would be the replacement of a portion of Main Avenue. There is the stimulus grant which has finally come down through the channels. We don't have properties that are adjacent to that street. We could do (inaudible) an assessment and replace that portion of the street, but instead we would like to use stimulus money. That is one of the things that I can think of that the city may fund in a different fashion. There are other funds available to the city; I can't go through all of those various funds. I guess right now we just don't want to have it tied to a tax levy. It may very well be that we have to use a tax levy. The levy that would be used for that purpose would be called a deficiency levy. A deficiency levy is used to pay special assessments on distinct (?) properties or other properties that would be exempt so that would be the process we would use. I would just like it not to say that for a cemetery we have to levy an assessment, but I can leave the bill (inaudible) but I want the language to say the city is responsible. We certainly have no question on that.

**Representative Wrangham:** Would sales tax revenue be one of those sources that you could see being substituted?

**Bill Wocken:** Yes, I think potentially that could be used.

**Representative Drovdal:** After listening to Senator Cook, I got the impression that under current law when you do a special assessment district, when somebody in that district is exempt, that just the people inside that district are going to pick up that tab of the one that is exempt. This is the only way they can open the door to do the whole city. You are saying there are other means they could accumulate the dollars to cover that exempt property under current law. If they were not able to assess it, would they then have to go back to the other participants in that district to pay the bill? This says it is automatically covered by the whole community.

**Bill Wocken:** Yes, there would be those two options. You could special assess the benefit inside the district if there were a small piece of benefit that included the cemetery. There may be a benefit to the property owners to see that improvement made. That certainly is one of the mechanisms that could be used. Of course, the property owners have the opportunity to protest as well so if they are not willing to see that exemption made, they have that opportunity to protest. If it is over a sizeable sum, we would almost certainly go the deficiency levy or try to find some other funds such as a grant revenue or other funds such as sales tax that could be used in that connection. So we have both options open to us.

**Representative Drovdal:** If we take that levy out of there, you don't have the option of spreading it over the whole city. Is that correct?

**Bill Wocken:** With the language "by the levy of taxes according to law" taken out of this bill, what we would have is basically the obligation with no direct reference to how we do it. Basically we would say the cemeteries are not paying, we are clear the cities are paying and the cities find a way to get it paid. We are going to be issuing bonds for most of our assessment districts and will have to pay off those bond holders so it is the city's responsibility

to pay those bonds off. If we have inadequate revenues from the property owners that are assessed and the exempts are the reason for that, we have to make up that loss.

**Jerry Hjelmstad, League of Cities:** I guess actually we are testifying in support of the bill with the amendment presented by Mr. Wocken. Ever since that City of Bismarck case, we have always presented information to cities that have inquired about special assessments on areas such as cemeteries and non-profits that are exempt from taxation, so we don't see this as a change in law, just a clarification from the legislature. We feel that the amendment presented would give another option to cities as to how those parcels would be paid. I would be happy to try to answer any questions.

**Representative Winrich:** With the amendment, the law certainly leaves open a number of possibilities, but the statement of legislative intent still says that it is the intent that these levies against non-profit cemetery property be paid through a levy of general property taxes within the city in recognition of the public benefit provided by operation of the cemetery. Is that likely to have much effect on the cities in their operation? Will they pay attention to that legislative intent?

**Jerry Hjelmstad:** I am not sure. I guess I was reading it differently. I was reading that the legislative intent was that they would use that method, but I don't know if that was just because of the language that is being removed or not. The proposed amendment would give it more options. If that were to be into place, we would probably have to modify this intent language to match that the legislative intent would be that the city would do the two taxes or another method.

**Representative Headland:** If we overstruck that language that we talked about in the proposed amendment, would that allow the city as an option to just put the special assessment over the property owners in the district, which I think would go against the legislative intent.

**Donnita Wald, General Council, State Tax Department:** I would have to agree with what Mr. Wocken testified to earlier; it just gives them a number of different options available to pay. I suppose that would be one way they could do that. Each city would have to decide how each of those assessments would be paid, whether it would be through special sales tax revenues that they pull off or whatever funds they have available at the time.

**Representative Headland:** Is there in code today language that would allow the cemetery a mechanism of getting their special assessed dollars back?

**Donnita Wald:** I don't believe that currently there is in law a refund mechanism for retrieving dollars. That does not go to say though that a court (if it has to go that far) that a court wouldn't give it to them.

**Representative Pinkerton:** On line 23 of the amendment, where it says "conferred under this title and the city", couldn't you be dealing with cemeteries that would be out in the county? Would that have an effect if the tax entity was not the city?

**Donnita Wald:** I believe this just deals with cities. I don't know; can you special assess in the county? I am not sure. I have never heard of it.

**Representative Pinkerton:** Should the language be for the "tax entity" or will we be back here again?

**Donnita Wald:** I don't know for sure. Let me look to see what the section is dealing with in the century code and I will let you know.

**Representative Wrangham:** We heard about deficiency levies or deficiency funding. What sources can the cities use at this time to fund their deficiency?

**Donnita Wald:** I will let Mr. Wocken answer that. I do state taxes. I don't work on the city funding mechanisms and deficiencies.

**Bill Wocken:** Representative Wrangham, my understanding is that the deficiency levy is one of the levies that becomes part of the tax levy so we would levy mills up to whatever the technical maximum for the deficiency levy is and then roll it into property tax. (56:50)

**Representative Wrangham:** So there are other special funds that can't be used at this time to fund the deficiency levy?

**Bill Wocken:** I am not sure what other special funds?

**Representative Wrangham:** You were talking about grants or possibly sales tax.

**Bill Wocken:** To declare a deficiency levy, that means that the city utilizes its resources when it finds itself unable to handle taxes that we would be able to put into a deficiency levy; therefore, we have to exhaust all our other sources before we levy a deficiency levy. (57:25)  
We tried the last four or five years not to have any deficiency levies.

**Representative Wrangham:** To fund that deficiency levy, can you use grants or sales tax funds to fund that deficiency if necessary?

**Bill Wocken:** We wouldn't have a deficiency levy. We would try to resolve it before it got to that point. When it gets to the point of the deficiency levy, we have to levy taxes to handle those. If we would have other resources, when it gets to this point, we would fund it from another source. For example, if sales tax is an appropriate source, we would fund it with sales tax and there wouldn't be a deficiency levy.

**Representative Headland:** When this amendment was proposed by the committee in the Senate, were you there and did you object to the language you objected to now?

**Bill Wocken:** I did not make that particular hearing. We had 18 inches of snow and some flooding concerns so I was otherwise occupied so no, I did not. We would have testified in favor of the bill. I did not know the amendment until I saw it in the record.

**Chairman Belter:** I guess I got the impression that under current law, we could handle this situation without this amendment. Am I mistaken?

**Bill Wocken:** That is correct. We have handled this situation since the St. Mary's case, which of course, was a Bismarck case. We have not assessed cemeteries for quite some time and we don't intend to start assessing them. We would handle those special assessments in a number of different ways. They could be assessed back to the district in which the cemetery resides if it is a large special assessment district. If it is an area wide assessment, we could fund it out of whatever other possibilities we have in the city. I don't believe we would use sales tax. That might perhaps be an issue. I know we have had used grants in the past.

**Chairman Belter:** So why do we need this additional amendment then?

**Bill Wocken:** We were happy with the original bill as it was originally written and would support it as it was originally written. I think the Senate's intention was to try to more clearly clarify.

**Chairman Belter:** No, I am talking about the amendment.

**Bill Wocken:** The amendment now offering? The amendment I am offering is simply to make it clear that the city does not have to levy a tax in order to pay those special assessments for cemeteries, that we can fund them in any way we wish. The way I am reading the bill as it presently exists, says "to be paid by the levy of taxes according to law". We are not saying by any means the city has available to it; we are saying by the levy of taxes. We would prefer in most cases not to levy taxes if we can find another way to do it.

**Representative Weiler:** Correct me if I am wrong. The amendment you are proposing is basically just giving the cities the option of how they want to pay for those specials that are not going to be paid for by the cemeteries. It gives you options. You can pay for it through property taxes, if you have a special fund that you want to pay for it with, if you want to use

general fund dollars, you can pay for it with that. It gives you the option. If we adopt your amendment, it gives the cities the option of how you want to pay for it versus being mandated to pay for it out of levy by taxes according to law. Just on the outside, I don't see a problem with that. It shouldn't matter to the state how they pay it as long as they do pay it and they don't charge special assessments to cemeteries like they do in Grand Forks against a Supreme Court decision.

**Representative Froseth:** You could accomplish the same and leave their language in by just inserting the word "or" on line 24 between "property" and "by", "and interest against such property or by the levy of".

**Bill Wocken:** Yes, I think that would probably work. We could also accomplish it by saying that we may pay it by special assessments or other language as the committee wishes. I think as Representative Weiler just expressed clearly, that is our concern, that we are not mandated to have to assess property taxes.

**Representative Headland:** If we take out that language, it is clear to me that the Senate intended this not to be assessed against the other people who live in the special assessment district. If we take out this language, that would be an option to the city, would it not?

**Bill Wocken:** Yes, that would be one of a number of options that the city could employ. Of course, the residents in the district have the opportunity to protest a special assessment so it would be foolish for the city to put a large assessment on and have property owners protest throughout the district. That is the balance we would have to strike. Technically, that is correct.

**Chairman Belter:** Any other questions? Any other testimony?

**Gordon Iseminger:** If I understand the changes this gentleman is suggesting, I am bothered by it. The Attorney General in an opinion commented that the power to defray expenses of

improvements by special assessments is granted to any municipality upon complying with the provisions of and so and so and so. I read that meaning that any city has the right to determine how it wants to levy special assessments. I may be completely out of order by suggesting this, because I don't know how this House feels about the Senate, but when we testified before the Senate committee, we were addressing the bill as Senator Holmberg had it crafted. Senator Connie Triplett is a lawyer and a member of the Senate and has one of the keenest minds I have ever confronted and she clarified the issue. If I might ask you to do this, before you make up your minds on whether or not to accept the suggestion of this gentleman, listen to what Connie Triplett said as she introduced the bill in the Senate. She specifically addressed this issue. Senator Holmberg has already indicated that the system that Grand Forks used, at best, could be described as being convoluted and ununderstandable. We were told that because the first two assessments have already been levied, they cannot be changed. The bonds have already been let; everything is taken care of and so they cannot go back to that special assessment district and undo the first two assessments and start it over again. I am sure, as I have listened to Senator Triplett's testimony, I am sure she knew about that issue and, therefore, she put in the language that she did, that it could be spread over the entire city by property taxes, if necessary, rather than just a special assessment district. I am bothered by the attempt to delete those few words. I urge you to listen to Senator Connie Triplett's testimony before you make up your minds on this.

**Chairman Belter:** Is there any other testimony on 2441? Any other questions from committee members? If not, we will close the hearing on SB 2441.

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2441**

House Finance and Taxation Committee

Check here for Conference Committee

Hearing Date: April 13, 2009

Recorder Job Number: 11834

Committee Clerk Signature

Minutes:

**Chairman Belter:** Okay, we have got SB 2441. Representative Weiler.

**Representative Weiler:** The amendments that I am passing out...I will just explain briefly what they do. I think you kind of figured out from my questioning of Gordon Iseminger that I wasn't too fond of the action that was taken by the city back in 2001. Mr. Iseminger had said in his testimony that they have paid \$47,000 in special assessments over a two-year period and they have incurred \$20,000 in expenses and fees to try to put this to rest. It was stated several times by Mr. Iseminger that the city attorney of Grand Forks basically ignored the Supreme Court decision. When we start ignoring Supreme Court decisions, I think it is a very dangerous thing. The amendment in front of you is an attempt for that non-profit cemetery association to recoup the \$47,000 from the city and also recoup the direct costs that were incurred by the non-profit entity. It says the city can pay that money back to the non-profit entity either in full or over a period of five years if they do not have the money. I would really hope that this committee would take a strong stance on this issue and send a message to governments or entities that go on and ignore Supreme Court decisions in the State of North Dakota. With that, I move the amendment.

**Chairman Belter:** We have a motion from Representative Weiler and a second from Representative Grande to move the .05TX amendments. Is there any discussion?

**Representative Winrich:** There are some strange circumstances here. I did a little investigation after we broke up this morning. There was apparently a serious question of whether the Supreme Court decision was limited in application to the case that existed in Bismarck. That would take more of an interpretation. I think the most serious question exists though because the legislature passed a law, which explicitly left in the property tax exemption for non-profit cemeteries but removed from existing law a provision that exempted them from special assessments. That was ten years before the Supreme Court decision. So there was apparently some question as to whether that was the legislative intent or not. The minority opinion that was filed in the Supreme Court decision cited that in objecting and voting against the majority opinion. That is why it was the close vote that it was. I don't think it is as clear cut as there is a Supreme Court decision and everybody has to follow it. This might be overreaching a little bit. I believe that if we put the exemption for special assessments back in, as this bill does, that there will be some settlement as Gordon Iseminger indicated, and I think this is a little heavy handed.

**Representative Drovdal:** If I could vote from my heart, I would vote for this, but sometimes I have to vote from my head. I agree. The testimony we heard here did sound bad and it was probably factual. But it is still only one side of the story, as Representative Winrich pointed out. We do have avenues for these people to address their grievances and I believe that they would win in most cases and the attorney's fees would be recovered. Not being an attorney, I am not positive, but that is the way the system apparently works. If they go in to win a case, the attorney's fees are covered. Much as I would like to support this (I do from my heart but not from my head), I am going to have to oppose this.

**Representative Headland:** Not to contradict my good friend from the committee, the question was asked of the counsel from the tax department if there was any language that would allow them to do this and they said not.

**Representative Drovdal:** Not in the tax code, but I have to believe in legal codes in our judiciary system that there would be an opportunity to recover. The prevailing side can recover some of the costs; the wronged side can recover some of their costs in some cases. We don't have any attorneys here that deal with that aspect.

**Representative Froelich:** I apologize for not hearing the whole testimony; but if this amendment is adopted and this bill is passed, would it be retroactive to this case we are talking about?

**Representative Winrich:** On page 2, section 3, it says, "This bill is effective for collection of special assessments regardless of the date of the assessment."

**Representative Weiler:** Also in the amendment, it says "the city that collected" (past tense) and Grand Forks did collect.

**Chairman Belter:** Any other discussion? We must have more discussion, don't we?

**Representative Weiler:** I don't want this thing to die on the floor and kill the whole bill. If I don't have a lot of strong support out of this committee... It is not my intention to kill this bill.

**Representative Froseth:** Maybe the language does cover because it says "effective for collection of special assessments regardless of the date of assessment" so that makes it go back to pay for special assessments so maybe the money that got paid is covered, maybe they would be obligated to pay back that \$47,000.

**Representative Weiler:** I agree with you; but I think if that were the case, we would have to put some legislative intent in here stating that that particular case needs to be... I see your point, Representative Froseth, but I don't think it is strong enough because they have already

paid it. The city already collected it so to change the law today and for the non-profit to go back to the city and say that they have just passed a law eight years later so now they have to pay them some money back, I don't think that would be strong enough. I apologize to you for bringing this up, but I would maybe like to visit with the sponsors of the bill if you would allow that to happen. This is a pretty important issue. I do not want this to kill the bill. With that, I would like a day to check with the sponsors.

**Chairman Belter:** Do you want to withdraw your motion?

**Representative Weiler:** Yes, I will withdraw my motion.

**Chairman Belter:** What about the other amendment?

**Representative Drovdal:** Representative Pinkerton had a question and Dee was going to check it out, but I don't remember what the question is.

**Representative Pinkerton:** It said "city" in there on the bottom line; do we need to put in "tax entity" or is "city" fine?

**Donnita Wald:** It applies only to cities right now, municipalities, but this particular change applies to cities so is it a problem in the counties? Probably not, because most of the counties are non-profit cemeteries that are owned by churches.

**Chairman Belter:** There was another issue that was brought forward. I don't remember.

**Representative Weiler:** It was the last four words of line 24, page 1, and the first four words of line 1, page 2.

**Chairman Belter:** What was the change?

**Representative Weiler:** The amendment that Mr. Wocken, Bismarck City Administrator, suggested we do is on page 1, line 24 – remove the last four words of that line and the first four words on page 2, line 1.

**Donnita Wald:** I didn't draft those; we can get those drawn up if that is what the committee desires to do.

**Representative Winrich:** Dee, you said this change applies only to cities. Are we speaking about the Weiler amendment or something else in the bill?

**Donnita Wald:** The change in that law applies to cities only. It was drafted to be very, very specific to address one specific situation that has occurred.

**Representative Pinkerton:** I did speak to the bill sponsor briefly in the hallway and it might be wise to allow Representative Weiler to spend some time with him before we proceed with the amendment.

**Representative Froseth:** Just on that proposed amendment, I think by Bill Wocken from Bismarck, to remove those eight words, I think that is probably a good thing to do because if you have a special assessment district and all those special assessments are spread, (these are spread eight years ago), how are you going to go back and respread the cost of this \$350,000 something to those property owners again? I think they have a good point. They are probably going to have to use some other source of revenue, rather than respread that amount of specials. They are probably going to have to use some other source of revenue and this gives them the option to do that. I think that would be a good amendment to attach to this bill including those eight words and if you want to do that now, I will make that motion.

**Chairman Belter:** We will wait. Any other discussion? If not, we will adjourn for the day.

# 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2441**

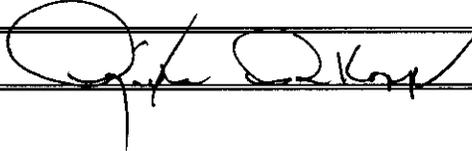
House Finance and Taxation Committee

Check here for Conference Committee

Hearing Date: April 14, 2009

Recorder Job Number: 11845

Committee Clerk Signature



Minutes:

**Chairman Belter:** We have SB 2441 before us. Representative Winrich.

**Representative Winrich:** What I am passing out is some information from the City of Grand Forks dealing with this special assessment (**Attachment 1**) on all of the cemeteries. It turns out that there are four other non-profit cemeteries in Grand Forks that came under this assessment. The big problem, of course, is that the Grand Forks Cemetery Association has so much more land than any of the others. If you add up all the square feet of land, Grand Forks Cemetery Association has 54 acres that they got assessed for. Of the other cemeteries, the biggest one is St. Michael's Church and that is nine acres, so it is six times as much. I would point out that the other cemeteries have paid their assessments and not protested. None of them are in arrears; they are making payments on a regular basis. It is not a clear cut case against one particular thing. Now that being said, I think the bill is entirely appropriate, but this is just some information about the general situation in Grand Forks. I also have an amendment (**Attachment 2**) that I will distribute. This deals with the amendment that was proposed by the League of Cities or by the Bismarck City Administrator to cross off the end of that sentence where it says "by levy of taxes according to law". The problem with that amendment that was proposed is that phrase at the end of the sentence that was put in in the

Senate specifically to keep the city from simply raising the special assessment on everybody else in the special assessment district. By crossing that off, we not only take away their option to use other funds, as was suggested, but we also allow them to go back and special assess at a higher rate. I talked to John Walstad this morning and I have this amendment which would simply add on at the end of the sentence that they could use other funds. That portion of the sentence would read "by the levy or by payment from other funds available to the city which are derived from sources other than special assessments" so it specifically takes out the use of special assessments but allows them to use other funds. If it is in order, I would move that amendment.

**Chairman Belter:** We have a motion from Representative Winrich to move his .0501 amendments and a second by Representative Drovdal. Any discussion?

**Representative Weiler:** Could I get a comment on the amendments from the League of Cities?

**Jerry Hjelmstad, League of Cities:** I think what the cities were looking for there was some flexibility and this does improve it. (04:08) I think they were also looking for, in certain instances, really it doesn't matter because the cemeteries would be exempt so they wouldn't have to worry about other cases, but this would provide flexibility.

**Chairman Belter:** Are there any other questions? Any discussion on the amendments? If not, all those in favor of the amendments, signify by saying "aye". **(By voice vote, the Winrich amendments .0501 were adopted.)**

**Representative Weiler:** I move a "do pass as amended".

**Chairman Belter:** We have a "do pass as amended" from Representative Weiler and a second from Representative Drovdal. Any discussion?

**Representative Drovdal:** Yesterday when we were discussing that possible amendment that we are not taking up, I made a comment that I thought attorney's fees could be recovered. If you remember, we were going to make the individual city council members of Grand Forks pay back the legal fees. I was mistaken. There are certain cases that are listed in law where they can be covered, but generally that is not the case. It has to be specified in law before they can so that motion would have been out of order.

**Representative Weiler:** As you know, I did discuss this with a couple of the sponsors of the bill, the possible amendments I had. They are concerned over it being too big of an issue and possibly causing the bill causing me to not offer the amendments. However, I think it is an absolute embarrassment to the City Council of Grand Forks; I am sorry it was City Attorney, I apologize, to ignore a Supreme Court decision.

**Chairman Belter:** Any other discussion? Since Representative Glassheim was here, I thought we were going to have some type of trial.

**Representative Weiler:** It wouldn't matter what the decision was. They would ignore it anyway.

**Chairman Belter:** Any discussion? If not, will the clerk read the roll for a **"do pass as amended"** on SB 2441. (A roll call vote resulted in 12 ayes, 0 nays, 1 absent/not voting – Brandenburg). **Representative Winrich will carry the bill.** Committee members, SB 2244, that was the "widow" bill that we brought down and put the capitalization rate amendment on, that has been brought up to the House floor so it will probably be on the Sixth Order tomorrow. I am going to bring it off the Sixth Order so I can explain those amendments.

**Representative Winrich:** Which bill?

**Chairman Belter:** 2244. Any other discussion? We are good.

**Senator Glassheim:** Can I say a word on behalf of Grand Forks? A couple of things. The Supreme Court decision only held that we could not special assess street projects. That was the narrow grounds of that decision; that is what it says. Secondly, if you read it, it was a 3 to 2 decision (and I read it), the 3 were quite political and just wanted to do it. The 2 were better argued. It was our impression if we went to court without making the change here (which I support), we would win in the court because the legislature specifically removed the exemption from the law that had held for 20 years and nobody challenged it. Nobody said you made a mistake; nobody challenged it. The legislature specifically removed the special assessment exemption from the law for cemeteries so we are awful, but we are not quite as awful as some might think.

**Chairman Belter:** Thank you, Senator Glasheim.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2441

Page 1, line 2, after "purposes" insert "and to provide for refund of special assessment taxes paid"

Page 2, line 1, after the underscored period insert "A city that collected special assessments from a nonprofit entity on cemetery property owned by the nonprofit entity shall refund to the nonprofit entity any special assessment taxes paid, plus interest at the rate of 1% per month from the date the special assessment was paid by the nonprofit entity. A city that is required to make a refund of special assessments shall also reimburse a nonprofit entity for direct costs incurred by the nonprofit entity, including attorney's fees, to protest the imposition of any special assessments levied against the cemetery property. If adequate funds to pay the refund are not immediately available, the city may refund the tax, interest, and costs over a period of five years from the effective date of this Act."

Renumber accordingly

Date: April 13, 2009

Roll Call Vote #: 1

**2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. \_\_\_\_\_**

House FINANCE AND TAXATION Committee

Check here for Conference Committee

Legislative Council Amendment Number . OSTX Amendment

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Weiler Seconded By Grande

Representatives	Yes	No	Representatives	Yes	No
Chairman Wesley R. Belter			Representative Froelich		
Vice Chairman David Drovdal			Representative Kelsh		
Representative Brandenburg			Representative Pinkerton		
Representative Froseth			Representative Schmidt		
Representative Grande			Representative Winrich		
Representative Headland					
Representative Weiler					
Representative Wrangham					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

withdrawn

91027.0501  
Title.0600

Prepared by the Legislative Council staff for  
Representative Winrich  
April 14, 2009

VR  
4/14/09

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2441

Page 2, line 1, after "law" insert "or by payment from other funds available to the city which are derived from sources other than special assessments"

Renumber accordingly

Date: April 14, 2009

Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2441

House FINANCE AND TAXATION Committee

Check here for Conference Committee

Legislative Council Amendment Number .0501

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Winick Seconded By Drovdal

Representatives	Yes	No	Representatives	Yes	No
Chairman Wesley R. Belter			Representative Froelich		
Vice Chairman David Drovdal			Representative Kelsh		
Representative Brandenburg			Representative Pinkerton		
Representative Froseth			Representative Schmidt		
Representative Grande			Representative Winrich		
Representative Headland					
Representative Weiler					
Representative Wrangham					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

*Motion Carries*

Date: April 14

Roll Call Vote #: 2

**2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. 2441**

House FINANCE AND TAXATION Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Weiler Seconded By Drozdal

Representatives	Yes	No	Representatives	Yes	No
Chairman Wesley R. Belter	/		Representative Froelich	/	
Vice Chairman David Drozdal	/		Representative Kelsh	/	
Representative Brandenburg			Representative Pinkerton	/	
Representative Froseth	/		Representative Schmidt	/	
Representative Grande	/		Representative Winrich	/	
Representative Headland	/				
Representative Weiler	/				
Representative Wrangham	/				

Total (Yes) 12 No 0

Absent 1

Floor Assignment Rep. Winrich

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

SB 2441, as engrossed: Finance and Taxation Committee (Rep. Belter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2441 was placed on the Sixth order on the calendar.

Page 2, line 1, after "law" insert "or by payment from other funds available to the city which are derived from sources other than special assessments"

Renumber accordingly

2009 TESTIMONY

SB 2441

Westlaw

181 N.W.2d 713  
 181 N.W.2d 713  
 (Cite as: 181 N.W.2d 713)

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Page 1

C

Supreme Court of North Dakota.  
 CITY OF BISMARCK, a Municipal Corporation,  
 Plaintiff and Respondent,  
 v.  
 ST. MARY'S CHURCH, a Corporation, Defend-  
 ant and Appellant.  
 Civ. No. 8667.

Dec. 4, 1970.

Declaratory judgment action by city to determine whether special assessments for street improvements levied upon cemetery property of a nonprofit corporation were valid. The District Court of Burleigh County, Clifford Jansonius, J., entered judgment for city, and the corporation appealed. The Supreme Court, Erickstad, J., held that cemetery property owned by nonprofit corporation was exempt from such assessments.

Reversed.

Teigen, C.J., dissented and filed opinion in which Knudson, J., concurred.

West Headnotes

**Municipal Corporations 268** ↪ 434(4)

268 Municipal Corporations

268IX Public Improvements

268IX(E) Assessments for Benefits, and Special Taxes

268k434 Exemptions

268k434(4) k. Cemeteries. Most Cited

Cases

Cemetery property lawfully owned by a nonprofit corporation was exempt from special assessments for purposes of street improvements. NDCC 1-02-01, 10-24-01 et seq., 10-25-01 et seq., 10-26-01 et seq., 10-27-01 et seq., 10-28-01 et seq., 28-22-02, 28-22-02, subd. 3, 57-02-08, subd. 5; NDRC 1943, 10-1011.

\*713 Syllabus by the Court

1. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be construed liberally, with a view to effecting its objects and to promoting justice.

2. For the reasons stated in this opinion it is held that cemetery property lawfully held by a nonprofit corporation is exempt from special assessments for street improvement purposes.

Rausch & Chapman, Bismarck, for defendant and appellant.

John A. Zuger, Bismarck, for plaintiff and respondent.

ERICKSTAD, Judge.

The defendant, **St. Mary's Church**, a corporation, appeals to this court from a judgment of the district court of Burleigh County, entered on the 9th day of March, 1970. The judgment appealed from results from a declaratory judgment action brought by the plaintiff, the City of Bismarck, to determine whether special assessments for street improvements levied upon the cemetery property of the Church are valid.

The Church's answer to the complaint is that the property on which the assessments have been levied is cemetery property and thus exempt from assessment under Section 28-22-02, N.D.C.C.

On a motion for summary judgment on the pleadings and upon a stipulation of the facts, the district court concluded to the contrary and ordered judgment for the plaintiff, holding that the assessments for special improvements were valid on the basis of this court's statement in *Soo Line Railroad v. City of Wilton*, 172 N.W.2d 74 (N.D.1969).

The district court in its memorandum opinion relied

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 181 N.W.2d 713  
 (Cite as: 181 N.W.2d 713)

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Page 2

particularly upon the following language in *Soo Line*:

'In determining whether an improvement does, or does not, benefit property within the assessment district, the land should be considered simply in its general relations and apart from its particular use at the time; and an assessment, otherwise legal, for grading, paving and curbing an adjoining street is not void under the Fourteenth Amendment because the lot is not benefited by the improvement owing to its present particular use.' *L. & N.R.R. Co. v. Barber Asphalt Co.*, 197 U.S. 430, 25 S.Ct. 466, 49 L.Ed. 819 (1905).

\*714 *Soo Line Railroad v. City of Wilton*, 172 N.W.2d 74, 82 (N.D.1969).

In the same memorandum opinion the trial court said:

While it is difficult for me to find that the cemetery property is subject to special assessments, the *Soo Line* case, above cited, leaves me no choice.

The trial court concluded that it was bound by the rule of 'stare decisis'.

In response to the argument that there could be no means of enforcing the assessments if the property were exempt from all process under Section 28-22-02, N.D.C.C., the court again quoted from *Soo Line* the following:

The great weight of authority is that a railroad right of way may be subjected to a special or local assessment even though such an assessment cannot be enforced by a sale of the property. 48 Am.Jur., Special or Local Assessments s 104, p. 653. See also 14 McQuillin, Municipal Corporations s 38.41, p. 140.

*Soo Line Railroad Company v. City of Wilton*, 172 N.W.2d 74, 82 (N.D.1969).

In applying the language in *Soo Line*, a case involving the question of the legality of special assessments upon property of a corporation organized

for profit, the *Soo Line Railroad Company*, to this case, involving the issue of the legality of special assessments on cemetery property owned by a non-profit corporation, when said property is by Section 28-22-02, N.D.C.C., 'absolutely exempt from all process, levy, or sale,' the trial court has extended the holding in *Soo Line* and the reasoning in support of that holding beyond the intent of this court in that case. The issues, the facts, and the statutes distinguish *Soo Line* from this case.

The City asserts that this court in another case has clearly distinguished between an exemption from taxation and an exemption from assessments, and in support of its position refers us to the following quotation from a 1967 decision of this court, involving the issue of the validity of special assessments on property owned by the City of Southwest Fargo Urban Renewal Agency. The City particularly refers us to the following quotation from the Urban Renewal case:

It will be noted from a study of the statute that urban renewal property is 'exempt from all taxes of the municipality, the county, the state or any political subdivision thereof.' Had the legislature intended that the urban renewal property be exempt from special assessments, the usual language to accomplish that would have been 'all taxes And special assessments.' The failure to make reference to special assessments, we believe, was intentional.

*City of Southwest Fargo Urban Renewal Ag. v. Lenthe*, 149 N.W.2d 373, 378 (N.D.1967).

We would point out, however, that in that case, immediately following the part quoted, we said:

Our view is supported by the fact that the legislature, in discussing the powers given to an urban renewal agency under s 40-58-07(8), empowered the agency to 'levy taxes and assessments.'

Section 40-23-07 further supports our view. The pertinent part of that section reads as follows:

40-23-07. Regulations governing determination of

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special assessments by commission-Political subdivisions not exempt.\* \* \* Benefited property belonging to counties, cities, villages, school districts, park districts, and townships, shall not be exempt from such assessment, and such public corporations whose property is so assessed shall provide for the payment of such assessments, installments thereof and interest thereon, by the levy of taxes according to law. \* \* \*

North Dakota Century Code.

\*715 Although urban renewal agencies are not specifically mentioned therein, cities are, and their property is made specifically not exempt from special assessments.

City of Southwest Fargo Urban Renew. Ag. v. Lenthe, 149 N.W.2d 373, 378 (N.D.1967).

We agree with the City that this court has distinguished between general taxation and special assessments and that Subsection (5) of Section 57-02-08, N.D.C.C., which exempts all lands used exclusively for burying grounds or cemeteries from 'taxation' does not of itself exempt cemetery property from special assessments. It may also be said that Subsection (3) of Section 28-22-02, N.D.C.C., which exempts lots in burial grounds from all process, levy, and sale, may not of itself exempt such property from special assessments. This may be argued from the fact that included among the items absolutely exempt is the homestead, which we realize may be lost to the county when taxes are not paid.

These sections, insufficient when standing alone, become more meaningful when considered in light of long-established public policy protecting the burial places of human beings from all intrusion. It is our view that the Legislature did not intend to legislate contrary to that policy, notwithstanding the adoption by the 1959 session of the Legislature of the Nonprofit Corporation Act, Chapter 111, creating Chapters 10-24, 10-25, 10-26, 10-27, and 10-28, of the North Dakota Revised Code of 1943,

and specifically repealing Section 10-1011, N.D.R.C. of 1943, which exempted cemetery property from 'taxation, assessment, lien, attachment, and from levy and sale upon execution.'

The records of the subcommittee on Judiciary and Code Revision of the Legislative Research Committee during the interim between the 1957 and the 1959 legislative sessions, which subcommittee studied the Nonprofit Corporation Act and ultimately recommended its adoption, disclose no intention on the part of that subcommittee to break with public policy. We likewise find no evidence of such an intention on the part of the full committee. See *Graves v. First National Bank in Grand Forks*, 138 N.W.2d 584, 592 (N.D.1965), in which we recognized public policy as a determining factor.

Pertinent is the rule of construction contained in Section 1-02-01, N.D.C.C., part of which reads:

\* \* \* The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be construed liberally, with a view to effecting its objects and to promoting justice.

Through Section 12-21-29, N.D.C.C., the Legislature has provided criminal sanctions to prevent disruption of the tranquility of a cemetery.

Such section reads as follows:

12-21-29. Injury to cemetery or tomb-Misdemeanor.-Every person who willfully shall destroy, mutilate, deface, injure, or remove any tomb, monument, gravestone, or other structure placed in any cemetery or private burying ground, or any fence, railing, or other work for the protection or ornament of such cemetery or place of burial of any human being, or who willfully shall destroy, cut, break, or injure any tree, shrub, or plant within the limits thereof, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than five dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than

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six months, or by both such fine and imprisonment.

It is inconceivable to us that the Legislature, with the policy in mind of preserving an atmosphere of tranquility, even to the extent of imposing criminal sanctions against those who would disrupt such tranquility, would on the other hand contemplate permitting an intrusion upon that atmosphere of tranquility by those who would purchase areas unused for burial interposed among the lots which contain graves \*716 of the dead or areas used as boulevards, walkways, or driveways, for possible uses other than the burial of the dead. Such a disruption would be possible if the property were not exempt from special assessments and consequently were sold in the process of enforcing those special assessments.

The Louisiana Supreme Court as long ago as 1885 expressed its sentiments in this way: 'What would be the security of those who venerate their dead, if the tax-gatherer might enter such sacred precincts and sell, at public out-cry, the land adjoining their tombs to some publican who might build thereon a bar-room or a brothel?' *Metairie Cemetery Asso. v. Board of Assessors* (1885), 37 La. Ann. 32, Bk. 44 La. 33, 36; 122 A.L.R. 901 (1939).

An annotation from *American Law Reports* explains the action which courts have taken generally, as follows:

The circumstance most commonly appealed to as indicating the exemption of cemetery property from special assessment is that, for one or more purposes, such property has been expressly or impliedly exempted from liability to sale. Where the exemption from sale has been held to preclude any sale whatever to enforce assessments, an exemption from the assessment itself is commonly inferred.

71 A.L.R. at 324 (1931).

For the reasons stated in this opinion, the special assessments upon the property of the cemetery lawfully owned by the Church (a nonprofit corpora-

tion) are held to be void and, accordingly, the judgment of the district court is reversed.

PAULSON and STRUTZ, JJ., concur.  
 TEIGEN, Chief Justice (dissenting).  
 I dissent.

As a person I sympathize with the result attained by the majority; however, as a judicial officer having the responsibility of interpreting the law and not writing the law on subjects which have been so clearly legislated, I must put my personal sympathies aside and decide the case applying the law established by the Legislature. There are many cases that the law decides but there are few cases that decide the law. The law clearly decides this case.

Section 10-1011, N.D.R.C. of 1943, provided:

'All the property of every cemetery corporation and the lots sold by it to individual proprietors shall be exempt from taxation, assessment, lien, attachment, and from levy and sale upon execution. All such real property shall be exempt from appropriation for streets, roads, or any other public uses or purposes.'

The above statute was expressly repealed by Chapter 111 of the Session Laws of 1959, Section 10-2818(c), which chapter enacted the 'North Dakota Nonprofit Corporation Act.' This repeal can now be found in Section 10-28-18 of the North Dakota Century Code. No statute has since been enacted which grants cemeteries a tax or assessment exempt status. In *State ex rel. Strutz v. Baker*, 71 N.D. 153, 299 N.W. 574, at 578, this court, in defining legislative parlance, said:

'A repeal destroys; an amendment keeps alive.'

Under Section 10-1011, N.D.R.C. of 1943, first enacted in 1895, the public policy was declared to the effect that all the property of every cemetery corporation be exempt from 'taxation, assessment, lien, attachment, and from levy and sale upon execution.' However, this policy was expressly repealed by the Legislature, effective from and after June 30,

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1961, by Chapter 111 of the Session Laws of 1959.

The Louisiana case of *Metairie Cemetery Association v. Board of Assessors*, cited by the majority, was decided in 1885, and the court in that case was concerned with a constitutional exemption from taxation of 'all places of burial-provided such exempted property be not used or leased for purposes of private or corporate profit or income, \* \* \*.' Construing this constitutional\*717 provision, the Louisiana court concluded that the cemetery in question, as a whole, was a 'place of burial' within the intentment of the constitution and, therefore, held that it was exempt from taxation unless it was leased or used for purposes of private or corporate income or profit. North Dakota has no similar constitutional provision and, in view of the action taken by the 1959 Legislature, we no longer have a statute exempting cemeteries from special assessments.

The general law on this subject, where there is no constitutional or statutory provision, appears to be quite to the contrary of the majority decision.

'The principle is generally recognized that lands are not exempt from liability to special or local assessment merely because set apart exclusively for burial purposes, and public cemeteries have been held not exempt from special assessments as being public property or devoted to public use. Any such exemption must be clearly established, and must result from constitutional or statutory provisions.'<sup>48</sup> *Am.Jur.*, Special or Local Assessments, Sec. 98.

'The principle is generally recognized that lands are not exempt from liability to special assessment merely because set apart exclusively for burial purposes.'<sup>71</sup> *A.L.R. Anno.-Cemeteries-Local Improvement Assessment*, at 322.

\* \* \* aside from valid constitutional or statutory exemption, according to the weight of authority, burial grounds and the property of cemetery associations are liable to special assessment for local improvements in like manner as other property, since,

as stated, exemption from taxation in general has no application whatever to such exactions.' *McQuillin on Municipal Corporations*, Sec. 38.83.

The majority state that the records of the subcommittee and the full committee on legislative research, which studied and recommended the adoption of the Nonprofit Corporation Act, disclose no intention to break with public policy. However, these committees did recommend the repeal of Section 10-1011, N.D.R.C. of 1943, which, to me, discloses an intention to break with established governmental or public policy as it then existed. Furthermore, the Legislature adopted the Nonprofit Corporation Act recommended by these committees and, in so doing, specifically repealed the exemption statute. In light of the above historical background, I cannot hold that the Legislature had no intention of doing what it so plainly did do.

Public policy of a state is founded upon its constitution and statutes. By the express repeal of the exemption statute, the exemption was destroyed.

'It is generally recognized that the public policy of a state is to be found in its constitution and statutes. Only in the absence of any declaration in these instruments may it be determined from judicial decisions. The Supreme Court has pointed out the limitations both of judicial declaration of public policy and of the application of the theory, stating that the theory of public policy embodies a doctrine of vague and variable quality, and unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.'

16 *Am.Jur.2d*, Constitutional Law, Sec. 167.

The courts are not at liberty to declare a law void as being in violation of public policy because public policy is determined by the Legislature and the only limits upon the legislative power in such determinations are those fixed in the state and Federal constitutions. *State ex rel. Linde v. Taylor*, 33 N.D. 76,

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156 N.W. 561, dismissed 245 U.S. 627, 38 S.Ct. 60,  
 62 L.Ed. 518.

Our court can announce no public policy of its own but merely what it believes to be the public policy of the people of the state by which it is created. The court has no power to create or command but merely to construe and, where the people have spoken \*718 either in the form of a constitutional enactment or a valid and constitutional statute, it must be controlled by their decisions. Northern P.R. Co. v. Richland County, 28 N.D. 172, 148 N.W. 545; L.R.A.1915A, 129.

This is not a case where the court is called upon to construe or enforce a private contract, concerning which no public policy has been announced. It is a case in which we are asked to set aside a statute which itself expresses a public policy of the state in that it expressly repeals the exemption statute. It is true, as stated by the majority, that in *Graves v. First National Bank in Grand Forks*, 138 N.W.2d 584, 592 (N.D.1965), we recognized public policy as a factor in determining the validity of a provision in a last will and testament, but that case is not applicable here as it involved a matter upon which no public policy had been announced in the constitution or statutes. In this case the public has spoken through its Legislature. It enacted Section 10-2818(c) of Chapter 111 of the Session Laws of 1959. It expressly repeals Section 10-1011, N.D.R.C. of 1943, and there is now no statute which, in clear and unequivocal terms, exempts cemeteries from special assessments. I do not agree that Section 12-21-29, 21-29, N.D.C.C., is an expression of legislative intent pertaining to taxation or assessment of cemeteries. This is a penal statute prohibiting desecration of property within a cemetery or a private burial ground. Its subject is not taxation, or assessments, or levy, or sale. It is not repugnant to the repeal of the exemption statute. One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. *State v. Young*, 68 N.D. 300, 279 N.W. 251; *State v. Hawley*, 68 N.D. 309, 279 N.W.

255; *State v. Coman*, 68 N.D. 310, 279 N.W. 256.

In the face of the express repeal of the exemption statute, it is inconceivable to me that the Legislature intended that the penal statute prohibiting desecration should be substituted for it. The quote cited by the majority from 71 A.L.R. at 324 does not support their reasoning in this case.

For the reasons set forth above, it is my opinion that special assessments on the property of the cemetery are valid assessments unless, for some reason not advanced here, they may be set aside. It is, therefore, my belief that the judgment of the district court should be affirmed.

KNUDSON, J., concurs.  
 N.D. 1970.

*City of Bismarck v. St. Mary's Church*  
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END OF DOCUMENT

#1

**SPECIAL ASSESSMENTS LEVIED UPON GFCA  
BY  
CITY OF GRAND FORKS, NORTH DAKOTA**

**Summary:**

The City of Grand Forks in the State of North Dakota, experienced a 500 year flood in April of 1997. As a result, the Grand Forks Special Assessment Commission established a formula by which to assess all property owners in the City of Grand Forks for the cost of a flood control system or levy around the City of Grand Forks. The assessment formula which the City of Grand Forks adopted is as follows:

**Assessment Formula Used:**

Residential Property @ \$24 per lineal foot of property frontage  
Commercial Property @ \$.17 per square foot of the property

**GFCA Protest at Initial Assessment Meeting:**

The Grand Forks Cemetery Association appeared before the City of Grand Forks Assessment Commission on October 22, 2001. At this meeting the GFCA protested the formula by which the cemetery property was assessed. The GFCA asked the City of GF not to assess it's property based upon the square footage of the entire property but rather only on the property which has buildings erected on it. The city rejected the request by the cemetery. Instead, the City of GF reduced all cemetery assessments in the city by 50% of the commercial rate on all burial lots and buildings

<b>GFCA Assessment Amounts:</b>	<b>Date Assessed</b>	<b>Amount</b>
Flood Control Phase #1	2001	\$85,042.76
Flood Control Phase #2	2003	<u>\$65,929.84</u>
Total for Phases 1 & 2		\$150,972.60
Rehab Pump Stations #182 & #188	2008	<u>\$87,187.15</u>
Total Assessments to Date:		\$238,159.75
Estimated Flood Control Phase #3	2010	<u>\$118,657.75</u>
Total Current and Proposed Assessments		\$356,817.50

**Assessment Payments:**

The GFCA made two assessment payments between the years 2001 and 2004 in the amount of \$45,309.61

Following 2004, the GFCA has not made any additional payments.

The GFCA, on several occasions between 2001 and 2008, went to City Hall to protest their assessments and their inability to pay for such assessments.

**ND Supreme Court Decision Civ. No. 8667.**

The GFCA first learned of the ND Supreme Court decision (*City of Bismarck v. St. Mary's Church*, N.D. 1970) in April of 2008. At that time, the GFCA contacted its attorney, Raymond J. German, seeking an opinion if this ruling would be applicable to cemetery property in the City of Grand Forks. Upon reviewing Mr. German's opinion, the GFCA then met with Grand Forks City Council President, Hal Gershman, on Thursday, May 15, 2008. At this meeting, President of the GFCA, Gordon Iseminger, and GFCA Administrator, Robin Purcell, presented the ND Supreme Court Decision from 1970, along with Mr. German's Opinion to Mr. Gershman. Also at this meeting, Mr. Iseminger told Mr. Gershman, based upon the 1970 Ruling, and Mr. German's opinion, that the GFCA will not pay the City of Grand Forks for any further special assessments. (See opinion Attached)

**On November 20, 2008**, the GFCA requested a formal hearing before the Grand Forks City Council to protest special assessments levied against the GFCA.

**On February 18, 2009**, the GFCA met before the Grand Forks City Finance and Development Committee to protest special assessments levied against the GFCA.

**On February 23, 2009**, the GFCA met before the Grand Forks City Council as a Whole to protest special assessments levied against the GFCA.

**On March 2, 2009**, the GFCA met before the Grand Forks City Council to protest special assessments levied against the GFCA. At this meeting, the City of Grand Forks denied the cemetery's appeal.

*Some given to the House*

#2

# **CEMETERY EXEMPTION FROM SPECIAL ASSESSMENTS**

**GRAND FORKS CEMETERY  
ASSOCIATION**

# WHO ARE WE?

- 1) The Grand Forks Cemetery Association, DBA “Memorial Park Cemetery,” was established on July 22, 1878, as a 501-(C)(13) Nonprofit Cemetery Association.
- 2) Several of our City’s founders, such as Arthur G. Sorlie, as well as other prominent individuals such as Chester Fritz and John Odegard, and several past UND Presidents and professors and former city business owners are buried in our cemetery. Indeed, one can learn much of the city’s history by reflecting on the names on their memorials.
- 3) Memorial Park, originally established as a “Protestant” cemetery, soon adopted a policy of accepting people of all faiths.

# HOW ARE WE FUNDED?

- 1) Unlike city-owned and church-owned cemeteries, Memorial Park is not supported financially by any outside revenue source.
- 2) We depend exclusively on revenues from the sale of cemetery related products and services.
- 3) Our budget is established upon ordinary and necessary expenses in connection with the operation, management, maintenance, and improvement of the cemetery.

# TRENDS IN THE DEATH CARE INDUSTRY THAT PRODUCE ADVERSE EFFECTS ON CEMETERY REVENUES

- 1) People are living longer.
- 2) Migration to retirement locations is increasing.
- 3) Cremation has become acceptable.
- 4) Environmental considerations are becoming more important.
- 5) Ties to tradition are becoming weaker.
- 6) Religious restrictions are being relaxed.

Taken from 2006 Data & Projections to the Year 2025 from Cremation Association of America (CANA)

# PROJECTIONS IN THE DEATH CARE INDUSTRY

- 1) The number of deaths nationally has remained relatively constant over the last 10 years.
- 2) The number of deaths nationally is projected to increase marginally to the year 2035.
- 3) The national rate of cremation in 2005 was 32%..
- 4) The national rate of cremation in the year 2010 is projected to be 39%.
- 5) The national rate of cremation in the year 2025 is projected to be 57%.
- 6) The cremation rate for ND in 2006 was 21%.
- 7) The cremation rate for ND in 2010 is projected to be 29%.
- 8) The cremation rate for ND in 2025 is projected to be 47%.

Taken from 2006 Data & Projections to the Year 2025 from Cremation Association of America (CANA)

# GFCA DEMOGRAPHICS FROM 1996 - 2007

<i>Burial Type</i>	<i>1996</i>	<i>1997</i>	<i>1998</i>	<i>1999</i>	<i>2000</i>	<i>2001</i>	<i>2002</i>	<i>2003</i>	<i>2004</i>	<i>2005</i>	<i>2006</i>	<i>2007</i>
<b>Traditional</b>	126	124	94	84	96	89	71	94	106	62	76	63
<b>Cremation</b>	18	18	15	25	26	14	17	22	22	34	31	32
<b>Total</b>	144	142	109	109	122	103	88	116	128	96	107	95
<b>% Cremation</b>	13%	13%	14%	23%	21%	14%	19%	19%	17%	35%	29%	34%
<b># Lots Sold</b>	130	74	72	82	81	82	82	78	90	60	80	60

### *From 1996 - 2007*

- ✓ Traditional Burials have Decreased by 63 Cases or 50%
- ✓ Lot Sales have Decreased by 70 Cases or 54%
- ✓ Cremations have Almost Doubled in Number
- ✓ Percentage of Cremations have Increased from 13% to 34%
- ✓ Cremation Association of North America (CANA) Estimates that the ND Cremation Rate will Increase to 47% by 2025.

Taken from 2006 Data & Projections to the Year 2025 from Cremation Association of America (CANA)

# COST COMPARISSON WITH OTHER CEMETERIES

<i>Cemetery</i>	<i>Lots</i>	<i>Single Cremation Niche</i>	<i>Interment Fee Summer Rate</i>	<i>Single Marker Setting</i>
Memorial Park GF	\$1000 - \$1500	\$1300 - \$1500	\$800	\$150
Calvary GF	\$800	\$950	\$780	\$120
Riverside Fargo	\$700 - \$1200	\$680 - \$960	\$600	\$100 - \$150

Our current price structure is as high as the market will bear in comparison with other cemeteries in our region.

# FINANCIAL HISTORY 1996 - 2007

Year	Revenues	Expenses	Net Profit/Loss	Net Increase (Decrease) in Cash At Year End	Adjusted Net (Decrease) in Cash At Year End If Specials were Paid	Cash And Cash Equivalents	Preneed Trusting Deposits	After Preneed Deposits
1996	\$150,531	\$164,060	(\$13,529)	\$7,893	\$7,893	\$21,993	\$0	\$21,993
1997	\$171,575	\$155,810	\$15,765	(\$21,667)	(\$21,667)	\$326	\$0	\$326
1998	\$171,229	\$194,411	(\$23,182)	\$3,731	\$3,731	\$4,056	\$0	\$4,056
1999	\$187,737	\$196,744	(\$9,007)	(\$1,021)	(\$1,021)	\$3,035	\$0	\$3,035
2000	\$189,568	\$173,226	\$16,342	(\$96)	(\$96)	\$2,939	\$0	\$2,939
2001	\$125,310	\$188,498	(\$63,188)	(\$2,692)	(\$8,265)	\$247	\$0	\$247
2002	\$157,670	\$167,995	(\$10,325)	\$1,789	(\$4892)	\$2,036	\$0	\$2,036
2003	\$210,786	\$181,359	\$29,427	\$71,725*	\$64,315	\$73,761	\$0	\$73,761
2004	\$225,535	\$194,612	\$30,923	(\$13,425)	(\$23,426)	\$60,336	\$2,218	\$58,119
2005	\$185,960	\$206,528	(\$20,568)	\$20,637	\$3,756	\$80,973	\$30,104	\$50,869
2006	\$307,519**	\$273,816**	\$33,703	(\$37,991)	(\$54,252)	\$42,982	\$28,113	\$14,869
2007	\$303,552**	\$264,212**	\$39,340	\$849	(\$12,969)	\$43,831	\$30,854	\$12,977

\* Net increase in cash for 2003 was due to withdrawal from Perpetual Care Trust to pay for flood repairs.

This withdrawal was also used to pay for dike assessments for the years 2001, 2002, 2003, 2004.

\*\* Reason for increase in revenues and expenses in 2006/2007 was the purchase of Sunnywood Gardens Cemetery.

<i>Dike Assessments:</i>	<i>Paid 01 - 04</i>	<i>Due 05-06</i>	<i>Due 07</i>	<i>Due 08</i>	<i>Est. 09</i>
Memorial Park	\$31,702	\$21,443	\$9,438	\$11,927	\$12,282
Memorial Park South	\$15,442	\$11,700	\$4,794	\$12,227	\$14,577
<b>Totals</b>	<b>\$47,144</b>	<b>\$33,143</b>	<b>\$14,232</b>	<b>\$24,154</b>	<b>\$26,859</b>

**Total Unpaid Assessments Due \$71,529**  
**All Totals Include Penalty & Interest**

# OUR SITUATION

**The Grand Forks Cemetery Association is experiencing the effects of the dramatic changes that are taking place in the death care industry nationally and regionally.**

- 1) As cremation has become more acceptable and common, the GFCFA has experienced a substantial decrease in the sale of lots and in the demand for its products and services. The resulting significant decrease in revenue produces an adverse effect on our cash flow and on our ability to meet expenses.
- 2) A large number of city residents in the 65+ age group moved away from Grand Forks after the flood in 1997 and did not return.
- 3) It is becoming more and more common for city residents to leave the area when they retire, and their remains are not returned to Grand Forks upon their deaths.
- 4) As revenues have decreased and expenses have increased, we have been compelled to increase charges for our lots, products, and services to the point where we cannot raise them any higher. Our prices are already higher than those of other cemeteries in the area.
- 5) Although often taken for granted, the Grand Forks Cemetery Association provides vital services to the citizens of Grand Forks, services that cannot be provided by any other entity or association.

# FACTS SUPPORTING “CEMETERY EXEMPTION”

- 1) As far back as the ND Revised Code of 1899, the property belonging to cemetery corporations has been held to be “exempt from taxation, assessment, lien, attachment, and from levy and sale upon execution.” This provision continued in ND law until 1959, when the legislature passed a new nonprofit corporation act which, we believe, inadvertently repealed the exemption of cemetery property from taxation and assessment.
- 2) In 1970, however, the ND Supreme Court held that public policy, as expressed in certain other laws, requires that cemetery property be exempt from special assessment: See St. Mary’s Church, 181 N.W.2d at 715-16.
- 3) In the years since St. Mary’s Church was decided, the legislature neither enacted a law to preserve the majority opinion in that decision, nor has it enacted a law to reverse or overturn that decision. It might be argued, therefore, that the legislature has acquiesced in the court’s interpretation and that the court’s decision was consistent with legislative intent.
- 4) Because of their exclusive and unique nature and the services they provide, cemeteries have historically been accorded special treatment in law. Considered sacred ground, cemetery property has been held to be exempt from taxes and special assessments. Nor can cemetery property be seized for nonpayment of taxes and assessments, courts have so ruled.
- 5) Many states, recognizing that cemeteries are unique by their very nature, have, by legislative action, accorded them exemption from taxation and special assessments.

# CONCLUSION

- 1) As far back as the ND Revised Code of 1899, cemeteries in North Dakota have been exempt from taxation, assessment, lien, attachment, and from levy and sale upon execution.
- 2) The ND Supreme Court, in 1970, held that public policy, as expressed in certain other laws, requires that cemetery property be exempt from special assessment. St. Mary's Church, 181 N.W.2d at 715-16.
- 3) The Supreme Court in 1970 noted the longstanding exemption from special assessments for cemetery property, holding that, in the Court's view, "the Legislature did not intend to legislate contrary to that policy" when it repealed the specific exemption of cemetery property from taxation and assessment in 1959. St. Mary's Church, 181 N.W.2d at 715-16.
- 4) Given the information as presented, the Grand Forks Cemetery Association urges the sixty-first legislative assembly to enact Bill No. 2441, which confirms and continues the 1970 ND Supreme Court decision holding that special assessments on the property of a cemetery owned by a nonprofit corporation are void.
- 5) Thank you for your time and consideration on behalf of North Dakota nonprofit cemeteries.

SB 2441

House Finance and Tax Committee.

April 13, 2009

Sen. Ray Holmberg

What would be the security of those who venerate their dead, if the tax-gatherer might enter such sacred precincts as their cemetery and sell, at public outcry, the tombstones located thereon to pay for flood protection?" (Adapted from a 1885 Louisiana Supreme Court Decision)

Should the dead be assessed for flood protection? That is a question the Grand Forks city council and the Grand Forks Cemetery Association have been embroiled in for a long time. The city arguing that irrespective of a 1970 North Dakota Supreme Court Decision, (City of Bismarck v. St. Mary's Church) the cemetery must pay special assessments for flood protection because of the benefit provided. Supporters of this bill believe that it's just wrong to assess dead people for this kind of a "benefit." At the request of the Grand Forks Cemetery Association, I asked the Attorney General to help bring closure and resolution to the matter.

Attorney General Wayne Stenehjem's opinion, issued last month, recommends that the legislature "enact into law a direct and unequivocal statement of its intent whether cemetery property may be subject to special assessment for public improvements." A copy of that decision is attached to my testimony.

SB 2441 was introduced in response to that opinion.

Section 1 provides clear and unequivocal language that: "Property owned by a nonprofit entity and used exclusively as a cemetery is exempt from assessment or collection of special assessments for benefits conferred under this title and the city in which such property is located shall provide for the payment of special assessments, installments, and interest against such property by the levy of taxes according to law."

Section 2 of the bill was added by the Senate finance and tax committee to provide clear legislative intent language regarding how cities can handle special assessments in the future.

Section 3 provides that "This act is effective for assessment or collection of special assessments regardless of the date of the assessment.

Section 4 declares that the bill is an emergency measure and goes into effect immediately.

Dr. Gordon Iseminger, President of the Cemetery Association and Mr. Robin Purcell, Administrator will provide this committee with additional specific testimony about the need for SB 2441.

## ***Grand Forks Herald***

Published April 07 2009

### **N.D. Senate: No specials for nonprofit cemeteries**

A bill banning special assessments against nonprofit cemeteries was unanimously passed by the state Senate on Tuesday, and now the bill will head to the House of Representatives for a final vote.

By: **Ryan Johnson**, Grand Forks Herald

A bill banning special assessments against nonprofit cemeteries was unanimously passed by the state Senate on Tuesday, and now the bill will head to the House of Representatives for a final vote.

Sen. Ray Holmberg, R-Grand Forks, said Senate Bill 2241 will need a hearing in the House before coming up for a final vote, but he didn't know when that will happen.

He wouldn't comment on the chances of the bill passing the House, but said Tuesday's unanimous vote "is a good omen." There was no debate in the Senate either, which Holmberg said he expected because senators had many discussions before the vote.

"The bottom line was we said it's just wrong to assess dead people for benefit," he said. "Frankly, (dead people) don't care. I think the Legislature surely does because there was no discussion on the other side."

Special assessments are a kind of property tax used to pay for infrastructure such as streets and dikes. They are levied on benefiting properties, which usually means a section of the city.

Holmberg introduced the bill two weeks ago as a reaction to a dispute between the Grand Forks City Council and the Grand Forks Cemetery Association.

Association President Gordon Iseminger argued the assessments were already banned by a 1970 state Supreme Court decision, but some City Council members said the fees that pay for Grand Forks' flood protection system should be charged to everyone as a matter of fairness.

Attorney General Wayne Stenehjem said in a March 18 opinion that the law was unsettled in this area.

#### **Solving old problem**

The bill was amended in the Senate Finance and Taxation Committee before being approved by the Senate Tuesday.

Sen. Connie Triplett, D-Grand Forks, said some lawmakers were originally concerned about exempting cemeteries because it could cause a large increase of special assessments to other property owners in the district.

But a change that makes it clear that the city can spread the fees across the whole municipality rather than expect a single district to make up the difference helps keep the impact to a minimum, she said.

We think this is a fair solution to a long, 40-year-old problem," Triplett said.

The Grand Forks Cemetery Association currently owes the city \$240,000 from previous assessments and was scheduled for another \$118,000 next year. It paid \$45,000 toward the assessments but hasn't paid any additional money since 2004.

Holmberg said if the law passes the House, that debt would be erased and the city could spread the fees out across all other special assessment payers. "It clearly gives the city a direction of what they can do," he said.

# The Editorial page

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our **Opinion**

## Give cemeteries a break on assessments

"What would be the security of those who venerate their dead, if the tax-gatherer might enter such sacred precincts and sell, at public outcry, the land adjoining their tombs to some publican who might build thereon a bar-room or a brothel?"

Thus spoke the Louisiana Supreme Court in 1885, in a case that has come in a fascinating way to shape 2009 life in Grand Forks.

Will Grand Forks residents have to open their wallets and pay more for their new dike? The answer may turn, in part, on whether the Louisiana court's sympathy to the "sacred precincts" of cemeteries finds an echo in North Dakota today. Here's how.

When Grand Forks levied a special assessment to pay for the city's share of the dikes, it taxed cemeteries, too. The cemeteries have paid some but not all of their assessments; and now, the Grand Forks Cemetery Association wants the assessments reduced, the Herald reported Tuesday.

What sets this issue apart is that the association has a strong case — a very strong case, in our view.

That's because the North Dakota Supreme Court ruled in 1970 that a Bismarck cemetery didn't have to pay a special assessment at all. So, Grand Forks' cemeteries apparently are being generous in offering

**Our view: The cemeteries shouldn't have to pay for GF's unhappiness with a Supreme Court ruling.**

to pay anything to the city, given the fact that according to precedent, they don't have to pay a dime.

But City Attorney Howard Swanson doesn't see it that way. He thinks the 1970 ruling was in error and believes a new case could prompt a reversal.

So, the city is weighing whether to sue the cemeteries to collect and so push the case into court.

Swanson may be right about the 1970 ruling, more about that in a minute. Even so, the Supreme Court decision is the city's problem, not the cemeteries'.

If the city forced the issue into court, the cemeteries would have to pay to defend themselves against this challenge to settled law.

That doesn't seem right, considering:

■ The cemeteries have paid and are offering to pay toward the dike. Again, that's generous.

■ Cemeteries tend to be shoe-string rather than prosperous organizations. No wonder: A burial plot is a finite expense, but a cemetery board's responsibility is for-

ever. Presumably, it stretches into eternity, and right here on Planet Earth, not in the hereafter.

Making that work financially is a challenge, to say the least. So, when the "big bad City" goes after the cemetery boards that are "doing the Lord's work," which side is the public likely to be on?

Read that Louisiana opinion again for a clue.

■ True, "we're all in this together, and we all should pay our fair share," as Curt Kreun, Grand Forks City Council member, said in the Herald story.

Nevertheless, the North Dakota Supreme Court ruled that cemeteries are exempt.

The cemeteries shouldn't have to pay for Grand Forks' unhappiness with that ruling. The city should accept the cemeteries' donations, spread any special-assessment shortfall among lawfully taxed property owners and save its capital — political and otherwise — for another day.

Now, about that 1970 ruling: In *City of Bismarck vs. St. Mary's Church*, the majority held that "the special assessments upon the property of the cemetery ... are held to be void," now and forever.

But the case is interesting because of Chief Justice Olbert Teigen's dissent, which is much more persuasive than the ruling (as

Swanson likely recognizes).

The majority goes on at flowery length about cemeteries' special status in society, including the quote from the Louisiana court.

But as Teigen points out, the majority had to resort to such language because North Dakota cemeteries no longer have special status in law. For decades, cemeteries were exempt from all taxation, but the Legislature specifically repealed that exemption in 1958.

"As a person, I sympathize with the result attained by the majority," Teigen writes in his dissent.

"However, as a judicial officer having the responsibility of interpreting the law and not writing the law, ... I must put my personal sympathies aside and decide the case applying the law established by the Legislature.

"In this case, the public has spoken through its Legislature. ... and there is now no statute which, in clear and unequivocal terms, exempts cemeteries from special assessments."

As Teigen notes, judicial officers must put personal views aside and simply interpret the law. Likewise, Grand Forks' officials now must put personal views aside and simply enforce the law — and the law, as it now stands, apparently gives cemeteries a pass.

— Tom Dennis for the Herald



Wayne Stenehjem  
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**LETTER OPINION  
2009-L-06**

March 18, 2009

The Honorable Ray Holmberg  
The Honorable Mac Schneider  
North Dakota Senate  
State Capitol  
Bismarck, ND 58505

Dear Senators Holmberg and Schneider:

Thank you for your letter requesting my opinion whether a municipality may impose special assessment on the land of a nonprofit cemetery association. I regret that I am unable to give you a definitive answer to this question because this issue is subject to pending litigation and because the law in this area is unsettled.

**ANALYSIS**

On March 2, 2009, the Grand Forks City Council met and considered a protest by the Grand Forks Cemetery Association against special assessments for the city's permanent flood protection project and associated improvements. The matter under consideration principally involved the question of whether a nonprofit cemetery association was subject to special assessments.<sup>1</sup> The city denied the protest.<sup>2</sup> The Grand Forks Cemetery Association still may appeal from the city's denial of its special assessment protest under N.D.C.C. chs. 28-34 and 40-26.

"It has been the long-standing practice and policy of this office to not knowingly give an opinion on an issue involved in pending litigation."<sup>3</sup> The opinion of the Attorney General is

<sup>1</sup> In The Matter of the Protest Against Special Assessments for Permanent Flood Protection and Associated City Funded Improvements Dists. #14 and #14.2 (Project #4704 And 4704.2) by Grand Forks Cemetery Ass'n, Grand Forks City Council, Findings, Conclusions and Decision Denying Protest (Mar. 2, 2009).

<sup>2</sup> Id.

<sup>3</sup> N.D.A.G. Letter to Flagstad (Nov. 15, 1988).

March 18, 2009

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not binding on the judiciary,<sup>4</sup> and "it would be impossible to respond in this instance without having very specific knowledge of all facts relevant to the litigation."<sup>5</sup> The decision made by the City of Grand Forks is still subject to appeal concerning the issue in your question, and if appealed then the court's decision would resolve the matter.<sup>6</sup>

Further, as explained below, the law regarding whether cemetery property is subject to special assessment is uncertain. My review of the statutes governing special assessments shows that cemetery property could be subject to special assessment for public improvements which benefit that property. However, the North Dakota Supreme Court has ruled otherwise in a decision that directly relates to the question you presented.<sup>7</sup>

While special assessments for city improvements are treated as taxes for many purposes, and are enforced in much the same way as property taxes, nevertheless, property taxes and special assessments are distinguishable.

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 [the property owner] receives an equivalent in the shape of the enhanced value of [the] property, and only property benefited by the improvement may be assessed. . . . Although possessing many points of similarity, special assessments and taxes are inherently different. . . .<sup>8</sup>

"Under the special assessments the payer is merely paying for a special benefit which [has been] received, and it is [the payer's] property which is pledged for the payment of the obligation."<sup>9</sup> Therefore, the fact that cemeteries are constitutionally<sup>10</sup> and statutorily<sup>11</sup> exempt from property taxation does not imply that cemetery property is exempt from special assessment for benefits provided to the property from public improvements.

The power to defray expenses of improvements by special assessment is granted to any municipality upon complying with the provisions of N.D.C.C. ch. 40-22.<sup>12</sup> The type of improvements which may be paid for through special assessment includes acquiring necessary land and easements, and construction of the necessary works, for flood

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<sup>4</sup> Id.

<sup>5</sup> N.D.A.G. Letter to Mehrer (July 5, 1983).

<sup>6</sup> See N.D.A.G. 99-L-68, see also N.D.A.G. 99-L-52.

<sup>7</sup> See City of Bismarck v. St. Mary's Church, 181 N.W.2d 713 (N.D. 1970).

<sup>8</sup> State v. Furstenau, 129 N.W. 81, 83 (N.D. 1910)

<sup>9</sup> Schieber v. City of Mohall, 268 N.W. 445, 450 (N.D. 1936).

<sup>10</sup> N.D. Const. art. X, § 5.

<sup>11</sup> N.D.C.C. § 57-02-08(5).

<sup>12</sup> N.D.C.C. § 40-22-01.

protection.<sup>13</sup> After a special assessment district has been created, and the contract and bond for any work required has been executed and approved by the municipality's governing body, the governing body may direct assessments to be made based on the total estimated cost of the work to be levied for payment.<sup>14</sup> A special assessment commission must be created pursuant to chapter 40-23. The commission determines the particular lots and parcels of land which would be specially benefited by the work, determines the amount of benefit to each lot or parcel of land, and assesses an amount not exceeding the benefits against each lot or parcel of land that is necessary to pay its just proportion of the costs of the work.<sup>15</sup> Benefited property belonging to counties, cities, school districts, park districts, and townships, is not exempt from assessment.<sup>16</sup> Subject to certain limitations, state property may also be subject to special assessment.<sup>17</sup> Generally speaking, all real property may be subject to special assessments if it is benefited by the project to which the special assessment relates, except where a specific exception has been enacted by the legislature.

As far back as the North Dakota Revised Code of 1899, the property belonging to cemetery corporations and lots sold to individuals were "exempt from taxation, assessment, lien, attachment, and from levy and sale upon execution."<sup>18</sup> This provision continued in North Dakota law until 1959, when the legislature passed a new nonprofit corporation act which repealed the exemption of cemetery property from taxation and assessment.<sup>19</sup> While present law exempts cemeteries from taxation, there is no statutory exemption from special assessments for cemeteries in North Dakota. If I were to base a legal opinion solely on statutory grounds, I would have to conclude that cemetery property is not exempt from special assessment for public improvements benefiting the cemetery property based on the lack of such exemption in present law and the legislature's repeal of a specific exception which formerly applied to cemetery property.

However, the North Dakota Supreme Court has held that public policy, as expressed in certain other laws, requires that cemetery property be exempt from special assessment.<sup>20</sup> In City of Bismarck v. St. Mary's Church, the North Dakota Supreme Court determined that

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<sup>13</sup> N.D.C.C. § 40-22-01(4).

<sup>14</sup> N.D.C.C. § 40-23-05.

<sup>15</sup> N.D.C.C. § 40-23-07.

<sup>16</sup> Id.

<sup>17</sup> See N.D.C.C. §§ 40-23-22 and 40-23-22.1.

<sup>18</sup> N.D. Revised Code of 1899, ch. 17, art. 4, § 3199.

<sup>19</sup> See St. Mary's Church, 181 N.W.2d at 715; see also 1959 N.D. Sess. Laws ch. 111, § 1 (creating section 10-2818, application and construction of act; deferred repeal, which repealed section 10-1011 of the N.D. Revised Code of 1943 which exempted cemetery property from taxation and assessment).

<sup>20</sup> St. Mary's Church, 181 N.W.2d at 715-16.

special assessments for street improvements may not be levied upon cemetery property belonging to a nonprofit corporation. The court noted the longstanding exemption from special assessments for cemetery property, holding that, in the Court's view, "the Legislature did not intend to legislate contrary to that policy" when it repealed the specific exemption of cemetery property from taxation and assessment in 1959.<sup>21</sup> The Court noted that the legislature has also provided criminal sanctions against disruption or injury to a cemetery.<sup>22</sup> The Court concluded that it is "inconceivable to us" that the legislature, with this policy against disrupting a cemetery, would also contemplate permitting a intrusion upon cemeteries that would be possible if the property were not exempt from special assessment.<sup>23</sup> The supreme court further cited with approval an 1885 Louisiana case which used a similar analysis,<sup>24</sup> and an annotation from American Law Reports.<sup>25</sup> The three to two decision of the North Dakota Supreme Court in St. Mary's Church was accompanied by a strong dissent from Chief Justice Teigen, which sympathized with the result reached by the majority but noted that the repeal of the exemption from special assessments for cemetery property demonstrated the legislature's intention to break with previously established public policy, stating that in light of the historical background "I cannot hold that the Legislature had no intention of doing what it so plainly did do."<sup>26</sup> Chief Justice Teigen concluded that the "courts are not at liberty to declare a law void as being in violation of public policy because public policy is determined by the Legislature and the only limits upon the legislative power in such determinations are those fixed in the state and Federal constitutions."<sup>27</sup>

In the years since St. Mary's Church was decided, the legislature has neither enacted a law to preserve the majority opinion in that decision, nor has it enacted a law to reverse or overturn that decision. It might be argued that because of the almost four decades that have passed since the court's decision in St. Mary's Church, the legislature has acquiesced in the court's interpretation and the decision is consistent with legislative intent.<sup>28</sup> But as that decision was based upon a perceived public policy instead of a constitutional or statutory provision, it is possible that a good faith argument may be presented to the supreme court, based on statutory law and public policy, for reversal of its decision in St. Mary's Church.

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<sup>21</sup> Id. at 715.

<sup>22</sup> Id.

<sup>23</sup> Id. at 715-16.

<sup>24</sup> Id. at 716, quoting Metairie Cemetery Asso. v. Board of Assessors, 37 La. Ann. 32 (1885).

<sup>25</sup> St. Mary's Church, 181 N.W.2d at 716, citing 71 A.L.R. at 324 (1931).

<sup>26</sup> St. Mary's Church, 181 N.W.2d at 717.

<sup>27</sup> Id.

<sup>28</sup> See State v. Buchholz, 678 N.W.2d 144 (N.D. 2004); see also State v. Am. West Cmty. Promotions, Inc., 645 N.W.2d 196 (N.D. 2002).

As previously indicated, this issue is subject to appeal to district court, and ultimately to the North Dakota Supreme Court, by which means a decision may resolve the matter.<sup>29</sup> Alternatively, because the decision in St. Mary's Church relied upon an interpretation of legislative intent, it may be appropriate for the legislature to consider this decision and enact into law a direct and unequivocal statement of its intent whether cemetery property may be subject to special assessment for public improvements.

Sincerely,



Wayne Stenehjem  
Attorney General

eee/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.<sup>30</sup>

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<sup>29</sup> See N.D.A.G. 99-L-68.

<sup>30</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

SPECIAL ASSESSMENTS TO CEMETERIES

NAME	PARCEL NUMBER	TOTAL SQUARE FOOTAGE	50% LESS SQ FT	1ST AND 2ND DIKE ASSESSMENT PROJ # 4704.0 & 4704.2	REMAINING BALANCE	PRINCIPAL & INTEREST PAID	PRINCIPAL & INTEREST IN ARREARS	PROJECTED 3RD DIKE ASSESSMENT	REHAB PUMP STATION PROJ # 6174.0
CONGREGATION OF CHILDREN OF ISREAL & ROSE HILL CEMETERY LOT 1, BLOCK 2 FAIRGROUNDS 2ND RESUB	1612.003.00	54,905	27,453	\$3,410.94	\$0.00	\$3,410.94	\$0.00	\$1,256.06	\$0.00
DIocese OF FARGO 10TH AVE N LOT 3, BLOCK OF WESTACOTT'S ADDN	3303.293.00	193,286	96,643	\$12,007.56	\$7,728.92	\$7,964.64	\$0.00	\$4,421.71	\$0.00
ST MICHAEL'S CHURCH WESTACOTT'S ADDITION	3303.286.00	390,090	195,045	\$24,233.67	\$15,598.51	\$16,074.37	\$0.00	\$8,923.89	\$0.00
GF COUNTY POTTER FIELD GATEWAY DR LOT 9, BLOCK OB WESTACOTT'S ADDITION	3303.288.00	43,560	21,780	\$2,706.09	\$1,741.79	\$1,795.00	\$0.00	\$996.50	\$0.00
GF CEMETERY ASSOCIATION 2423 GATEWAY DR WESTACOTT'S ADDITION	3303.287.00	840,270	420,135	\$52,200.33	\$33,599.78	\$18,162.64 (2001 - 2004)	\$21,858.13 (2005 - 2008)	\$19,222.44	\$0.00
GF CEMETERY ASSOCIATION GATEWAY DR LOT 10, BLOCK OB WESTACOTT'S ADDITION	3303.289.00	42,866	21,433	\$2,662.97	\$1,714.08	\$859.47 (2001 - 2004)	\$1,220.88 (2005 - 2008)	\$980.62	\$0.00
GF CEMETERY ASSOCIATION 12TH AVE N LOT 11, BLOCK OB WESTACOTT'S ADDITION	3303.290.00	79,222	39,611	\$4,921.53	\$3,167.86	\$1,580.18 (2001 - 2004)	\$2,243.63 (2005 - 2008)	\$1,812.32	\$0.00
GF CEMETERY ASSOCIATION 10TH AVE N LOT 4, BLOCK OC WESTACOTT'S ADDITION	3303.291.00	231,335	115,668	\$14,371.35	\$9,250.39	\$4,594.63 (2001 - 2004)	\$6,523.08 (2005 - 2008)	\$5,292.14	\$0.00
GF CEMETERY ASSOCIATION 1003 N 23RD ST LOTS 1 & 2, BLOCK OF WESTACOTT'S ADDITION	3303.292.00	417,912	208,956	\$25,962.06	\$16,711.02	\$8,005.27 (2001 - 2004)	\$11,771.62 (2005 - 2008)	\$9,560.00	\$0.00
GF CEMETERY ASSOCIATION (SUNNYWOOD GARDENS UNPLATTED PARTS GF TOWNSHIP	3117.164.01	742,352	371,176	<u>\$50,854.36</u>	<u>\$27,057.00</u>	<u>\$15,442.21</u> (2001 - 2004)	<u>\$32,620.71</u> (2005 - 2008)	<u>\$16,982.42</u>	<u>\$87,187.15</u> \$11,748.47 (DUE IN 2008)
TOTALS				<b>\$193,330.86</b>	<b>\$116,569.35</b>	<b>\$77,889.35</b>	<b>\$76,238.05</b>	<b>\$69,448.10</b>	<b>\$87,187.15</b>