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**THE NEW MINNESOTA IMPROVEMENT-ASSESSMENT
PROCEDURE (Chapter 398, Laws of 1953)**

DE FOREST SPENCER, JR.*

The purpose of this Article is to propose answers to problems which are likely to be encountered by officers and attorneys of Minnesota municipalities¹ in proceedings under Chapter 398, Minnesota Session Laws of 1953 (now Chapter 429 of Minnesota Statutes of 1953).² I have selected for treatment those problems, whether strictly legal in nature or not, which seem to me to recur most often in such proceedings. I will try throughout to deal with these problems in the light of Minnesota statutes and decisional law, drawing on decisions of other jurisdictions, or on treatises, only when Minnesota decisions are lacking.

The chapter is one of those wonders of the world in statute-making: a law specifically repealing a whole host of prior laws—in fact, expunging no less than 58½ pages of Minnesota Statutes.³ Only one improvement-assessment law of general application to villages and cities (other than 1st-class cities) remains.⁴ The effect of this wholesale repeal is reinforced by the provisions in Minnesota Statutes, § 429.021(3) (1953)⁵ that “when any portion of the cost of an improvement is defrayed by special assessments, the procedure prescribed in this chapter shall be followed unless the council determines to proceed under charter provisions. . . .”⁶ Since § 429.011(5) defines “improvement” as “any type of improvement made under authority granted by section 429.021 of this chapter,”

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1. Whenever used in the text and footnotes, “municipalities” means all 2d, 3d and 4th class cities, villages, and boroughs, and some townships. See Minn. Stat. § 429.011 (2) (1953).

2. Hereinafter referred to as “the chapter”.

3. Previous enactments of improvement-assessment procedures for Minnesota municipalities generally embodied no repeals. *Borgerding v. Freeport*, 166 Minn. 202, 207 N. W. 309 (1926), portrays the resulting problems.

4. The sole survivor is Minn. Stat. § 459.14 (1953), authorizing parking facilities and the levy of assessments therefor in all cities and villages except 1st class cities. Counties and townships have their own improvement-assessment procedures, but the chapter applies to some townships. Minn. Stat. § 429.011 (2) (1953). Presumably, § 444.075 still authorizes the sewer improvements therein described, using either the chapter or charter procedure. *Quaere*, what (if any) are the local improvement powers of townships under Minn. Stat. § 368.01 (1949), as amended by Minn. Laws 1953, c. 462. This section apparently should have been amended by Minn. Laws 1953, c. 398. However, most townships which in the past have levied assessments for improvements fall within the definition of “municipalities” in Minn. Stat. § 429.011 (2) (1953).

5. All subsequent section numbers in the text and footnotes refer, unless otherwise indicated, to Minnesota Statutes (1953).

6. See also § 429.111.

and § 429.021 grants authority for making almost every type of improvement for which special assessments have traditionally been levied, the result is that municipalities as defined by § 429.011(2) must make such improvements, when they are to be financed wholly or in part by the levy of special assessments, under either the chapter or under charter procedure.⁷ And since Minnesota villages, being governed by the general laws,⁸ have no charters, and few existing city charter procedures are as good as the chapter's, probably almost all city and village assessment improvements, except in first class cities, should and will be made under the chapter.

This is a fortunate result, because the new law, drafted by a committee of experts in municipal law and finance, and endorsed for passage by the League of Minnesota Municipalities, provides a simpler procedure and answers more questions than any of the previous improvement-assessment statutes, with the exception of the local improvement sections of the Village Code,⁹ from which the new law mainly derives. It is also an advantage to have but one uniform procedure for all city and village improvements. To municipal officers and attorneys, it means having to be familiar with only one statute instead of several; and to bond dealers and investors, it means absence of doubt as to the nature of the obligation of municipal improvement bonds.

PRELIMINARY STEPS

Unless it has received a petition, the council will initiate the improvement. In either event, its first step should be to ask the city or village engineer for a report on the improvement as required by § 429.031(1). If the project still appears sound and desirable, but is on a large scale, the council should consider whether its estimated cost is within the financial capacity of the municipality. Some of the relevant factors are:

- (1) Cash on hand available for the improvement.
- (2) Cost of other anticipated projects.
- (3) Revenue-producing possibilities of the improvement and other municipal utilities and enterprises.
- (4) Assessed valuation of the municipality.
- (5) Present municipal indebtedness.

7. The only possible exception to this result is in the case of Winona, the only second-class city in the state operating under special law. See § 429.111.

8. § 412.901.

9. Minn. Stat. §§ 412.401 to 412.481 (1949), repealed by Minn. Laws 1953, c. 398, * 13 (1).

- (6) Debt of overlapping taxing districts (such as the county and school district).
- (7) Estimated interest cost on the portion of the cost to be borrowed.
- (8) Present and future ability of the property area to be assessed to pay the assessments.¹⁰

The evaluation of these factors, in relation to the feasibility of the project, the method of allocating cost among assessments, taxes and other revenues, the period over which the cost can be paid from each of these sources, and the terms on which bonds can be sold in anticipation of such payments, is a specialized field in investment banking. Particularly if the project is relatively large and the municipal officers have had little experience with such matters, it is desirable to seek professional advice. All of the factors mentioned bear ultimately on the ability of the municipality's tax-payers and property-owners to pay the necessary general taxes and assessments, so on any big project it would also be desirable to have the village engineer draw up an estimate of the amounts of taxes and special assessments which will be required from various types of home-owners and business concerns, and from those owning large undeveloped tracts. At any rate, the taxpayers and property-owners will pretty surely ask the council for such estimates at the outset.

When an expensive improvement is being planned, the average amount of general taxes which will have to be levied annually to pay the portion of the cost not assessed should be checked to see that, when added to other necessary annual tax levies, it does not push the municipal tax levies up over the statutory per capita limitation.¹¹ Violation of the per capita limitation could cause the municipal officers to become personally liable for paying the contractor,¹² or could result in drastic cuts in operating fund tax levies.¹³ Fortunately, the per capita limitation is set so high that it is extremely un-

10. If part of the cost will be specially assessed, the statutory debt limit is not a factor. §§ 429.091 (3) and 475.51 (4).

11. §§ 275.11 and 275.44-275.47. Unless the municipality can borrow the cost of the improvement from its permanent improvement revolving fund or another municipal fund, levying taxes and assessments to pay the cost of the improvement normally implies that improvement bonds or warrants will be issued under § 429.091, since the taxes and assessments are usually made collectible in installments. Section 429.091 (2) does not take all taxes levied to pay improvement bonds or warrants entirely out from under the statutory per capita limitation: it exempts from legal limitations only the deficiency levies for improvement bonds when the tax levies first made for the improvement prove insufficient. *Cf.* § 475.74. The statutory per capita limitation therefore applies to the tax levies before deficiencies arise or are reasonably to be anticipated.

12. § 275.27.

13. § 275.16.

likely it will be exceeded by the average municipality even when improvements are being planned on a large scale.¹⁴ Mill rate limitations are not much of a problem either; I feel it is safe to assert that they do not in the usual case apply at all to general tax levies to pay for improvements.¹⁵ While special assessments are in theory levied under the taxing power,¹⁶ they are not "taxes" in the sense in which that word is used in tax levy limitation provisions.¹⁷

If no engineering, legal or financial objections to the improvement remain, the council may proceed to call the formal hearing required by § 429.031(1). However, it may be advisable, if the improvement is of a controversial nature, or affects the whole municipality, to hold an informal public or mass meeting prior to the formal hearing, for the purpose of explaining the improvement to the general public, with talks by experts on the pros and cons. While such an informal meeting does not take the place of the formal hearing required by § 429.031(1), it may disclose that there is popular support for the project and thus facilitate the subsequent legal steps, or possibly show that the project should be recast or altered in scope. It would be improper for the council to go further than such a preliminary meeting and actually expend public funds on a propaganda campaign in favor of the improvement.¹⁸

Another step the municipality may take before holding the formal hearing is to prepare plans and specifications and advertise for construction bids, as permitted by § 429.031(1). The opening of bids might well be set for a date shortly before or coinciding with that of the hearing, so that the hearing may be conducted in the

14. See State Governmental Research Bull., *The Minnesota Tax System*, Appendix D, 130-134 (May, 1948).

15. As to villages, see § 412.251. Subdivision 1 of § 412.251 puts improvement bond or warrant taxes outside the general 30 or 35 mill limitation, since these are sinking fund taxes under § 475.61; subdivision 12 does the same for improvement fund taxes levied under § 429.051, even when no bonds or warrants are issued. As to cities, provisions of special and home-rule charters should be examined. Usually the mill rate limitations are so stated that they do not limit general tax levies for improvements. *Cf. In re Delinquent Taxes in Polk County*, 147 Minn. 344, 180 N. W. 240 (1920) (Crookston home-rule charter).

16. *McComb v. Bell*, 2 Minn. (Gil. 256) 295 (1858); *Noonan v. Stillwater*, 33 Minn. 198, 22 N. W. 444 (1885); *cf. Stinson v. Smith*, 8 Minn. (Gil. 326) 366 (1862); *First Div. R. R. v. St. Paul*, 21 Minn. 526 (1875); *St. Paul v. St. P. & Sioux City R. R.*, 23 Minn. 469 (1877); *State v. St. Paul*, 36 Minn. 529, 32 N. W. 781 (1887).

17. *Cf. First Div. R. R. v. St. Paul*, *supra* note 16; *State v. District Court*, 31 Minn. 354, 17 N. W. 954 (1884); *Washburn Mun. Orphan Asylum v. State*, 73 Minn. 343, 76 N. W. 204 (1898); *Sloan v. Duluth*, 194 Minn. 48, 259 N. W. 393 (1935). *But cf. Stinson v. Smith*, *supra* note 16.

18. These cases hold that public moneys may not be expended on advertising to bring about a "yes" vote on a municipal bond issue: *Mines v. Del Valle*, 201 Cal. 273, 257 Pac. 530 (1927); *Elsenau v. Chicago*, 334 Ill. 78, 165 N. E. 129 (1929). See 13 Minn. L. Rev. 739 (1929).

light of the cost as shown by actual bids. If the council decides on this arrangement, it should see that the advertisement for bids

(1) permits it to hold the best bid or bids for a number of days, so that they will still be open to acceptance when the hearing has been concluded and the improvement ordered made, and

(2) reserves the right to reject any and all bids for any portion of the work (but probably the municipality has this right without stating it).¹⁹

However, the municipality may not wish to incur the expense of getting final plans and specifications prepared until it has held the hearing and ordered the improvement.

Many improvements, particularly paving, curb and gutter, and sewer and water main extensions, are commonly initiated by a petition. The council must by resolution²⁰ determine whether it has been signed by the owners of 35% in front footage of the property abutting on the street where the improvement is petitioned to be made.²¹ While the council is not thereby obligated to go further,²² at least a resolution finding the petition to be sufficient has the effect of lowering the council majority needed to order the improvement from $\frac{2}{3}$ to a bare majority of all its members,²³ and of ending the petitioners' right to withdraw their names.²⁴ Sometimes such petitions come from real estate developers, requesting water, sewer and paving for tracts to be developed as residential communities. In such

19. See § 429.041 (2): "... The council shall award the contract to the lowest responsible bidder or it may reject all bids..." Cf. *Starkey v. Minneapolis*, 19 Minn. (Gil. 166) 203 (1872).

20. There is nothing in the chapter to indicate that statutory and charter provisions as to passage of resolutions do not apply; therefore I assume that any resolutions required to be passed by the chapter must comply with such provisions as to number of readings, publication, approval by mayor, passage by particular majority (except the resolution ordering the improvement), etc. I believe, however, that despite any charter requirements that action be taken by ordinance, all council action under the chapter may be by resolution.

21. §§ 429.031 (1) and 429.035.

22. There is nothing in the chapter which expressly requires the council to call an improvement hearing when a petition has been filed. By way of contrast, see Minn. Stat. §§ 429.04 and 429.21 (1949) (repealed). The requirement in § 429.031 (1) that the council secure a report on the feasibility of the improvement and on how it may best be made implies that the council need not call a hearing if the report is not favorable, despite the filing of a sufficient petition. The question of whether an improvement shall or shall not be ordered is normally within the legislative discretion of the council. *Sherwood v. Duluth*, 40 Minn. 22, 41 N. W. 234 (1889); *Tate v. St. Paul*, 56 Minn. 527, 58 N. W. 128 (1894); *Janeway v. Duluth*, 65 Minn. 292, 68 N. W. 24 (1896); *State v. District Court*, 89 Minn. 292, 94 N. W. 870 (1903); *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911 (1903); 13 *McQuillin*, *Municipal Corporations* §§ 37.25-37.27 (3d ed. 1950); *accord*, *Wolfe v. Moorhead*, 98 Minn. 113, 107 N. W. 728 (1906).

23. § 429.031 (1).

24. Cf. *In re Dissolution of School Dist. No. 33*, 60 N. W. 2d 60 (Minn. 1953).

situations the municipality runs the risk that the development will fail, particularly if there are no houses on the tract, in which case the assessments out of which the municipality will recoup the cost of the improvement may not be paid. On the other hand, the council may feel that the development, including the improvements, is needed by the municipality. There seems to be no easy solution for such a dilemma. It is impractical to ask the developer to come back with his petition after he has built his houses, because by then he will have had to provide roads, wells and septic tanks, in order to sell them. That is to say, he cannot afford to build the houses and keep them off the market until the municipality has provided them with such improvements. The dilemma could perhaps be resolved if the municipality could induce the developer to execute a written guaranty of payment of the special assessments to the municipality, thus adding his personal liability to the liability of the land to pay the special assessments. Failing an arrangement of this kind, I should think the council could reasonably take the position that if the development is uncertain of success, the public necessity for the improvement is correspondingly uncertain.²⁵

While liberal in its provisions, the chapter does not authorize the making of any improvements outside the corporate limits, except sewer and water improvements, and parks, playgrounds and recreational facilities.²⁶ It is not clear whether this exception in favor of water and sewer improvements extends only so far as to permit such items as wells, pumps, tanks, and disposal plants to be built outside corporate limits, or whether it also permits water and sewer laterals outside corporate limits to be included in an improvement. At any rate, nothing in the chapter is sufficient to overcome the well-established rule that municipalities may not assess property lying beyond their boundaries.²⁷

THE IMPROVEMENT HEARING

The council may not proceed with the proposed improvement without calling and holding a hearing.²⁸ Whoever is in charge of

25. Municipalities which have availed themselves of the city planning activities sections (§§ 471.26-471.33) may under § 471.30, before a proposed plat is approved, require that streets be graded and improved and water, sewer and other utility facilities be installed or that a bond be furnished to secure the construction and installation of such improvements within a period specified by the council.

26. § 429.021 (1).

27. 14 McQuillin, Municipal Corporations § 38.62. *But cf.* §§ 456.29 and 456.30.

28. As required by § 429.031. This hearing is no doubt "jurisdictional," see note 42 *infra*, but is not constitutionally required. *State v. Burnes*, 124 Minn. 471, 145 N. W. 377 (1914); *In re Delinquent Taxes in Polk County*, 147 Minn. 344, 180 N. W. 240 (1920).

drafting the notice of hearing should carefully examine § 429.021 to determine if the project consists of one or more than one improvement. The way this section is worded, so large a venture as a complete sewage disposal plant, lift station and trunk sewer, with sewer lines and service connections on various streets, is one improvement; on the other hand, a water main on one street and a sewer line on another are two separate improvements. If there are or may be two or more improvements, and they are to come up for hearing at the same council meeting, it does not seem necessary to publish separate notices of hearing; all that is necessary is to describe each improvement separately in the notice, stating the estimated cost for each one, and to provide that there will be a separate hearing on each improvement. After conclusion of the hearing or hearings, when ordering the improvements to be made,²⁹ the council may order the improvements to be consolidated under § 435.56, particularly if it contemplates that they will all be contracted for, financed and assessed at about the same times. Of course, they can under the statute just cited be consolidated later on, or reconsolidated with other current improvements. In ordering improvements or consolidated improvements, most municipalities follow the practice of giving them a short descriptive name and number, such as "Paving Improvement No. 1," or "Water and Sewer Improvement No. 1," for ease of reference in subsequent proceedings.

It is very important that the notice of hearing correctly describe the area proposed to be assessed. In the first place, as the law now stands, the council may not later assess property not included in this description.³⁰ Thus, even before the hearing is held, this area must be definitely ascertained. Secondly, the description should be sufficiently definite to enable any property-owner to tell whether his property is included in the area to be assessed. A description of this area as "the area which will be benefited by said improvement" is, I think, too uninformative.

The determination of the area to be assessed is most difficult in the case of storm sewer improvements. It is elementary that property may not be assessed which is not specially benefited;³¹ con-

29. This may be done any time within 6 months after the hearing. § 429.031 (1). *Quaere*, in the case of a hearing adjourned from time to time, whether the six months run from the first or the last date of hearing.

30. § 429.051. However, if the original assessment is invalid, the re-assessment may include property not described in the notice of hearing. *Cf. State v. District Court*, 95 Minn. 503, 104 N. W. 533 (1905).

31. Minn. Const. Art. IX, § 1. The Minnesota cases are cited in 13 Dunnel, Minnesota Digest § 6862 (3d ed. 1954).

versely, property which is specially benefited should be assessed.³² What, however, of a system of storm sewers providing drainage of surface waters in a particular area: should the higher lots therein, which have natural drainage, be assessed? Probably all property in the area is benefited by the storm sewer system, since it clears water from the public streets therein, and by removing standing surface water promotes general health and safety conditions. While all property in the area may therefore be assessed, the council might in some situations establish a higher rate of assessment on the lower lots which are actually drained.³³

At the hearing all persons interested should have a chance to be heard, not just those who are liable to be assessed. I think this is implied because the statute³⁴ requires a "public hearing," without specifying who is to be heard. Since the improvement contract (and probably also the financing) will be a general liability of the municipality even if the whole cost will be specially assessed,³⁵ all residents and creditors of the municipality have a practical interest in presenting their views. It is then for the council to order or not to order the improvement, as it may see fit.³⁶ While the council ought to consider any public sentiment against the improvement, there is nothing in the statute forcing the council to bow to it, even if it is overwhelming. Where an expensive improvement generally affecting the whole municipality is proposed, some councils favor holding an "advisory" or "popular sentiment" election. Such an election, on the question of making the improvement itself, is not authorized and presumably has no legal effect whatsoever.³⁷ However, there is authority for calling an election on the issuance of bonds to finance the improvement, or on the pledge of municipal liquor store revenues to the payment of bonds financing certain improvements, as discussed later in this Article, and such an election may be a convenient substitute for an advisory election.

However, where the improvement is the first entry by the municipality into a new utility business, statutory provisions ex-

32. See *State v. District Court*, 33 Minn. 295, 23 N. W. 222 (1885); *State v. District Court*, 80 Minn. 293, 83 N. W. 183 (1900); *Mayer v. Shakopee*, 114 Minn. 80, 130 N. W. 77 (1911). These cases indicate that in the absence of fraud or demonstrable mistake, the court will not upset the municipality's determination that there was no benefit to certain properties.

33. Cf. *Sherwood v. Duluth*, 40 Minn. 22, 41 N. W. 234 (1889).

34. § 429.031 (1).

35. *Accord*, *State v. Ely*, 129 Minn. 40, 151 N. W. 545 (1915).

36. See note 22 *supra*. It also stands to reason that if the council has ordered an improvement, it may subsequently rescind such action.

37. Cf. *Muehring v. School Dist. No. 31*, 224 Minn. 432, 28 N. W. 2d 655 (1947). While the council may nevertheless wish to hold an election of a purely advisory nature, it is doubtful whether municipal funds may be expended on an election which has no legal effect.

traneous to the chapter do require an election on the establishment of the utility before such improvement may be made.³⁸ The most important provisions are § 412.321 (villages; waterworks or gas, light, power or heat plants), § 452.02 (certain cities; most utilities), and § 455.24 (4th class cities; electric light systems). Special and home-rule charters may contain similar provisions. For certain improvements, a concurring resolution of the park board or the utilities commission is required.³⁹

Although, as pointed out above, the municipality may have plans and specifications prepared and receive construction bids before the improvement hearing, it is essential, for the subsequent levy of assessments for all or part of the cost of the improvement, that the hearing be held and the improvement ordered before the construction contract is awarded, or the work ordered done by day labor.⁴⁰ In turn, the right to issue improvement bonds or warrants is by implication predicated on the council's having properly awarded a contract or ordered the work done by day labor.⁴¹ It is clear that the hearing is a mandatory step in the assessment procedure,⁴² and therefore the owners of property to be assessed may get further proceedings enjoined if the council omits this step.⁴³ Lack of an initial hearing, or irregularities in holding it, in the absence of waiver, are grounds for setting aside an assessment.⁴⁴

THE IMPROVEMENT CONTRACT

The provisions of § 429.041 regarding the advertisement for construction bids, the awarding of improvement contracts, the do-

38. It is perhaps arguable that since the chapter is a complete enactment on improvements for which assessments will be levied, and since it nowhere requires voter approval of improvements, no election is therefore required as to any improvements made under the chapter. However, I believe that under ordinary principles of statutory construction, particularly as stated in § 645.39, other statutes requiring elections remain applicable.

39. § 429.031 (2).

40. § 429.031 (1); *Nelson v. Willmar*, 201 Minn. 305, 276 N. W. 234 (1937) *semble* (contract held void). But a contract awarded prematurely under this chapter might still be enforceable against the municipality and its taxpayers, if it were correctly advertised and violated no charter or statutory budget limitations.

41. § 429.091 (1).

42. The giving of notice and holding of a hearing, where required by statutes such as the chapter, are generally held to be "jurisdictional" and mandatory. *In re Meyer*, 158 Minn. 433, 197 N. W. 970, 199 N. W. 746 (1924) (opinion by Holt, J.); 13 McQuillin, *Municipal Corporations* §§ 37.40, 37.51.

43. *Cf. Soukup v. New Prague*, 161 Minn. 299, 201 N. W. 604 (1924); see *In re Meyer*, *supra* note 42 at 441, 199 N. W. at 747 (1924). As to the right of the general taxpayers to get an injunction, compare *Patterson v. Barber Asphalt Paving Co.*, 96 Minn. 9, 104 N. W. 566 (1905), with *Merritt v. Duluth*, 103 Minn. 236, 114 N. W. 758 (1908).

44. *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053 (1904); *In re Meyer*, 158 Minn. 433, 197 N. W. 970, 199 N. W. 746 (1924) (only 10 days' published notice given, 14 being required).

ing of work by day labor, and the furnishing of materials and equipment by the municipality are lengthy but generally well worded. They tend to be more liberal and flexible than other Minnesota statutory and charter provisions on the same subject. For improvements made under the chapter, they of course supersede other and more stringent limitations otherwise applicable.⁴⁵ Among the liberal rules in this section are those permitting the improvement to be done by day labor if the engineer estimates the cost will be less than \$5,000,⁴⁶ and permitting the council to advertise separately for various portions of the job, or to combine several improvements into one advertisement for bids. Despite their liberality, the public bidding rules are mandatory; if they are not observed, the contract will be invalid.⁴⁷ As previously stated, if the contract is not properly awarded, the council may not issue obligations under § 412.091 to finance the improvement.

Before it starts to contract for the making of an expensive improvement, the council ought to survey the availability of financing. If it has reason to believe that it may not be able to get financing at

45. §§ 429.021 (3) and 429.111; as to villages, see § 412.311. Sections 471.01-471.04 probably do not apply to proceedings under the chapter, since the latter requires publication of the estimated cost in the notice of hearing, and also requires public bidding. However, §§ 471.87-471.89 are undoubtedly applicable to improvement contracts. General laws may constitutionally supersede home rule charter provisions. *E.g.*, *State v. Peterson*, 180 Minn. 366, 230 N. W. 830 (1930).

46. May the council, if the estimated cost of the improvement is less than \$5,000, award a construction contract therefor without public bidding? This depends on the proper interpretation of § 429.041 (2) where it says that in such cases "the council may . . . without advertising for bids, directly purchase the materials for the work and do it by the employment of day labor or in any other manner the council considers proper." Possibly the municipality should comply with applicable statutory and charter public bidding provisions in such cases if it does not propose itself to purchase the materials and hire the work done by day labor but intends to hire a contractor. *Quaere*, also, whether in purchasing materials to be used on any improvement, whenever permitted by § 429.041, public bidding provisions must be observed, such as §§ 471.34-471.37 (all municipalities), § 412.311 (villages), and § 365.37 (towns). The public bidding rules of § 429.041 are undoubtedly applicable to contracts made under § 429.041 (4), as well as §§ 471.34-471.37.

47. *E.g.*, *Schiffman v. St. Paul*, 88 Minn. 43, 92 N. W. 503 (1902); *Arpin v. Thief River Falls*, 122 Minn. 34, 141 N. W. 833 (1913) (franchise); *Fargo Foundry Co. v. Callaway*, 148 Minn. 273, 181 N. W. 584 (1921); *Casey v. Central Elec. & Tel. Co.*, 202 Minn. 510, 279 N. W. 263 (1938) (franchise); and *Coller v. St. Paul*, 223 Minn. 376, 26 N. W. 2d 835 (1947). Despite such invalidity of the contract, the Minnesota supreme court has generally permitted a quasi-contractual recovery, provided the contract is not *ultra vires* in the primary sense and not tainted with fraud. *Kotschevar v. North Fork*, 229 Minn. 234, 39 N. W. 2d 107 (1949) (reviewing many of the cases). A good review of the Minnesota law on recovery on *ultra vires* municipal contracts will be found in Note, 34 Minn. L. Rev. 46 (1949). For the distinction between contracts *ultra vires* in the primary and in the secondary sense, see *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271 (1907); *Oliver Iron Mining Co. v. Independent School Dist. No. 35*, 155 Minn. 400, 193 N. W. 949 (1923); *Mares v. Janutka*, 196 Minn. 87, 264 N. W. 222 (1936); *Kotschevar v. North Fork*, *supra*; Note, 34 Minn. L. Rev. 46 (1949).

all, or only at an interest rate it would be unwilling to accept, it is faced by this dilemma: if it awards the improvement contract before financing is arranged, it may render the municipality liable to the contractor for a breach of contract, or may have to sell bonds on terms it considers unwise; on the other hand, bonds may not be issued until the contract has been awarded.⁴⁸ The solution is either to negotiate a commitment with a bond purchaser, in advance of the letting of the contract, to purchase an approximate number of bonds,⁴⁹ or to receive construction bids on the basis that the best bid or bids may be held for 30 days, and in the interval arrange a private or public sale of the bonds.

I feel there is no point in rehearsing in this Article such matters as what the advertisement for bids must contain, and how the advertisement must be published, the chapter being its own clear expositor on these requirements. There are a number of matters, however, not covered by the chapter, which will bear comment.

For example, there is the question whether, in the plans and specifications and the contract for the improvement, there may be included a provision for repairs or for a guarantee of maintenance of the improvement during a certain period after construction. It is well settled that the municipality may not include in the contract for an improvement an item for future repairs, and charge such item to the property-owners; however, if the item is found to be merely a guarantee of good workmanship and extends for a reasonable time only, it may be included in the cost to be assessed.⁵⁰ By analogy, if the municipality is having the work done by day labor, it should be permitted to include in the cost to be assessed the amount which it reasonably expects to spend in correcting defects which experience indicates will become apparent soon after the job is done.

The chapter requires that plans and specifications be drawn up for any improvement;⁵¹ by implication, the improvement contract must conform to the plans and specifications.⁵² This is of course

48. § 429.091 (1).

49. It is technically possible to hold a public sale of the bonds before or concurrently with the letting of the contract, since the contract will be awarded before the bonds are actually issued, but the practical objection is that before the bids are opened there will not be a definite amount of bonds to be bid for. Furthermore, the municipality runs the risk, if it sells the bonds first, that the project cannot be carried out because the construction bids are too high.

50. *State v. District Court*, 80 Minn. 293, 83 N. W. 183 (1900); 13 McQuillin, *Municipal Corporations* §§ 37.92, 37.113; 14 *id.* § 38.17. If the repair item can be and is segregated, and not more than the remaining cost is assessed, it seems that those assessed can have no valid objection.

51. § 429.041 (1).

52. *Le Tourneau v. Hugo*, 90 Minn. 420, 97 N. W. 115 (1903); *Coller v. St. Paul*, 223 Minn. 376, 26 N. W. 2d 835 (1947).

necessary if there is to be true competitive bidding. But suppose among the bids received, the lowest one specifies a different material, or a different type of construction, from that proposed in the plans and specifications; may the council accept such a bid? The answer to this question seems to depend on whether the variance is a material one, and this, according to the cases, depends primarily on whether it gives the low bidder a substantial advantage over other bidders.⁵³ Even if the municipal officials in good faith believe it is to the advantage of the municipality to accept the bid which materially varies from the plans and specifications, they may not do so.⁵⁴ However, bids need not be rejected which propose alternative materials or methods of installation, etc., as long as they are open for acceptance within the terms of the plans and specifications.⁵⁵ Apparently whether a particular variance is material is not a merely administrative question as to which the council has any wide latitude for decision, because the cases quite thoroughly review the facts whenever the question is presented.⁵⁶

A similar problem, also stemming from the letter and the spirit of public bidding requirements, arises after the contract has been awarded and changes in the amount or nature of the work appear necessary or desirable. Most plans and specifications for municipal improvements provide that the council may order such changes, and require that bids be submitted on the basis of unit prices for work and materials, additions to or deductions from the total contract price to be made at unit prices in the event that changes are made in the extent of the improvement. Where the plans and specifications are so drawn, the council may order additional quantities of work and materials without advertising for competitive bids.⁵⁷ Even if there are no specific provisions in the plans or contract for changes in the scope of the improvement, municipal officers must

53. *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911 (1903); *Rice v. St. Paul*, 208 Minn. 509, 295 N. W. 529 (1940); *Coller v. St. Paul*, *supra* note 52. But in *Sutton v. St. Paul*, 234 Minn. 263, 48 N. W. 2d 436 (1951), the court stated that substantial advantage to the noncomplying bidder is not the only test: the bid must respond to specifications in all material respects. This statement is no doubt correct. For instance, specifications call for 4" curbs, but A's bid is for 6" curbs, and it is the low bid. The council considers 4" curbs safer and more convenient, so it should not have to accept A's bid.

54. *Diamond v. Mankato*, *supra* note 53; *Coller v. St. Paul*, *supra* note 52.

55. *Cf. Hendricks v. Minneapolis*, 207 Minn. 151, 290 N. W. 428 (1940); *Coller v. St. Paul*, *supra* note 54.

56. *Cf. cases cited in notes 52-55 supra*; *Interstate Power Co. v. Fairbanks, Morse & Co.*, 194 Minn. 110, 259 N. W. 691 (1935); *Bemidji v. Ervin*, 204 Minn. 90, 282 N. W. 683 (1938).

57. *Carson v. Dawson*, 129 Minn. 453, 152 N. W. 842 (1915). The reasoning in the opinion also appears to sanction ordering of decreases without readvertising.

be allowed some reasonable discretion to make them, if they are necessary or advisable.⁵⁸

Section 429.041(2) says the contract shall be awarded to the lowest "responsible" bidder. It seems to be definitely established that the council has a wide discretion in deciding who is a responsible bidder, and the courts will not be likely to interfere with their decision.⁵⁹ Section 429.041(1) requires the advertisement for bids to state that "no bids will be considered unless . . . accompanied by a cash deposit, cashier's check, bid bond, or certified check" for a stated percentage of the amount of the bid. However, the council can still enter into a binding contract with a bidder who fails to submit such security.⁶⁰ The fact that only one bid was submitted does not, under § 471.34, bar the council from accepting it, provided the bid includes the necessary work, as well as the furnishing of materials and equipment.⁶¹

Even if the council has in all respects so far complied with the improvement procedure, it may be embarrassed to find that the lowest bid is substantially in excess of the engineer's estimate of the cost. The obvious argument against accepting the bid is that the improvement which was ordered and on which the hearing was held was one costing approximately that dollar amount which was stated in the notice of hearing as being its estimated cost, and therefore there has been no hearing on this improvement, nor any resolution ordering it. On the other hand, the council can claim that a hearing was held on this improvement, despite the difference between the estimated and the actual cost, because the notice did describe this particular improvement, and did give as correct an estimate of the cost as was then possible; and further, conceding the estimated cost to have been a material element in deliberating on the improvement, that it was not meant to be a top limitation,

58. *Accord*, *O'Dea v. Winona*, 41 Minn. 424, 43 N. W. 97 (1889); *see* *Diamond v. Makato*, 89 Minn. 43, 55, 93 N. W. 911, 914 (1903) (dissenting opinion). It may seem to be contrary to the public policy in favor of competitive bidding to permit subsequent changes in improvement contracts, but it is better policy that municipal officials should not be irrevocably committed to carry out strictly a contract which it later appears should, in the best interests of the municipality, be changed. Obviously the municipality, already bound on the contract awarded, cannot readvertise for bids. However, substantial variances introduced into the contract by the municipality at the time it is awarded cannot be justified because at that time the municipality is free to reject all bids and readvertise according to revised plans and specifications. *But cf.* *O'Dea v. Winona*, *supra*.

59. *State v. Snively*, 175 Minn. 379, 221 N. W. 535 (1928); *Otter Tail Power Co. v. Elbow Lake*, 234 Minn. 419, 49 N. W. 2d 197 (1951); *Otter Tail Power Co. v. Wheaton*, 235 Minn. 123, 49 N. W. 2d 804 (1951).

60. *Cf.* *Tunny v. Hastings*, 121 Minn. 212, 141 N. W. 168 (1913).

61. *Otter Tail Power Co. v. Elbow Lake*, 234 Minn. 419, 49 N. W. 2d 197 (1951).

fixed or approximate, on the amount which could be spent, but "was precisely what its name imported, to-wit, an approximate judgment or opinion."⁶² As to the resolution ordering the improvement, the council can argue either that (1) it still stands, because the estimated cost was not an essential or controlling element in the council's decision to make the improvement, or that (2) while the former resolution is voided, the resolution awarding the contract (if adopted within six months after the date of hearing) comprehends within it the necessary order that the improvement be made. To avoid any question in this situation, the council could, if the delay will not be harmful and it has reserved the right to hold bids for a sufficient period, hold a rehearing on the same notice as the original hearing, but stating the new cost figure, before awarding the contract.⁶³

A bond "conditioned as required by law" must be furnished with the contract.⁶⁴ It must comply with § 574.26 *et seq.*⁶⁵ The bond ought to include all the provisions required by statute, for although when a bond is obviously given for the purpose of complying with statute, the Minnesota court has said that it will liberally construe the language of the bond in the light of the statute,⁶⁶ it has indicated that it will not supply non-existent provisions.⁶⁷ On

62. *Nash v. St. Paul*, 23 Minn. 132, 135 (1876).

63. This problem will not arise if, as suggested earlier, the hearing is held after opening of bids.

64. § 429.041 (2). If no bond is furnished, the contract is void. See § 574.26; *Lundin v. Butternut Valley*, 172 Minn. 259, 214 N. W. 888 (1927).

65. Minn. Laws 1929, c. 369, added the following to the text of § 574.26: "The provisions hereof shall govern every municipal corporation or other public board or body in this state, any provision in any general or special act or charter to the contrary notwithstanding. It shall not be necessary to obtain leave of court to bring any action against any principal or surety in any such bond." Apparently this addition to the section was the legislature's answer to *Rand Kardex Service Corp. v. Forrestal*, 174 Minn. 579, 219 N. W. 943 (1928), holding that Duluth home rule charter and ordinance provisions regarding contractors' bonds prevailed over statutory provisions. However, this language was omitted from Minn. Laws 1931, c. 229, further amending the section, and has never since reappeared. An unpublished opinion of the Attorney General (83-F, Sept. 9, 1932) stated that this language was, nevertheless, still in effect, but this is possibly not the case since the enactment of the Minnesota Revised Statutes of 1945. *Cf. State ex rel. Bergin v. Washburn*, 224 Minn. 269, 28 N. W. 2d 652 (1947). *But cf. State v. Pierz*, 62 N. W. 2d 498 (Minn. 1954). The sensible course for a municipality to take is to require the bond to comply with the statutory as well as local requirements, if any.

66. *Waterous Engine Works v. Clinton*, 110 Minn. 267, 125 N. W. 269 (1910); *Fairmont Cement Stone Mfg. Co. v. Davison*, 122 Minn. 504, 142 N. W. 899 (1913); *Fay v. Bankers Surety Co.*, 125 Minn. 211, 146 N. W. 162 (1914); *Ceco Steel Products Corp. v. Tapager*, 208 Minn. 367, 294 N. W. 210 (1940).

67. *Scott-Graff Lum. Co. v. Independent School Dist. No. 1*, 112 Minn. 474, 128 N. W. 672 (1910); *Fairmont Cement Stone Mfg. Co. v. Davison*, *supra* note 66; *Fay v. Bankers Surety Co.*, *supra* note 66; *Ceco Steel Products Corp. v. Tapager*, *supra* note 66.

the other hand, in *Guaranteed Gravel & Sand Co. v. Aetna Casualty & Surety Co.*,⁶⁸ the court wrote into the bond a provision it did not contain.

In § 429.041(5), the chapter expressly contemplates the possibility that a municipality may undertake an improvement jointly with the state, the county, or another municipality, and that the other party will advertise for bids and award the improvement contract. Express authority to make co-operative agreements for joint improvements is not found in § 429.041(5), but is given in various other statutes,⁶⁹ each of which has special requirements to be observed, over and above the requirements of the chapter. If city *B* is to advertise for bids and award the contract, city *A* should in the co-operative agreement protect itself by reserving the right to pass on the plans, specifications, contract proposal and form of advertisement for bids, to make sure that they (1) comply in all respects with the intentions of the parties and the public bidding rules of city *B*,⁷⁰ and (2) do not permit bids for other improvements of city *B* to be tied to bids for the joint project.⁷¹ City *A* should also stipulate in the agreement that it will not be bound on the improvement contract until it has passed a concurring resolution approving it. This will protect city *A* from city *B*'s having let the job for too high a price, or having awarded a contract in violation of the applicable public bidding law. City *B* may, of course, rightfully insist on the reciprocal provision that its award of the contract is not final until city *A* has adopted its concurring resolution. In many cases it may be advisable, also, to limit each city's liability, *vis a vis* the contractor, to that amount or percentage of the cost charged to the city in the co-operative agreement.

68. 174 Minn. 366, 219 N. W. 546 (1928).

69. Chiefly § 471.59, permitting any state governmental units except the state itself to enter into co-operative projects under an agreement. Section 160.41 authorizes municipalities and the commissioner of highways to enter into agreements for construction of trunk highways within corporate limits. Section 160.431 authorizes such agreements, as to state aid roads, between counties and municipalities. Section 435.36 authorizes agreements between counties and municipalities as to state aid or county aid roads. Section 161.03 (26) authorizes municipalities to appoint the commissioner of highways as agent for construction of federally aided roads and bridges or for construction of roads and bridges connecting with such federally aided improvement. There are a number of sections of Minn. Stat., c. 162, which provide for appropriations to or reimbursements of municipalities by counties for the improvement of roads, streets or bridges within municipal boundaries, but these sections do not contemplate that the improvement contract will be awarded by the county.

70. § 429.041 (5).

71. If bids for sole improvements of city *B* are permitted to be tied to bids for the joint improvement, there is a possible argument that city *A* is participating, under § 471.59, in construction of city *B* improvements, which of course it has no power to do.

IMPROVEMENT BONDS

Having awarded a contract for making the improvement, or ordered it done by day labor, the council may then calculate the total expense of the improvement,⁷² determine by resolution the amount to be paid out of general ad valorem tax levies and the amount to be assessed, if any, and issue obligations to pay for the improvement.⁷³ It may also proceed with preparation of the assessment roll and levy of the assessments, but the assessment procedure normally comes after the issuance of the obligations.

In determining the portions of the cost to be assessed and to be raised by general taxation, the chief consideration is: what is the amount of special benefits to property, as distinguished from general benefits to the whole community?⁷⁴ Actually, every improvement confers both special and general benefits.⁷⁵ At first blush, a municipal sewage or waterworks plant seems to confer purely general benefits, but surely there must be some properties in the municipality which do not, and never will, benefit from its operation, and even more surely, all of the properties do not benefit equally. Contrariwise, the paving of a dead-end street seems to involve no general benefit whatever, but a general benefit may be derived, for instance, from greater ease of street maintenance.⁷⁶ Fortunately,

72. § 429.061 (1). The expense figure should cover the contract price and all incidental items. § 429.091 (1); *St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. 424 (1880); *Burns v. Duluth*, 96 Minn. 104, 104 N. W. 714 (1905). The obvious incidental items are the cost of acquiring necessary land or easements, engineering cost, legal fees, fiscal agent's fees, publication costs, and expense of bond printing; there may also be included the following:

- (a) Engineering and other services of salaried municipal officers and rental value of municipal equipment used. *In re* Improvement of Lake of the Isles Park, 152 Minn. 29, 188 N. W. 54 (1922).
- (b) Capitalization of interest to be paid on the bonds before taxes and special assessments can be collected. *Accord*, *Otter Tail Power Co. v. Wheaton*, 235 Minn. 123, 49 N. W. 2d 804 (1951).
- (c) When work is to be done by day labor, an allowance for repairing the original construction, as previously discussed.
- (d) The total fees to be paid to the county auditor by municipalities in Hennepin County under Minn. Laws 1953, c. 74.

73. § 429.091 (1).

74. § 429.051 requires the assessments to be based upon the benefits received. Cf. Minn. Const. Art. IX, § 1: "... the legislature may authorize municipal corporations to levy and collect assessments for *local improvements* upon property *benefited thereby* without regard to a cash valuation..." [Emphasis added]. "Local improvements" in this section of the constitution means "improvements made in a particular locality, by which the real property adjoining or near such locality is specially benefited." *Rogers v. St. Paul*, 22 Minn. 494, 507 (1876). To the same effect: *In re* Improvement of Lake of the Isles Park, 152 Minn. 29, 188 N. W. 54 (1922).

75. *Accord*, *Rogers v. St. Paul*, *supra* note 74; and see *State v. District Court*, 33 Minn. 295, 23 N. W. 222 (1885) (good discussion).

76. I do not mean to imply that the general benefits must be so narrowly appraised, in order to justify payment of part of the cost of the improvement by general taxation, as the special benefits must be, in order to

the courts give a wide discretion to municipal governing bodies in the determination of benefits, holding that their determination is final, unless it can be shown that they (1) acted fraudulently, or (2) made a palpable mistake of fact, or (3) applied a mistaken rule of assessment.⁷⁷ The measure of the special benefits is the enhancement of the market value of the property caused by the improvement.⁷⁸ This being the rule, it is improper to proportion the assessments according to the present value of the property.⁷⁹ The market value of property may be enhanced by an improvement even though the property does not abut on the improvement or cannot immediately be served by it.⁸⁰ The market value of property may also be enhanced although the improvement does not add to its value for the use to which it is presently devoted, as long as it adds to its value for other uses.⁸¹

Having determined the amount of the benefits, the council must make sure that the proportion of the cost to be assessed does not exceed the benefits, as it has been repeatedly held that assessments in excess of benefits are invalid.⁸² The council ought also to ask itself the following practical questions about the assessments :

justify the levy of special assessments. All of the improvements authorized by the chapter are public improvements and legitimate objects for the expenditure of money raised by general taxation.

77. *State v. District Court*, 33 Minn. 295, 23 N. W. 222 (1885); *State v. District Court*, 68 Minn. 242, 71 N. W. 27 (1897); *State v. District Court*, 80 Minn. 293, 83 N. W. 183 (1900); *State v. District Court*, 95 Minn. 70, 103 N. W. 744 (1905); *Mayer v. Shakopee*, 114 Minn. 80, 130 N. W. 77 (1911); *In re Assessment for Mississippi River Blvd.*, 169 Minn. 231, 211 N. W. 9 (1926).

78. *In re Improvement of Superior Street*, 172 Minn. 554, 216 N. W. 318 (1927), *cert. denied*, 276 U. S. 628 (1928); *cf. Armour v. Litchfield*, 152 Minn. 382, 188 N. W. 1006 (1922).

79. *In re Improvement of Third Street*, 185 Minn. 170, 240 N. W. 355 (1932). Section 429.061 (1) requires the assessments to be calculated without regard to cash valuation.

80. *State v. District Court*, 33 Minn. 295, 23 N. W. 222 (1885); *Strickland v. Stillwater*, 63 Minn. 43, 65 N. W. 131 (1895); *St. Paul v. Sanborn*, 176 Minn. 62, 222 N. W. 522 (1928). Section 429.051 provides that "the cost . . . may be assessed upon property . . . whether the property abuts on the improvement or not. . . ." The classic fact situation is that portrayed in the *Sanborn* case, where a trunk sewer must be constructed big enough to serve eventually an entire drainage district, but the district is at present only partially built up, so that the mains and laterals are left to be added later. It is unjust that only those properties in the district immediately tied into the sewer system should bear the cost of the trunk sewer. But no benefit can accrue to property so situated that it cannot be connected to a lateral sewer without trespassing on private property. *State v. District Court*, 90 Minn. 540, 97 N. W. 425 (1903).

81. *In re Improvement of Superior Street*, 172 Minn. 554, 216 N. W. 318 (1927), *cert. denied*, 276 U. S. 628 (1928); *In re Assessment for Widening East Fourth Street*, 173 Minn. 67, 216 N. W. 607 (1927); *Board of Park Comm'rs v. Bremner*, 190 Minn. 534, 252 N. W. 451 (1934); *Qvale v. Willmar*, 223 Minn. 51, 25 N. W. 2d 699 (1946); *Note*, 12 Minn. L. Rev. 524 (1928) (railroad property).

82. *E.g., Armour v. Litchfield*, 152 Minn. 382, 188 N. W. 1006 (1922);

(1) Is the proposed apportionment of the cost between special assessments and general taxes in line with what is, or ought to be, the policy of the municipality? For instance, if all the cost of paving *A* Street was assessed to the abutting owners, then is it fair to assess only 50% of the cost of paving *B* Street to the abutting owners?

(2) What other revenues is it the policy of the municipality to use to aid in paying for improvements of the type in question? Possible sources of revenues are discussed further on.

(3) Are the proposed assessments too high in relation to the market value of the land plus the improvement? For example, if an unimproved tract is worth \$25 and the improvement increases its market value to \$225, an assessment of \$200 will be valid; however, the municipality will in effect have a mortgage for about 90% of the value of the land,⁸³ and the owner will lose only \$25 by letting it go for taxes. Obviously, the risk of failure to collect the assessments in such a situation is serious, and will adversely affect the terms on which the municipality can finance the improvement. The council should consider whether the public necessity for the improvement outweighs the risk.

Finally, and especially in gauging the capacity of the property to pay the assessments, the council should consider the number of annual installments into which the assessments are to be divided.⁸⁴ Like the determination of the proper proportion of the cost to be assessed, this is also a proper subject for the exercise of an over-all policy. As a practical matter, the assessments should in general not run longer than a conservative estimate of the life of the improvement. The shorter the period, the shorter the bond maturities may be, and also the lower the interest rate on the bonds.

Under § 429.091 (3), the council is not required, if it is specially assessing at least 20% of the cost⁸⁵ of the improvement, to call an election on the issuance of obligations to finance all or part of

In re Assessment for Mississippi River Blvd., 169 Minn. 231, 211 N. W. 9 (1926). It seems, however, that the determination of the assessments by the council will not be disturbed by the courts unless it is greatly or materially in excess of the benefits. See the two cases just cited; also, *In re* Assessment for Paving Concord Street 148 Minn. 329, 181 N. W. 859 (1921); *In re* Improvement of Superior Street, 172 Minn. 554, 216 N. W. 318 (1927), *cert. denied*, 276 U. S. 628 (1928).

83. On the assumption that the municipality finances the improvement from available moneys on hand, or by issuing general obligation improvement bonds; if the improvement is financed by issuing improvement warrants, the risk that the assessments will not be paid falls on the warrant holders.

84. Not to exceed 20. § 429.061 (2).

85. Note that the formula is 20% of the "cost", not of the principal amount of the obligations.

such cost.⁸⁶ Some home-rule charters require that all bonds must be submitted to a vote, with only a few unimportant exceptions for re-funding bonds, judgment bonds, etc. Such charter provisions are, I believe, not applicable to obligations issued under the chapter.⁸⁷

Some councils seem to desire voter approval of bond issues even though such approval is not legally required. It seems that there is authority for holding an election on improvement obligations, even when more than 20% of the cost of the improvement is to be assessed. In the first place, all that the chapter says is that an election is not "required" in such cases, and the wording of § 475.58 of the bond code is also neutral. Secondly, § 429.091 (3) provides that "all obligations shall be issued in accordance with the provisions of Minnesota Statutes, Chapter 475,"⁸⁸ and § 475.57 provides that an initial resolution for the issuance of bonds shall be adopted, which "may provide for the submission of the question [of the issuance of bonds] to vote of the electors." However, one should assume that a bond election will have the effect of holding the council to issuing no more bonds than the amount stated in the ballot, and therefore such a restriction may be hampering if the election is held before the final estimated cost figure has become available.

The improvement obligations, whether they are bonds or warrants, are not subject to legal debt limits.⁸⁹ However, they must not be issued in excess of the cost of the improvement or improvements to be financed.⁹⁰ Due to the necessity for meeting periodic payments on the improvement contract,⁹¹ the bonds or warrants are usually issued before the work has been completed and the final cost figure established. The amount of the obligations must therefore necessarily be based on an estimate of the cost, which may turn out to have been set too high. If there are any proceeds of the obligations left over after payment of all expenses of the improvement or improvements, they should be transferred to the fund established under § 429.091 (4) for payment of the obligations.⁹²

Before selling the improvement obligations, the council must decide whether to make them general obligations ("improvement

86. See also § 475.58 (1), subparagraphs (3) and (6). § 429.091 (1) places the basic power to issue obligations in the council.

87. See §§ 429.021 (3) and 429.111, and *cf.* *Pike v. Marshall*, 146 Minn. 413, 178 N. W. 1006 (1920).

88. Incidentally, this subjects improvement obligations to the numerous miscellaneous provisions of Chapter 475, such as: they must mature serially (§ 475.54), may not promise to pay interest at a rate higher than 6% per annum (§ 475.55), etc.

89. §§ 429.091 (3), 475.51 (4) and 475.53.

90. See § 429.091 (1).

91. See § 429.041 (6).

92. See § 475.65.

bonds") or special obligations ("improvement warrants"). The difference is that bonds are secured by a promise to pay out of other municipal funds and out of unlimited additional tax levies, should it turn out that the original taxes and assessments levied to pay the cost of the improvement are insufficient;⁹³ but warrants are payable only out of the originally-levied taxes and assessments.⁹⁴ Naturally enough, municipalities can dispose of improvement warrants only at higher interest rates, if at all, and therefore they have rarely been issued in recent times. They will not be dealt with further.

The bond maturities generally correspond to the schedule of installments of assessments and taxes,⁹⁵ but with a suitable lag to allow time for collection of such installments. Since § 429.061 (2) limits the number of installments of assessments to 20, this usually means that the bonds mature finally in 22 years or less, depending on the number of installments of assessments. The reservation of a privilege to call all or a part of the bonds for redemption before maturity presents a problem. Such a privilege is desirable, if any of the bonds run out longer than about 10 years, in order to take full advantage of prepayments of special assessments,⁹⁶ but all of the usual schemes have their disadvantages, as follows:

- (1) All bonds callable on any interest payment date: the bonds cannot ordinarily be sold to advantage on the general market, but perhaps a local investor, usually a bank, may be willing to buy the entire issue on this basis.
- (2) Some bonds non-callable, but the rest callable on any interest payment date: in a sale of the bonds on the general market, the non-callable bonds may "carry" the others if

93. *Bergman v. Golden Valley*, 201 Minn. 28, 275 N. W. 297 (1937), construing provisions similar to § 429.091 (2).

94. § 429.091 (2). The only liability of the city on the warrants, beyond the statutory one of paying them out of the moneys in the improvement fund on which they are issued, is for failure to levy sufficient valid assessments, or for negligence in collecting them and applying them to the proper improvement fund. Cf. *Leslie v. White Bear Lake*, 186 Minn. 543, 243 N. W. 436 (1932); *Judd v. St. Cloud*, 198 Minn. 590, 272 N. W. 577 (1936).

95. See § 429.091 (3).

96. See § 429.061 (3). It is usually very difficult to estimate the amount which property-owners will prepay, under § 429.061 (3), before the assessment roll is certified to the county auditor. While many property-owners say they will prepay, often this intention is not carried out. The rate of assessment prepayments later on will to a large extent depend on the rate of turnover in property, because in most real estate transactions the buyer insists on getting title free and clear of the lien of assessments.

The call privilege may also be of great value, in the case of a bond issue with long maturities, in permitting the later-maturing bonds which remain unpaid when the privilege becomes exercisable to be redeemed and refunded at a lower rate of interest.

the ratio of callable bonds to non-callable bonds is small. Alternatively, the non-callable bonds may be sold on the general market, and the callable ones sold locally.

- (3) All bonds maturing 10 or more years after date of issue callable at or after such time: this arrangement is palatable to bond buyers, but assessment prepayments cannot, during the period of 10 or more years in which no bonds may be called, be used to pay off bonds and stop the running of interest.
- (4) All bonds callable after a shorter period than 10 years from date of issue, at a premium: the redemption premium tends to take the curse off the call feature, resulting in a lower rate of interest on the bonds. However, marketability is always reduced if there is a wide spread between the maturity and the call date.
- (5) All bonds callable one or two years before their respective maturity dates, but in no case less than a year (or preferably longer) after date of issue: this plan may not too adversely affect the terms of sale. If about 10% of the assessments are initially prepaid, such prepayments can be used to retire bonds in a year or two.

If it should happen that assessments are prepaid in large amounts before the municipality can exercise the call privilege, it is still possible to make up at least part of the bond interest which will run until the call date by investing the amount of the prepayments.⁹⁷

The bonds may be sold publicly, upon competitive bidding, or privately.⁹⁸ It is impossible to generalize successfully on which method should be chosen; the decision will depend on market conditions prevailing at the time of sale. If the sale is to be made on public bidding, it is generally wiser to specify that only sealed bids will be considered, because possible purchasers who cannot be personally present are reluctant to submit sealed bids, only to present a target for oral auction bidders to shoot at. The sale notice normally defines the bond denominations, maturities, etc., but leaves the interest rate and purchase premium open. A sale of the bonds to the local bank should be avoided, if any member of the council has a personal financial interest in the bank.⁹⁹ Whether the sale be public

97. The permitted investments are set forth in § 475.66.

98. § 475.60 (2) exempts bonds payable wholly or partly from special assessments from the public sale requirements. § 475.60 (4) authorizes the sale of bonds on public subscription, but this method of sale is practically never used.

99. § 471.87. The municipal treasurer is usually not a member of the council. As to villages, see § 412.191 (1). A sale to a bank in which he has an

or private, § 475.60(1) requires that the bonds be sold for not less than par and accrued interest; a discount sale is not permitted.

In municipalities having a municipal liquor store, all or part of the net revenues of such store may be pledged to the payment of sewer or water improvement bonds, but the voters must first authorize the pledge at an election.¹⁰⁰ As previously suggested, this type of election may be effective beyond its stated legal purpose as a means of testing voter sentiment on the proposed improvement bond issue: obviously, any voter who disapproves of the bonds will vote "no" on the liquor pledge question. The pledge may be in the form of a stated percentage of the liquor revenues over and above the cost of operation, or of a minimum dollar amount per annum of the revenues in excess of such cost. Such a pledge in one sense does not add very much to the essential security of the bonds, since the bond holders have a right to payment from any revenues of the municipality, including those in the liquor fund,¹⁰¹ but the pledge does accomplish the following: (1) it draws to the attention of prospective purchasers the fact that the municipality has a profit-making municipal liquor store; (2) it compels the municipality to operate the store efficiently; (3) it permits ad valorem taxes to be levied initially in an amount lower than would be required if the pledge had not been made;¹⁰² (4) it gives the taxpayers as well as the bondholders a right not to have the liquor store profits dissipated on other projects. But in pledging liquor revenues, the municipality cannot promise that the municipal liquor store will be kept in operation until the bonds are paid, because there is always the danger that the municipality or the county may, under Chapter 340, vote dry.

For utmost flexibility in financing, it would be useful if the municipality could pledge the revenues of the municipal system improved, if it is a revenue-producing one, to the payment of the bonds. There is, however, no statutory or case authority for such a

interest would therefore be proper, as he is not "authorized to take part in any manner" in the contract selling the bonds, within the language of § 471.87. Even if the sale is made pursuant to competitive bids, the literal terms of §§ 471.87-471.89 would prevent sale of the bonds to the lowest bidder, if a council member had an interest in such bidder. See 35 Minn. L. Rev. 322 (1951). For a discussion of what interests are disqualifying, see 23 Minn. L. Rev. 239 (1939).

100. § 426.19.

101. As to improvement bonds, § 429.091 (2) provides that in the event the improvement fund is insufficient, "the council shall pay the principal and interest out of any fund of the municipality."

102. § 475.61 (1).

pledge.¹⁰³ The municipality can certainly annually appropriate sums from the revenues of the improvement to the improvement fund, as they are received.¹⁰⁴ To the extent of such annual appropriations, the municipality may each year cancel the general taxes originally levied for that year for the improvement fund.¹⁰⁵

SPECIAL ASSESSMENTS

I discussed above the fixing by the council of the total amount to be assessed, in the light of their determination of the benefits, before they proceed to issue bonds. Actually, the council would, in determining benefits, simultaneously determine what scheme of assessment should be followed, the benefits and assessments being so inseparably connected.

As previously stated, the assessments must be based on, and must not exceed, the benefits received,¹⁰⁶ and must not rely upon a mistaken rule of assessment.¹⁰⁷ But these rules are not enough; the council must devise a practical formula for the calculation of the assessment to be made against each property specially benefited.¹⁰⁸ This formula must operate so that the assessment on each property does not exceed the benefits thereto, and so that the assessments on all properties are roughly in the same proportion to their respective benefits.¹⁰⁹ A number of formulas have received the blessing of

103. § 459.14 (3), by way of contrast, grants such authority for parking facility improvements. *Struble v. Nelson*, 217 Minn. 610, 15 N. W. 2d 101 (1944), and the cases cited therein, support the proposition that the mere power to operate a revenue-producing enterprise implies power to improve it with bonds payable from its own net revenues. Where express authority to issue general obligation bonds for such an improvement also exists, it seems reasonable to suppose that combined general obligation and revenue bonds may be issued, but there is no case deciding the point. The bond chapter (Chapter 475) contemplates the possibility of such bonds, in §§ 475.52 (1) and 475.61 (1), and might perhaps be considered to authorize them expressly. Some city charters also may provide for such bonds. But Chapter 429 contains no language authorizing the municipality to pledge improvement revenues to the improvement fund; such a pledge may therefore be unenforceable.

104. Almost all cities and villages are required, under §§ 443.09 and 443.10, to apply sewer revenues in excess of those needed for operation and maintenance to the payment of bonds and to a reserve for replacements and obsolescence.

105. § 475.61 (3). This does not permit the cancellation of special assessments levied for the improvement. *Cf.* § 443.10, as to sanitary sewer assessments.

106. See notes 74 and 82 *supra*.

107. See note 77 *supra*.

108. Neither the constitution nor the statute lays down any rule or basis of apportionment. An apportionment according to cash valuation of the various tracts benefited would be invalid because "unequal". See note 79 *supra*; see *Noonan v. Stillwater*, 33 Minn. 198, 202, 22 N. W. 444, 446 (1885).

109. Under Minn. Const. Art. IX, § 1, special assessments (in the language of the section) "shall be as nearly equal as may be." *Noonan v. Stillwater*, *supra* note 108.

the Minnesota Supreme Court, at least where not shown to result in inequality, including the front-foot method,¹¹⁰ and an area formula.¹¹¹ As in the determination of benefits, the council performs a legislative function in the selection of the plan of apportionment of special assessments,¹¹² and the fact that a few minor inequities result from the plan chosen will not lead the court to invalidate the assessments.¹¹³ But if the inequities become too pronounced, the court may declare the plan of assessment to be arbitrary.¹¹⁴ In view of the principles and rules just stated, municipalities will usually find it convenient to apportion assessments by developing as fair a general formula as possible, and then applying it to all tracts of land deemed benefited by the improvement, with adjustments in individual cases.

Once it has decided on a satisfactory assessment formula, the municipality must see that it is applied only to property which may lawfully be assessed. This can include, of course, only benefited property, with the further limitation that it must have been included in "the area proposed to be assessed as stated in the notice of hearing on the improvement."¹¹⁵ Although the chapter is ambiguous on the point, it is usually better practice for the municipality not to levy an assessment against its own property, but rather to include the amount which would otherwise be so assessed in the portion of the cost to be paid by taxes or out of funds on hand.¹¹⁶

110. *State v. District Court*, 80 Minn. 293, 83 N. W. 183 (1900); *State v. Burnes*, 124 Minn. 471, 145 N. W. 377 (1914); *State v. Ely*, 129 Minn. 40, 151 N. W. 545 (1915); *In re Improvement of Third Street*, 185 Minn. 170, 240 N. W. 355 (1932); *Quale v. Willmar*, 223 Minn. 51, 25 N. W. 2d 699 (1946). In *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175 (1901), the court did not actually condemn the front-foot method *per se*; it was only a part of a scheme whereby assessments in excess of the cost of the improvement were levied. Cf. *In re Meyer*, 176 Minn. 240, 223 N. W. 135 (1929). *State v. Ely*, *supra*, holds that a variation in the front-foot formula so as to reduce the assessment for corner lots is valid.

111. *Mayer v. Shakopee*, 114 Minn. 80, 130 N. W. 77 (1911).

112. *Hughes v. Farnsworth*, 137 Minn. 295, 163 N. W. 525 (1917); *In re Assessment for Paving Concord Street*, 148 Minn. 329, 181 N. W. 859 (1921); *In re Improvement of Superior Street*, 172 Minn. 554, 216 N. W. 318 (1927), *cert. denied*, 276 U. S. 628 (1928); *Qvale v. Willmar*, 223 Minn. 51, 25 N. W. 2d 699 (1946).

113. Compare *Mayer v. Shakopee*, 114 Minn. 80, 130 N. W. 77 (1911), with *State v. Brill*, 58 Minn. 152, 59 N. W. 989 (1894); see *Noonan v. Stillwater*, 33 Minn. 198, 203, 22 N. W. 444, 446 (1885); *In re Improvement of Third Street*, 185 Minn. 170, 178, 240 N. W. 355, 358 (1932).

114. *State v. Judges of Dist. Court*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122 (1892); *State v. Brill*, *supra* note 113; *In re Improvement of Third Street*, *supra* note 113.

115. § 429.051.

116. See § 429.061 (1). If the municipality does assess itself, it has to provide for payment of the assessment by a transfer of moneys on hand or by levying taxes. Since under § 429.051 such transfer or levy may be made directly to or for the improvement fund, the assessment is a superfluous in-

Land owned by the United States and by the state is exempt from special assessment;¹¹⁷ also, most cemeteries,¹¹⁸ and property of volunteer fire departments.¹¹⁹ But special assessments may be levied on land owned by counties and school districts,¹²⁰ or by religious, charitable and educational institutions,¹²¹ or by railroads.¹²²

When the assessment roll is ready, the council must call and hold a public hearing on the assessments, as set forth in § 429.061.¹²³ At the hearing the council "may amend the proposed assessment as to any parcel."¹²⁴ Literally, therefore, the council may increase as well as decrease particular assessments at the hearing, even if the owners are not present, but it would seem to be better practice,

tervening step. Note that under § 475.61 all taxes needed for payment of the bonds must be levied once and for all, before the bonds are delivered.

117. *Cf.* State v. Board of Education, 133 Minn. 386, 158 N. W. 635 (1916); *In re* Delinquent Real Estate Taxes, Polk County, 182 Minn. 437, 234 N. W. 691 (1931); Independent School Dist. v. White Bear Lake, 208 Minn. 29, 292 N. W. 777 (1940).

118. Section 306.14 exempts the lands and properties of non-profit cemetery associations formed under § 306.01 *et seq.* from "all public taxes and assessments." State v. St. Paul, 36 Minn. 529, 32 N. W. 781 (1887); St. Paul v. Oakland Cemetery Ass'n, 134 Minn. 441, 159 N. W. 962 (1916). But this section does not apply to cemetery corporations organized under other laws. State v. Crystal Lake Cemetery, 155 Minn. 187, 193 N. W. 170 (1923). In this opinion, the court expresses doubt (*Id.* at 192, 193 N. W. at 172) that corporations organized for pecuniary profit may constitutionally be exempted. Section 307.09 similarly exempts land dedicated as a private cemetery, by a private person or a religious corporation. Diocese of St. Paul v. St. Paul, 138 Minn. 67, 163 N. W. 978 (1917).

119. § 272.021.

120. § 435.19. Note that § 429.061 (4) requires special notification to be given of the levy of assessments on property of a county or school district, or on a right of way (usually, railroad property).

121. Washburn Memorial Orphan Asylum v. State, 73 Minn. 343, 76 N. W. 204 (1898); State v. Trustees of Macalester College, 87 Minn. 165, 91 N. W. 484 (1902); Diocese of St. Paul v. St. Paul, 138 Minn. 67, 163 N. W. 978 (1917).

122. Minnesota Transfer Ry. v. St. Paul, 165 Minn. 8, 205 N. W. 609, 207 N. W. 320 (1923); *In re* Improvement of Superior Street, 172 Minn. 554, 216 N. W. 318 (1927), *cert. denied*, 276 U. S. 628 (1928); Note, 12 Minn. L. Rev. 524 (1928); see note 120 *supra*.

123. The assessment hearing, unlike the hearing on the making of the improvement, has to do with the constitutional rights of the property-owners. That is, due process does not require that a property-owner shall be heard on the question whether the improvement shall be made, but only on the question whether his assessment exceeds the benefits to his property. This requirement is met by the assessment hearing plus the opportunity to appeal to the District Court. But there is no constitutional requirement that such hearing take place prior to the levy of assessments; the demands of due process are satisfied if the property-owners have a right at some time to be heard in court, whether before or after confirmation of the assessment roll, as, for instance, by a petition under § 278.01 *et seq.*, or in defense to an action for the enforcement of payment of taxes. County of Hennepin v. Bartleson, 37 Minn. 343, 34 N. W. 222 (1887); Duluth v. Diblee, 62 Minn. 18, 63 N. W. 1117 (1895); *In re* Delinquent Taxes in Polk County, 147 Minn. 344, 180 N. W. 240 (1920); State v. Great Northern Ry., 165 Minn. 22, 205 N. W. 612, 207 N. W. 322 (1926).

124. § 429.061 (2).

due to the constitutional questions involved, not to increase an assessment without giving notice, either personal or published, and affording opportunity for hearing to the property-owner. All written and oral objections to the assessments must receive consideration. The usual objections are that the property assessed is not benefited, or is assessed for more than the amount of the benefit, but objection may also be made that the proposed assessments are invalid for lack of compliance with proper procedure, such as failure to hold the improvement hearing in the manner required,¹²⁵ or to award the improvement contract properly.¹²⁶ Suppose objections of the latter sort, charging lack of compliance with the chapter procedure, are made; what is the council, or the district court on appeal, to do about them? The answer seems properly to depend on whether the variances from the prescribed procedure were mere irregularities not materially affecting the rights of the property owners.¹²⁷ However, the Minnesota court has in the past often indicated its feeling that since the imposition of special assessments is often onerous and borders upon confiscation, the least that it can do is "insist upon compliance with the statute in all matters of detail, in order to levy and collect."¹²⁸

But suppose, as often happens, a property-owner's objections at the assessment hearing are overruled, and he does not appeal to the district court within 20 days after adoption of the assessments, as § 429.081 permits him to do; may he thereafter in another proceeding attack the assessment? Section 429.081 provides: "All objections to the assessment shall be deemed waived unless presented on such appeal." Even without this sort of statutory declaration, the rule in Minnesota is well-established that if the law authorizing the assessment provided the property-owner assessed with a procedure for attacking it, and he failed to use it, he cannot attack the assessment in other proceedings, except on the ground of lack of jurisdiction to make the assessment.¹²⁹ As the court said in *In re Assess-*

125. *In re Meyer*, 158 Minn. 433, 197 N. W. 970, 199 N. W. 745 (1924) (opinion of Holt, J.). This case also holds that such objection may be made even if the objector stood by without acting while the improvement was being made.

126. *See County of Hennepin v. Bartleson*, 37 Minn. 343, 34 N. W. 222 (1887).

127. 14 McQuillin, *Municipal Corporations* § 38.175 *et seq.* (3d ed. 1950); *cf.* *State v. Blake*, 86 Minn. 37, 90 N. W. 5 (1902); *State v. District Court*, 95 Minn. 70, 103 N. W. 744 (1905).

128. Collins, J., in *State v. District Court*, 80 Minn. 293, 311, 83 N. W. 183, 189 (1900). *See Sewall v. St. Paul*, 20 Minn. (Gil. 459, 465) 511 (1874).

129. *McKusick v. Stillwater*, 44 Minn. 372, 46 N. W. 769 (1890); *Everington v. Board of Park Comm'rs*, 119 Minn. 334, 138 N. W. 426 (1912); *A. A. White Townsite Co. v. Moorhead*, 120 Minn. 1, 138 N. W. 939 (1912); *County of Rock v. McDowell*, 157 Minn. 296, 196 N. W. 178 (1923). In

ment for Paving Minnehaha Street: "It is clear that municipalities have an interest in the speedy and final determination of assessment liens. . . ." ¹³⁰ Therefore the property-owner who did not object at the assessment hearing or did not carry his objections, within 20 days from the hearing, to the district court has lost his day in court except, it is said, for "jurisdictional" objections. ¹³¹ Unfortunately, the court has not vouchsafed to us any standard whereby to distinguish "jurisdictional" from other objections. ¹³² In a sense, every step in the improvement-assessment proceeding is "jurisdictional"; but if this is so, then the rule of the cases would mean nothing. It seems hardly possible that this exception to the rule any longer exists, in view of the broad statement in § 429.081 that failure to appeal waives *all* objections; therefore, nothing prior to the assessment proceedings can be considered a "jurisdictional" defect or omission. But in order to have such opportunity to appeal, the property-owner must of course be given due notice of hearing and the hearing must be held in accordance with the notice. As a matter of common sense, therefore, the property-owner cannot subsequently be considered to have waived his objections to his assessment if he can show that he never had a legitimate opportunity to appeal in the manner required by § 429.081, either because (1) no

Rosso v. Brooklyn Center, 214 Minn. 364, 8 N. W. 2d 219 (1943), where plaintiffs attempted to enjoin the collection of special assessments, the court sustained demurrers on the ground that they had an adequate remedy at law, either by the appeal provided by statute from the assessment hearing, or by tax contest proceedings under §§ 278.01-278.05. In view of the other cases cited *supra*, one cannot infer that either remedy was equally available. It is unfortunate that the court did not make clear that the tax contest remedy was available only for jurisdictional objections. However, the holding of the case, that the collection of assessments will not be enjoined if the plaintiffs had a prior adequate remedy at law, is correct. *Cf. Schultz v. North Mankato*, 176 Minn. 76, 222 N. W. 518 (1928). It is similarly held that if plaintiffs have a subsequent statutory remedy, they cannot get an injunction against the levy of assessments. *Kelly v. Minneapolis*, 57 Minn. 294, 59 N. W. 304 (1894); *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911 (1903).

130. 170 Minn. 403, 405, 212 N. W. 811, 812 (1927).

131. *State v. Bury*, 101 Minn. 424, 112 N. W. 534 (1907); *County of Rock v. McDowell*, 157 Minn. 296, 196 N. W. 178 (1923); *Freding v. Minneapolis*, 177 Minn. 122, 224 N. W. 845 (1929).

132. Objections held jurisdictional: lack of sufficient petition or order for making improvement: *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053 (1904), and *State v. Bury*, *supra* note 131; improvement contract in excess of charter debt limit: *A. A. White Townsite Co. v. Moorhead*, 120 Minn. 1, 138 N. W. 939 (1912); failure to give notice of assessment hearing: *Sewall v. St. Paul*, 20 Minn. (Gil. 459) 511 (1874), *Flint v. Webb*, 25 Minn. 93 (1878), *Schultz v. North Mankato*, 176 Minn. 76, 222 N. W. 518 (1928); failure to lay service connections before paving, arbitrary choice of materials, and unconstitutionality of the assessment law: *Freding v. Minneapolis*, *supra* note 131. Objections held not jurisdictional: property not benefited, mistakes in plans and specifications and in making the assessment: *A. A. White Townsite Co. v. Moorhead*, *supra*; assessment invalid, improper and too high: *County of Rock v. McDowell*, 157 Minn. 296, 196 N. W. 178 (1923).

assessment hearing was held, or no sufficient notice given of the hearing, or because (2) through fraud or misrepresentation, he was induced not to present his objections at the hearing, or not to appeal therefrom.

An assessment hearing held in accordance with statute, from which no appeal is taken, may thus "cure" any infirmities in the assessments; but suppose objection is taken upon such defects (more than mere irregularities in procedure or trifling inequities in the amounts assessed) at the assessment hearing? The council should declare the assessment invalid, on advice of the municipal attorney, as provided in § 429.071(2). If it does not, the assessment will be set aside by the district court. In either event, the stage is set for the council to make a reassessment under § 429.071(2). The reassessment is not open to attack on the ground of lack of compliance by the municipality with chapter procedure before the levy of assessments, even if such lack of compliance was "jurisdictional."¹³³ Then why bother to take procedural steps required by the chapter, if a valid reassessment may be made without their having been taken? Entirely aside from the duty of public officers to manage public affairs in accordance with law, I believe the following considerations demonstrate why the chapter procedure must be followed:

(1) The municipality will normally wish to issue the improvement bonds before getting around to the levy of the assessments, and bond purchasers will not accept delivery of the bonds

133. So held in cases involving home rule charter reassessment provisions substantially similar to § 429.071(2): *St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. 424 (1880) (illegally let contract); *State v. District Court*, 95 Minn. 183, 103 N. W. 881 (1905) (order authorizing making of improvement void); *State v. District Court*, 95 Minn. 503, 104 N. W. 553 (1905); *State v. District Court*, 97 Minn. 147, 106 N. W. 306 (1906) (no petition for the improvement); *State v. District Court*, 98 Minn. 63, 107 N. W. 726 (1906); *State v. District Court*, 102 Minn. 482, 113 N. W. 697, 114 N. W. 654 (1907) (improvement contract void); see *In re Meyer*, 158 Minn. 433, 442, 197 N. W. 970, 199 N. W. 746, 748 (1924) (notice of improvement hearing not published in accordance with statutory requirements). The *Meyer* reassessment came before the supreme court in *In re Meyer*, 176 Minn. 240, 223 N. W. 135 (1929).

All the same, one wonders if the reassessment actually goes to the extent of "validating" all prior jurisdictional defects. Probably the theory underlying the reassessment power is that it is fairer that municipalities should be permitted to assess properties which have benefited from an improvement, than that the owners of such properties should be unjustly enriched simply because municipal officials have carelessly or in ignorance failed to comply with proper procedure, and therefore no valid assessment may be made. If this theory is correct, then the reassessment cannot be made until the improvement is completed and the reasonable value of the improvement to the property-owners is established, and the amount of the reassessment must be held within such reasonable value, instead of being limited by the contract cost of the improvement, which would perhaps be higher.

unless all preliminaries through the award of the contract have been observed, as the authority to issue bonds is predicated upon the due observance of such preliminaries.

(2) Even if the municipality waits to issue bonds until after the assessment or a reassessment has been made, the bonds may not be valid to the extent they exceed the total of the assessments (*i.e.*, to the extent they are payable from ad valorem taxes).

(3) Whether or not bonds are issued, the municipality may not have authority to levy general taxes or transfer money from its various funds to pay part of the cost of the improvement.

It may happen, after the assessments have been levied, that due to unforeseen circumstances the improvement must be abandoned. In such cases, § 435.20 provides that the special assessments paid must be refunded, and this is also the rule of the cases, upon the theory that there has been a failure of consideration and consequently the municipality must make restitution.¹³⁴ However, this rule (and the statute) apply only to situations where the improvement fund money was never spent for the intended purpose; if the situation is instead one where the improvement was merely left incomplete due to lack of sufficient funds, or where it proved not to benefit the property assessed because it was improperly carried out, the rule (in the absence of statute) is that the property-owners assessed may not recover the assessments they paid.¹³⁵

Normally the assessment hearing will be held before the improvement has been completely paid for; so, unless someone has committed a gross error, it will be impossible to prove at the hearing that the assessment is greater in amount than the cost of the improvement. But after final settlement of the accounts of the improvement, it may become evident that its cost is actually less than the amount of the assessment. While this situation is rare, occurring only when the council has purported to assess all or substantially all of the cost, it presents a difficult problem, because § 435.20 imposes some duty on the council to refund the excess of the assess-

134. *Valentine v. St. Paul*, 34 Minn. 446, 26 N. W. 457 (1886); *Strickland v. Stillwater*, 63 Minn. 43, 65 N. W. 131 (1895); *McConville v. St. Paul*, 75 Minn. 383, 77 N. W. 993 (1889); *see Germania Bank v. St. Paul*, 79 Minn. 29, 33, 81 N. W. 542, 542-543 (1900). It appears from § 435.20 that the municipality is obliged to make the refund only if the owner applies for it.

135. *Rogers v. St. Paul*, 79 Minn. 5, 81 N. W. 539, 47 L. R. A. 537 (1900); *see McConville v. St. Paul*, 75 Minn. 383, 389, 77 N. W. 993 (1899) (dissenting opinion); *Germania Bank v. St. Paul*, 79 Minn. 29, 34, 81 N. W. 542, 542-543 (1900); 13 Minn. L. Rev. 631 (1929).

ment over the actual cost, but it is almost hopelessly ambiguous in meaning.¹³⁶ This section of the statutes emphatically needs to be replaced.¹³⁷

CONCLUSION

Although the subject of special assessment financing is a fairly recondite legal specialty, it is interesting to see how many court decisions there are in this limited field, and how at every legislative session new laws affecting it are enacted. Since this branch of the law is not a "live" one (in the law-review sense of the word), one must conclude that special assessment financing of local improvements has been very common, and will continue to be widely used. One must also conclude, from the fact that in many, if not most of the cases, the amount involved was relatively small, that the imposition of special assessments is very apt to excite popular apprehensions of injustice. To protect itself, the municipality must make sure that it has in all respects complied with applicable statutory provisions and interpretations.

136. For instance:

(1) When must the refund be made:

(a) as soon as the actual cost is known (*i.e.*, the work has been done)? If so, may the excess unpaid assessments be cancelled, or must a portion of the assessments so far paid be refunded?

(b) upon completion of collection of all installments of assessments, when the actual cost including interest on money borrowed and loss of delinquent assessments is known?

(2) Who is entitled to refund: the owner of the property at the time of the assessment, the owners at the various times when installments were paid, or the owner at the time of refund?

137. Although not discussed in this Article, mention should be made of the useful provisions of § 429.101 for imposing special assessments to pay the cost of weed control and certain street and sidewalk maintenance expenses.