VOLUME NO. 36 **Opinion No. 109**

SPECIAL IMPROVEMENT DISTRICTS—Statutory construction; SPECIAL IMPROVEMENT DISTRICTS—Power and authority of county commissioners; Section 16-1601, Revised Codes of Montana 1947.

HELD: The board of county commissioners has the power and authority to determine whether a proposed special improvement district lies within an area which is a "thickly populated locality" and there need not be any inhabitants living in the proposed district itself.

November 30, 1976

Mr. J. Fred Bourdeau
Cascade County Attorney
Courthouse
Great Falls, MT 59401

Dear Mr. Bourdeau:

You recently requested my opinion interpreting section 16-1601, R.C.M. 1947. You specifically directed my attention to the following phrase, "... the board of county commissioners is hereby authorized and empowered to order and create special improvement districts in thickly populated localities outside of the limits of incorporated towns and cities..."

It is my understanding that the Board of County Commissioners of Cascade County has received a petition for a proposed special improvement district which will involve the sale of 1.5 million dollars worth of bonds for improvements. The proposed district contains 300 unimproved acres and lies totally within the boundaries of Cascade County and outside the boundaries of any incorporated city or town. The area within the confines of the proposed special improvement district has no inhabitants; however, the district is located in a densely populated area near the city of Great Falls.

Section 16-1601, **supra,** reads in pertinent part as follows:

> Whenever the public interest or convenience may require, and upon the petition of sixty per centum (60%) of the freeholders affected thereby, the board of county commissioners is hereby authorized and empowered to order and create special improvement districts in thickly populated localities outside of the limits of incorporated towns and cities for the purpose of building, constructing, or acquiring by purchase devices intended to protect the safety of the public from open ditches carrying irrigation or other water, and maintaining sanitary and storm sewers, light systems, waterworks plants, water systems, sidewalks and such other special improvements as may be petitioned for.

The Montana Supreme Court has held that certain statutory provisions with respect to special improvement districts must be strictly observed in order for the municipality to acquire jurisdiction to create a special improvement district. **Shaphard v. City of Missoula,** 49 Mont. 269, 141 P.2d 544. These are (1) the adoption of a resolution of intention; (2) the service of the required notice; and (3) a hearing and determination against protests. Strict observance of these jurisdictional steps is required so as to assure that taxpayers are afforded the opportunities which the law provides, to object to an unwanted special improvement district. As was stated in **Koich v. City of Helena,** 132 Mont. 194, 315 P.2d 811, the notice provisions are essential, "so that taxpayers will not be burdened with some improvement which they do not want, cannot afford, or do not need." Other statutory provisions respecting the formation of special improvement districts have been regarded by our Supreme Court as less essential, requiring substantial rather than strict compliance. See **City of Billings v. Nore,** 148 Mont. 96, 417 P.2d 458; **Evans v. City of Helena,** 60 Mont. 577, 199 Pac. 445; **Weber v. City of Helena,** 89 Mont. 109, 297 Pac. 455.

In my opinion, the term "thickly populated locality" as used in section 16-1601, **supra,** refers to the general area within and surrounding the proposed special improvement district, and is not restricted to the confines of the district.

Contrary interpretation would make it almost impossible for the county commissioners to create such district as an incident to the development of new subdivisions, and would thwart the intent of the legislature in granting this authority.

It will be noted that there are no statutory requirements for a hearing or for findings as to whether the area involved is a thickly populated locality. The determination appears to be an administrative one, which would fall within the class of determinations which are subject to court review only in cases of fraud or abuse of discretion. This principle was defined in **State ex rel. State Highway Commission v. District Court,** 107 Mont. 126, 81 P.2d 347, as follows:

> Repeatedly, and consistently, this Court has adhered to the rule that courts will not substitute their discretion for the discretion reposed in officers or boards by legislative enactment. **State ex rel. North American Life Insurance Co. v. District Court,** 97 Mont. 523, 37 P.2d 329. Courts are without power to interfere with the board's discretionary action within the scope of its authority, or the exercise of powers conferred by statute on the sole ground that the board's action is characterized by lack of wisdom or sound judgment. The review power of the courts must be exercised with caution.

Another statement of the rules appears in **Freeman v. Board of Adjustment,** 97 Mont. 342, 34 P.2d 532:

> It appearing that the board is vested with discretionary power within the limits defined in the law and the ordinance, and that there was substantial evidence to move that discretion, we come to the well-established principle uniformly recognized in Montana—that a court will not substitute a judicial discretion for the discretion of an officer, board, or party acting within the scope of his or its exclusive authority. This court has decided the matter so many times that it is axiomatic.

THEREFORE, IT IS MY OPINION:

> The board of county commissioners has the power and authority to determine whether a proposed special improvement district lies within an area which is a "thickly populated locality", and that if such a decision is in the affirmative, the board may proceed by resolution of intention to create the district, even though there may be no inhabitants in the district itself.

Very truly yours,

ROBERT L. WOODAHL
Attorney General