

VOLUME NO. 38

OPINION NO. 23

COUNTY COMMISSIONERS - Authority to create rural special improvement districts, "thickly populated localities";
SPECIAL IMPROVEMENT DISTRICTS - Creation of rural special improvement districts on land owned by a single developer, "thickly populated localities";
1972 MONTANA CONSTITUTION - Article XI, section 4(2);
MONTANA CODE ANNOTATED - Sections 1-2-105, 7-12-2102, 7-12-2105, 7-12-2106, 7-12-2107, 7-12-2109, 7-12-2110, 7-12-2111, 7-12-2112;
REVISED CODES OF MONTANA, 1947 - Sections 16-1601, 16-1602, 16-1604, 16-1625, 16-1628, and 19-103.

HELD: Section 7-12-2102, MCA (section 16-1601, R.C.M. 1947), allows the board of county commissioners to create RSID's to fund improvements on underdeveloped and unoccupied parcels of land, provided the proposed district lies within an area which is "thickly populated."

28 June 1979

Robert L. Deschamps, III, Esq.
Missoula County Attorney
Missoula County Courthouse
Missoula, Montana 59801

Dear Mr. Deschamps:

You have requested my opinion on the following question:

Does section 7-12-2102, MCA (section 16-1601, R.C.M. 1947), allow the board of county commissioners to create rural special improvement districts (RSID's) to fund improvements on underdeveloped and unoccupied parcels of land which are in the process of being subdivided for sale by a single developer?

Your letter informs me that the Missoula County Commissioners have created several of the so-called "developer RSID's," which allow subdividers to finance improvements with little expenditure of their own capital and pass the costs along to the ultimate purchasers of the lots in the form of RSID assessments.

The controlling statute is section 7-12-2102, MCA, which provides:

Authorization to create rural special improvement districts upon petition. Whenever the public interest or convenience may require and upon petition of 60% of the freeholders affected thereby, the board of county commissioners is 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.

(Emphasis added.)

From the language of the statute, it was obviously contemplated that RSID's would be created in areas which had already undergone substantial development and which were already occupied by taxpaying freeholders. Your question is whether the statute will admit of a construction allowing creation of RSID's on property owned by only one freeholder, viz., the developer-subdivider.

The uncertainty of the statute arises from its reference to "thickly populated localities" and from the requirement that "60% of the freeholders" approve the RSID. It is suggested that these provisions evidence an intent to limit RSID's to districts which are "thickly populated" when the petition for RSID is filed. In my opinion, the language need not be read so restrictively, especially in light of Article XI, section 4(2) of Montana's Constitution, which provides that local government powers should be liberally construed. Keeping that constitutional mandate in mind, I conclude that section 7-12-2102, MCA, permits the county to create "developer" RSID's in some circumstances.

It should be noted initially that the RSID statutes were designed to benefit the public and to concomitantly protect two classes of citizens--the taxpayers who bear the burden of paying assessments against the property which benefits

from the improvement, and the citizens of the county whose credit is pledged in support of the RSID bonds. Members of the former category are protected by the requirements that sixty percent of the freeholders in the district must petition for the creation of the district, § 7-12-2102, MCA, that the commissioners must publish notice of their intention to create the district, §§ 7-12-2105 through 2107, MCA (§§ 16-1602, 1626, 1628, R.C.M. 1947), and that dissenting freeholders may protest the creation of the district, §§ 7-12-2109 through 2112, MCA (§§ 16-1604, 1626, R.C.M. 1947). The interests of the public at large are protected by the requirement that the board of commissioners find the creation of the district to be required for "the public interest or convenience." The petition, notice and protest provisions are jurisdictional--the commissioners may not proceed to create a district without complying with those requirements. See Koich v. City of Helena, 132 Mont. 194, 315 P.2d 811 (1957). However, the finding that the creation of a RSID is in the public interest is vested in the discretion of the commissioners, reviewable by a court only in cases of fraud or manifest abuse. See O'Brien v. Drinkenberg, 41 Mont. 538, 544-45, 111 P. 137 (1910).

The provision for creation of RSID's only in "thickly populated localities" is closely tied to the requirement that RSID's be created for "the public interest or convenience." A prior opinion of the Attorney General has noted:

[T]here are no 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.

36 Op. Att'y Gen. No. 109 (1976).

The opinion further noted that the proposed district itself need not be thickly populated. Rather, it was found to be sufficient if the general area in which the district would be located was a "thickly populated locality." The opinion explicitly recognized the value of RSID's in promoting the development of raw land into marketable residential real estate.

I adhere to the analysis of that opinion. The county commissioners plainly have the discretion to determine that enhanced development of uninhabited districts which lie within thickly populated areas may benefit public interest or convenience. On the basis of that determination, section 7-12-2102 allows but does not require the commissioners to create a RSID, even though the district is owned by only one freeholder. The fact that the statute requires approval of a percentage of freeholders is not significant, since by statute the plural "freeholders" necessarily includes the singular "freeholder." § 1-2-105(3), MCA (§ 19-103, R.C.M. 1947).

Your letter suggests that the commissioners may create a RSID on the basis of a mere expectation that the area comprising the district may be thickly populated in the future, when development is complete and the lots are sold and occupied, relying on the provision of section 1-2-105(1), MCA, that "[t]he present tense includes the future as well as the present." In my opinion the statute does not permit this construction. Initially, section 1-2-105(1) refers to verb tense, and was intended to insure that statutes operate prospectively as well as presently. The term "thickly populated" in section 7-12-2102 is an adjective form modifying "locality." It is a term of limitation, and the extent of its limitation may not be modified by application of the canon of construction set forth in section 1-2-105(1).

The requirement that the area in which the RSID is located be "thickly populated" has a sound basis in public policy. The credit of the county is pledged in support of RSID bonds. In the event the development proves unsuccessful, the county taxpayers may end up bearing the costs of the improvements. The likelihood of an unsuccessful development is obviously lessened when the area in which the proposed RSID is located already supports one or more residential developments. It seems plausible that the Legislature considered this fact in requiring that the area be thickly populated as a condition precedent to creation of a RSID. However, in voting to create a RSID under these circumstances, the commissioners should bear in mind that such an exercise of their powers approaches the limits of their authority under section 7-12-2102, MCA. Since the county taxpayers are exposed to potential financial liability should the developer's business judgment prove faulty, the commissioners should exercise great care in assuring that the public interest requires creation of a "developer RSID."

THEREFORE, IT IS MY OPINION:

Section 7-12-2102, MCA, allows the board of county commissioners to create RSID's to fund improvements on underdeveloped and unoccupied parcels of land, provided the proposed district lies within an area which is "thickly populated."

Very truly yours,

MIKE GREELY
Attorney General