VOLUME NO. 39 OPINION NO. 48

RURAL SPECIAL IMPROVEMENT DISTRICTS - Assessment of less than all property in district;
RURAL SPECIAL IMPROVEMENT DISTRICTS - Enforcement of delinquent assessments;
RURAL SPECIAL IMPROVEMENT DISTRICTS - Inclusion of portions of individual lots within district;
SUBDIVISION AND PLATTING ACT - Exemption from Act of division which occurs through enforcement of lien for rural special improvement district assessments;
MONTANA CODE ANNOTATED - Sections 7-12-2151, 7-12-2168, 7-12-4161 to 7-12-4165, Title 76, ch. 3.

HELD: 1. The county commission has no power to create a rural special improvement district in which only portions of the land within the district will be assessed for the cost of the improvement.

2. The county commission may create a rural special improvement district including only portions of individual lots in a rural subdivision in order to equalize the benefits and burdens borne by each lot.

3. If only a portion of a lot is included in the district and the owner defaults in paying his rural special improvement district assessment, only the portion of the lot within the district may be sold to satisfy the delinquency.

4. Sale of a portion of a lot to satisfy delinquent rural special improvement district assessments is a division of property "by operation of law" which is exempt from the provisions of the Subdivision and Platting Act, Title 76, ch. 3, MCA.

1 February 1982

Harold F. Hanser, Esq.
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Dear Mr. Hanser:

You have requested my opinion on the following question:

> May the county commissioners create a rural special improvement district containing within its boundaries a smaller "assessment area" whose property will bear the entire assessed cost of the improvement?

Your letter and memorandum inform me that the Yellowstone County Commission has proposed creation of a rural special improvement district for the purpose of paving a road into a rural subdivision. The subdivision contains lots ranging in size from two to twenty acres. The commissioners have determined that each lot is equally benefited regardless of size. They decided to include the entirety of each lot within the boundaries of the subdivision but to assess only an equal sized portion of each lot. The result is the proposed district contains within its boundaries land which is not assessed for the cost of the improvement.

In my opinion, the statutes dealing with creation of rural special improvement districts do not permit this

kind of arrangement. Section 7-12-2151, MCA, provides the method by which the cost of an improvement must be assessed against the land within the district boundary:

> To defray the cost of making any of the improvements provided for in this part, the board of county commissioners shall adopt the following method of assessment:
>
> (1) The board shall assess the entire cost of such improvements against the entire district. Each lot or parcel of land assessed in such district shall be assessed with that part of the whole cost which its area bears to the area of the entire district, exclusive of streets, avenues, alleys, and public places.
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> (2) Where said rural special improvement district is located more than 5 miles from the boundary of an incorporated city or town, said assessment may, at the option of the board, be based upon the assessed value of the lots or pieces of land within said district.
>
> (3) The board in its discretion shall have the power to pay the whole or any part of the cost of any street, avenue, or alley intersection out of any funds in its hands available for that purpose or to include the whole or any part of such costs within the amount of the assessment to be paid by the property in the district.

(Emphasis added.) In creating a special improvement district, a local government must comply in all respects with the statutory procedures. Shapard v. City of Missoula, 49 Mont. 269, 278-79, 141 P. 544, 547 (1914). The Shapard rule requires the local government to comply with statutory methods of assessing the cost of the improvement against the property in the district. Smith v. City of Bozeman, 144 Mont. 528, 540-41, 398 P.2d 462, 469 (1965). Your proposal for creation of an "assessment area" including only a part of the land within the district boundary is plainly at odds with the legislative provision, set forth in section 7-12-2151, MCA, that the cost of the improvement "shall" be assessed against "the entire district," and that each lot be assessed a percentage of the cost based on the

ratio of its area to the total area of the district. Unlike the statutes dealing with municipal special improvement districts, the statute in question here gives the county commissioners very little discretion in selecting a method of assessment. Compare § 7-12-2151, MCA, with §§ 7-12-4161 to 4165, MCA. Montana law does not allow the method you propose.

You suggest that assessment of the cost on an area basis will result in an unconstitutional inequality between the assessment and the benefit derived by the larger lots. The Montana Supreme Court has found such arguments unpersuasive in cases in which the local government complied with a statutory requirement that the assessment be determined on an area basis. Mansur v. City of Polson, 45 Mont. 585, 594-96, 125 P. 1002, 1004-05 (1912); McMillan v. City of Butte, 30 Mont. 220, 224-28, 76 P. 203, 204-05 (1904). Concededly, in both Mansur and McMillan the Court had before it no proof of equal benefit accruing to differently situated lots. However, even if such proof is present, see, e.g., Larsen Farms v. City of Plentywood, 145 Mont. 509, 402 P.2d 410 (1965), the commissioners are not thereby empowered to violate the law and create an assessment method other than that set forth in the statute. Rather, the commissioners may deal with the problem of equalizing benefits and burdens by including within the boundaries of the district only part of the larger lots which would otherwise bear an unfairly large part of the cost. Ricker v. City of Helena, 68 Mont. 350, 360-61, 218 P. 1049, 1051-52 (1923).

While this may not be a wholly satisfactory solution, it appears to be the only option left open by law.

You raise an additional question not reached by the Court in Ricker: In the event the property owner defaults in paying his assessments, may the county execute against and sell the entire lot, or only the portion included in the district? You assert that sale of only a portion of the lot may be unworkable. Under Montana law, taxes for rural special improvement districts are a lien "against the property assessed." § 7-12-2168(1), MCA. While our courts have not ruled on the question, it appears the general rule is that statutory methods of enforcement of special improvement assessments are exclusive. 88 A.L.R.2d 1250 (1963); see

City of Cut Bank v. Clapper Motor Co., 120 Mont. 274, 280, 182 P.2d 474, 476-77 (1947). The Legislature provided a lien against assessed property as the enforcement mechanism, and it is doubtful the courts would permit the county to proceed against the owner's other property to satisfy any deficiency in the security provided by the lien. Since only the portion of the lot within the district is assessed and therefore is subject to the lien, only that portion may be executed against and sold.

You suggest that this conclusion will provide insufficient security for the county. If so, the same result may follow from your proposal to create "assessment areas" within the rural special improvement district. As noted above, the statutory lien attaches only to "the property assessed" under section 7-12-2168(1), MCA. If only a portion of the lot is assessed, it could be argued that only a portion may be subjected to the lien, even if the entire lot is included in the district. If this reasoning is adopted, your attempt to assess less than all of the property will be unavailing. In any event, if the statute provides insufficient security, it is for the Legislature to remedy.

You finally suggest that sale of only a portion of a lot would subject the sale to the provisions of the Subdivision and Platting Act, Title 76, ch. 3, MCA. I disagree. Section 76-3-201(1), MCA, exempts divisions of land resulting from an order of a court or "by operation of law" from the requirements of the Act. Where part of a lot is sold to satisfy a rural special improvement district assessment, the buyer acquires a new title created by operation of the statutes governing enforcement of delinquent assessments. See State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 116-17, 270 P. 638, 640 (1928). In such a case, the lot is divided by operation of the statutes, and not through any affirmative act on the part of the owner. Such a division "by operation of law" is exempt from the requirements of the Subdivision and Platting Act.

THEREFORE, IT IS MY OPINION:

1. The county commission has no power to create a rural special improvement district in which

only portions of the land within the district will be assessed for the cost of the improvement.

2. The county commission may create a rural special improvement district including only portions of individual lots in a rural subdivision in order to equalize the benefits and burdens borne by each lot.

3. If only a portion of a lot is included in the district and the owner defaults in paying his rural special improvement district assessment, only the portion of the lot within the district may be sold to satisfy the delinquency.

4. Sale of a portion of a lot to satisfy delinquent rural special improvement district assessments is a division of property "by operation of law" which is exempt from the provisions of the Subdivision and Platting Act, Title 76, ch. 3, MCA.

Very truly yours,

MIKE GREELY
Attorney General