

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 73

INITIATIVE AND REFERENDUM - Application to the creation of a Special Improvement District;  
SPECIAL IMPROVEMENT DISTRICTS - Repeal by referendum;  
MONTANA CODE ANNOTATED - Sections 7-5-131, 7-5-132, 7-5-134, 7-5-137, 7-12-4102, 7-12-4110;  
MONTANA CONSTITUTION - Article III, sections 4 to 5, article V, section 1, article XI, section 8.

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HELD: A resolution creating a special improvement district under section 7-12-4102, MCA, is not subject to repeal by referendum.

28 September 1982

Joseph R. Hunt, Esq.  
Acting City Attorney  
Aronow, Anderson, Beatty & Lee  
Drawer D  
153 Main Street  
Shelby, Montana 59474

Dear Mr. Hunt:

You have requested my opinion on the following questions concerning the application of the initiative and referendum powers to a city's creation of a special improvement district:

1. Is a resolution creating a special improvement district under section 7-12-4102, MCA, subject to repeal by referendum?
2. Does the filing of a sample petition requesting a referendum on a resolution creating a special improvement district delay the effective date of the resolution?
3. If a resolution creating a special improvement district is subject to repeal by referendum, what is the effect of the resolution's repeal if the city has already ordered the proposed improvement?

You have indicated that on July 6, 1982, the Shelby City Council adopted a resolution creating a special improvement district for the purpose of installing a storm-sewer drainage system. The state laws relating to the creation of special improvement districts provide that if more than 50% of the owners of the property to be assessed for the improvements protest such improvements, further proceedings shall be halted. § 7-12-4110, MCA. In this case, the protest by affected property owners was not successful.

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The questions you have posed arose when, soon after the protest was found to be insufficient, a petition was filed with the Clerk and Recorder of Toole County calling for a referendum on the resolution creating the special improvement district.

The powers of initiative and referendum are reserved to the people in the 1972 Montana Constitution, article III, sections 4 to 5, article V, section 1, and article XI, section 8. Pursuant to these provisions in the state constitution, the Legislature enacted sections 7-5-131 through 7-5-137, MCA. These sections set forth the procedures by which electors of each local government may exercise the powers of initiative and referendum. Section 7-5-131, MCA, provides, in part, that prior resolutions and ordinances may be repealed in the manner provided in sections 7-5-132 through 7-5-137, MCA. Briefly stated, sections 7-5-132 through 7-5-137, MCA, call for the filing of a petition for referendum signed by 15% of the registered electors of the local government (§ 7-5-132(3)(d), MCA), which petition, if submitted prior to the effective date of the ordinance in question, shall delay the ordinance's effective date until ratification by the electors (§ 7-5-132(1), MCA). Before a petition is circulated for signatures, however, a sample petition must be submitted to the county election administrator for approval as to form and for referral to the local government attorney, who, in turn, must prepare a statement of purpose and a statement of the implication of a vote for or against the ballot issue (§ 7-5-134(2) to (4), MCA).

The first question presented is whether the general power of referendum provided in the state constitution and enacted in sections 7-5-131 through 7-5-137, MCA, applies to a resolution creating a special improvement district. I have concluded that it does not apply and I therefore need not reach your second and third questions.

Recent Montana Supreme Court decisions have held that the initiative and referendum procedures apply to legislative actions but not to acts that are administrative in character. City of Billings v. Nore, 148 Mont. 96, 417 P.2d 458 (1966); Chouteau County v. Grossman, 172 Mont. 373, 563 P.2d 1125 (1977); Dieruf v. City of Bozeman, 173 Mont. 447, 568 P.2d 127 (1977).

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While it is difficult to differentiate between legislative and administrative acts, the court in Dieruf determined that an ordinance and resolution passed by the city commission of Bozeman relative to the creation of a special improvement district were not subject to either referendum or initiative procedures. The Court went on to cite a long line of decisions of other courts in support of its holding. 173 Mont. at 451-52. Montana case law on this point goes back to the early part of the century when the Montana Supreme Court held in Allen v. City of Butte, 55 Mont. 205 at 208, 175 P. 595 at 596 (1918), quoting Carlson v. City of Helena, 39 Mont. 82, 102 P. 39 (1909), that:

The initiative and referendum apply only to matters of general legislation, in which all the qualified electors of the city are interested, and not to matters of purely local concern, such as the creation of a special improvement district, in which only the inhabitants or property owners are interested. [Emphasis added.]

This holding was affirmed in Boyle v. City of Butte, 55 Mont. 209, 175 P. 596 (1918), and distinguished in Grossman, 172 Mont. at 379. In that case, the Court noted the difference between a case involving use of general county funds and a case such as Allen where a special assessment was involved.

In reaching the conclusion that a resolution creating a special improvement district is not subject to a referendum, I have kept in mind the principle that, as a general rule, all matters in which the voters have an interest are subject to the referendum and that statutes in aid of these reserved powers should be liberally construed. See Grossman, 172 Mont. at 378, and State ex rel. Haynes v. District Court, 106 Mont. 470 at 484, 78 P.2d 937 at 945 (1938). However, in addition to support for my conclusion in the Montana case law, the fact that there is a specific provision in the law that enables the affected member of the public to protest the creation of special improvement districts is also persuasive. Under sections 7-12-4110 and 7-12-4113, MCA, if written protest against a proposal for a special improvement district is made by the owners of more than 50% of the area of the property to be assessed for

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improvements, no further action is to be taken on the proposal. Thus, citizens affected by the county commission's action in this matter do have means by which they may register their opposition.

THEREFORE, IT IS MY OPINION:

A resolution creating a special improvement district under section 7-12-4102, MCA, is not subject to repeal by referendum.

Very truly yours,

MIKE GREELY  
Attorney General