

VOLUME NO. 40

OPINION NO. 44

COUNTIES - Modification of existing rural special
improvement districts;

COUNTY COMMISSIONERS - Modification of existing rural special improvement districts;
RURAL SPECIAL IMPROVEMENT DISTRICTS - Modification of existing rural special improvement districts;
MONTANA CODE ANNOTATED - Sections 7-12-2102, 7-12-2103, 7-12-2105, 7-12-2106, 7-12-2111, 7-12-2113, 7-12-2151, 7-12-2161.

HELD: Where a contemplated improvement would constitute a substantial expansion of both an existing improvement and a rural special improvement district, section 7-12-2161(4), MCA, is inapplicable, and the procedures for the creation of a new rural special improvement district in sections 7-12-2102 to 2113, MCA, must be followed.

30 March 1984

Ted O. Lympus
Flathead County Attorney
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P.O. Box 1516
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Dear Mr. Lympus:

You have requested my opinion concerning a question which I have phrased as follows:

May section 7-12-2161(4), MCA, be utilized by a board of county commissioners to modify substantially an existing improvement and to expand significantly the geographical scope of a rural special improvement district? If not, then by what method may a rural special improvement district be modified and expanded?

The rural special improvement district involved is a sewer district which was created during the 1960s, and its facilities are presently at full utilization. A planning study is presently under way concerning the feasibility of doubling the district's service area and constructing significantly expanded sewer facilities. Thus, the contemplated improvement will involve, if not

replacement of, at least a major addition to that presently in use and substantially increase the current district's geographical area.

Section 7-12-2102(1), MCA, permits a board of county commissioners, when petitioned by 60% of the affected freeholders, to order the creation of rural special improvement districts for certain specified purposes including the construction or purchase of sanitary and storm sewers. However, prior to creating the district, the board must: (1) adopt a resolution of intention to do so (§ 7-12-2103(1), MCA); (2) specify in the resolution, among other things, the character of the contemplated improvements and their approximate cost (§ 7-12-2103(2), MCA); (3) give notice of the resolution through newspaper publication, public posting, and mailing to all real property owners within the proposed district (§§ 7-12-2105 to 2106, MCA); and (4) conduct hearings on any protests to the proposed improvement filed by affected property owners (§ 7-12-2111, MCA). After disposition of any objections, the board must create the improvement district in accordance with the resolution of intention and may then order the proposed improvement. § 7-12-2113(1), MCA. Section 7-12-2151, MCA, requires the cost of the improvement to be assessed on a prorated basis, calculated on either the size of the owner's property or, under certain circumstances, its value. § 7-12-2151(1) and (2), MCA.

Section 7-12-2161, MCA, provides a procedure for assessing property for costs associated with maintaining, preserving, or repairing improvements. Subsection (4) grants to the board the power "of changing by resolution, not more than once a year, the boundaries of any maintenance district." (Emphasis supplied.) The term "maintenance district" is not defined or otherwise used in sections 7-12-2101 to 2186, MCA.

The statutory scheme for formation of rural special improvement districts clearly reflects a concern that, prior to creation of a district and implementation of an improvement, the affected property owners will be given appropriate notice. "[N]otification is the prime purpose of the statute so that taxpayers will not be burdened with some improvement which they do not want, cannot afford, or do not need...." Koich v. City of Helena, 132 Mont. 194, 197-98, 315 P.2d 811, 813 (1957)

(applying sections 7-12-4101 to 4191, MCA). Such notice and opportunity for protest have been held as required under the due process provision of the Montana Constitution where special assessments against property may be made to finance the improvement. Great Northern Railway Co. v. Roosevelt County, 134 Mont. 355, 358-59, 332 P.2d 501, 503 (1958) (statute permitting county commissioners to create fire districts upon petition but without further notice to real property owners unconstitutional). Moreover, as a taxing statute, the provisions permitting creation of rural special improvement districts will be strictly construed. Vail v. Custer County, 132 Mont. 205, 211, 315 P.2d 993, 997 (1957). The Montana Supreme Court thus held in Billings Bench Water Association v. Yellowstone County, 70 Mont. 401, 410, 225 P. 996, 999 (1924), that a failure to serve notice of a resolution of intention upon a property owner voided a proposed tax levy in connection with a rural special improvement district, noting that "it is quite generally held that failure to give the notice prescribed by statute in the attempted creation of an improvement district deprives the county of jurisdiction to proceed." Other decisions under a similar special improvement district statute have emphasized the need for literal compliance with the statutory procedure in creating a proposed district and have narrowly construed a governmental entity's authority under that statute. See, e.g., Shapard v. City of Missoula, 49 Mont. 269, 278-79, 141 P. 544, 547 (1914); Johnston v. City of Hardin, 55 Mont. 574, 579, 179 P. 824 (1919); Wood v. City of Kalispell, 131 Mont. 390, 393-94, 310 P.2d 1058, 1060-61 (1957); Smith v. City of Bozeman, 144 Mont. 528, 533, 398 P.2d 462, 465 (1965). Your questions must be resolved with reference to these general principles and the rural special improvement statutory provisions.

Presently the contemplated improvement is a substantial expansion of an existing improvement. It does not constitute merely maintenance, preservation, or repair of a previously-constructed improvement. The provisions of section 7-12-2161, MCA, are, however, directed only to assessment for maintenance or repair work and, whatever the precise meaning or scope of section 7-12-2161(4), MCA, have no application to the proposed improvement or district expansion involved here. A contrary decision would, aside from ignoring the express provisions of section 7-12-2161, MCA, conflict with the

notice procedures whose purpose, as stated, is to give affected property owners an opportunity to object to a proposed improvement or rural special improvement district creation whose cost may result in an assessment against their property.

Where the proposed improvement involves a substantial addition to both an existing improvement and district boundaries, the only method provided for its implementation is formation of a new rural special improvement district in accordance with the procedure described above. No other method, and especially one omitting notice and opportunity to protest to affected property owners, can be inferred. Existing improvements may be included as part of the proposed improvement and, upon formation, transferred to the new district. The present rural special improvement district will continue until its function is superseded by and its property transferred to the proposed district.

THEREFORE, IT IS MY OPINION:

Where a contemplated improvement would constitute a substantial expansion of both an existing improvement and a rural special improvement district, section 7-12-2161(4), MCA, is inapplicable, and the procedures for the creation of a new rural special improvement district in sections 7-12-2102 to 2113, MCA, must be followed.

Very truly yours,

MIKE GREELY
Attorney General