

COUNTIES - Share of costs for local road improvement;  
COUNTY COMMISSIONERS - Creation of local improvement district for county road;  
HIGHWAYS - Procedure for creation of local improvement district for county road;  
SPECIAL IMPROVEMENT DISTRICTS - Creation of local improvement district for county road;  
MONTANA CODE ANNOTATED - Title 7, chapter 14, part 27; sections 7-6-2318, 7-14-2124, 7-14-2501, 7-14-2513, 7-14-2601, 7-14-2603.

- HELD: 1. The board of county commissioners is required to pass a resolution of public interest upon receipt of a proper petition, under section 7-14-2702, MCA, requesting the creation of a local improvement district for a county road. The board may not hold a hearing for the purpose of making an independent determination of the public interest.
2. The board may not refuse to create a local improvement district which has been properly petitioned where the requirements of section 7-14-2710(1), MCA, are met.
3. The county's share of the costs of the improvement may be paid either from the county road fund or from the general fund.
4. Pursuant to section 7-14-2714, MCA, the county may construct or improve the road and thereby meet its share of the costs by providing in-kind services. Otherwise, the county's share must be paid from county funds in accordance with section 7-14-2733, MCA.

22 January 1986

Harold F. Hanser  
Yellowstone County Attorney  
Yellowstone County Courthouse  
Billings MT 59101

Dear Mr. Hanser:

You have requested my opinion on the following questions concerning local improvement districts for county roads:

1. Upon receipt of a petition as provided in section 7-14-2702, MCA, for opening or improving a county road, is the board of county commissioners required to pass the resolution of public interest provided in section 7-14-2704, MCA, without holding a hearing and without making an independent determination of public interest?
2. May the board of county commissioners refuse to create a local improvement district if the county does not have sufficient funds for its portion of the costs?
3. Is the county's share of the costs to be paid from the county road fund or the general fund?
4. May the county meet its share of the costs by providing in-kind services, such as furnishing gravel and signs?

Title 7, chapter 14, part 27, MCA, sets forth the procedure for creation of local improvement districts for the purpose of laying out, opening, constructing, or improving county roads. Owners of land fronting on the road and residents of the proposed district may petition the board of county commissioners for the improvement. § 7-14-2702, MCA.

Section 7-14-2704(1), MCA, then provides:

Upon receipt of the petition, the board shall pass a resolution that the public interest demands the laying out, opening, constructing,

or improving of the road or part thereof described in the resolution. [Emphasis added.]

The word "shall" is generally interpreted as mandatory except where the intent and purpose of the Legislature are plain and unambiguous and clearly signify a contrary construction. State ex rel. McCabe v. District Court, 106 Mont. 272, 76 P.2d 634, 637 (1938). I have concluded that the language of section 7-14-2704, MCA, does not grant discretion to the board to make an independent determination of public interest prior to passing the resolution and that no hearing on the proposed improvements is necessary. See also State ex rel. Palmer v. Hart, \_\_\_ Mont. \_\_\_, 655 P.2d 965, 968 (1982).

In 1965 the Legislature revised and recodified the highway code, including the statutes pertaining to the creation of local improvement districts. Although the Legislature adopted a statement of legislative policy and intent (§ 60-1-102, MCA) and rewrote other statutes (§§ 7-14-2101, 7-14-2102, MCA) which indicate that county officials have been vested with broad authority and discretion in county road matters, the Legislature also retained the substance of the local improvement district status.

It is clear from the plain meaning of section 7-14-2704, MCA, as well as its predecessor statutes, that the Legislature has limited the usual discretion of the board and has required the resolution of public interest to be passed upon receipt of the petition and without further investigation by the board. Cf. § 7-14-2603, MCA. It should be noted that the resolution of public interest is a distinct act and precedes the order that the improvement shall be made. See § 7-14-2710, MCA; 70 Am. Jur. 2d Special or Local Assessments § 123.

Following passage of the resolution, the board is required to schedule and give notice of a meeting of the county road superintendent, the owners of land to be included within the district, and the residents of the proposed district. §§ 7-14-2705, 7-14-2706, MCA. At the meeting, a committee of supervisors is elected. § 7-14-2707, MCA. After the road superintendent, with the assistance of the committee, has prepared plans (including a description of the proposed local assessment district) and estimates of the damages,

costs, and expenses, he must submit a report to the board at the board's next annual meeting. § 7-14-2709, MCA. Section 7-14-2710(1), MCA, then provides:

If the whole amount of damages, costs, and expenses shall not exceed 135% of the total taxable value of the parcels of land in the district as determined from the last annual assessment roll of the county, the board shall make and enter upon the report an order that the road be made.

Subsection (2) further provides that the order "shall create" the local improvement district.

Again, the statutory language is mandatory. Creation of the district is not subject to availability of funds or any condition other than the requirement that costs not exceed 135 percent of taxable value. The Legislature has not given discretion to the board to refuse to create a local improvement district when this threshold requirement has been satisfied.

By contrast, the board does have discretion to deny a petition filed pursuant to section 7-14-2601, MCA. See § 7-14-2603, MCA; Ingram-Clevenger, Inc. v. Lewis and Clark County, \_\_\_ Mont. \_\_\_, 636 P.2d 1372 (1981). But the county must bear the entire cost of improvements which are petitioned under section 7-14-2601, MCA, and the board is required to take immediate steps if it decides to grant the petition (see § 7-14-2605, MCA). Under the local improvement district statutes, however, the district pays for up to 75 percent of the cost of the improvement, and the board need not order the improvement or create the district until its annual meeting, at which time the county's share of the cost may be considered by the board in estimating expenditures for the next year and preparing the county budget.

Section 7-14-2702, MCA, requires the petition to set forth the portion of the costs which the district, if formed, will assume and pay. Section 7-14-2703, MCA, states that the district's portion of the costs must not be less than 35 percent and may be as much as 75 percent of the costs. Section 7-14-2733, MCA, then provides:

Sharing of road costs with county. (1) The board may enter an agreement to share costs with the district when the petition presented states the proportion which the district will pay. After such an agreement has been made specifying the amount to be paid by the district and the amount to be paid from county funds, the board shall make an order to that effect on the records of its proceedings.

(2) The board shall order paid from county funds the share of the county for construction or improvement of the road. However, payment shall not exceed 65% of the cost. This amount shall be a proper charge against the county and shall be paid by the treasurer upon warrants, duly drawn, as ordered by the board.

The Legislature has required the county to share the road costs by paying at least 25 percent of the costs and has permitted the county to agree to pay up to 65 percent of the costs; within these limitations the board must determine the proportion of costs to be borne by the county. It is not bound by the proposals set forth in the petition. Although section 7-14-2733, MCA, does not specify from which county fund the share of the county is to be paid, I have concluded that the board may use the county road fund for this purpose. See §§ 7-14-2501, 7-14-2513, MCA. However, the board is not precluded by statute from specifying the general fund as the fund against which warrants are to be drawn for the share of the county. See § 7-6-2318, MCA.

I can find no express statutory authority for permitting the county to pay its share of the costs by providing in-kind services. However, section 7-14-2714, MCA, allows the district to contract with the board to construct or improve the road in the event that the local committee of supervisors rejects the bids of private contractors. The county may then take the place of a private contractor and may furnish materials and services for part or all of the improvement project. If the committee awards the contract to a private contractor, then the county's share must be paid from county funds pursuant to section 7-14-2733, MCA. Of course, the county may agree with the private contractor to sell crushed rock or gravel for use by the contractor. See § 7-14-2124, MCA.

THEREFORE, IT IS MY OPINION:

1. The board of county commissioners is required to pass a resolution of public interest upon receipt of a proper petition, under section 7-14-2702, MCA, requesting the creation of a local improvement district for a county road. The board may not hold a hearing for the purpose of making an independent determination of the public interest.
2. The board may not refuse to create a local improvement district which has been properly petitioned where the requirements of section 7-14-2710(1), MCA, are met.
3. The county's share of the costs of the improvement may be paid either from the county road fund or from the general fund.
4. Pursuant to section 7-14-2714, MCA, the county may construct or improve the road and thereby meet its share of the costs by providing in-kind services. Otherwise, the county's share must be paid from county funds in accordance with section 7-14-2733, MCA.

Very truly yours,

MIKE GREELY  
Attorney General