

VOLUME NO. 43

OPINION NO. 13

ANNEXATION - Authority of municipality to require consent to annexation as condition of providing sewer service when property is within county water and sewer district;

CITIES AND TOWNS - Authority of municipality to provide sewer service within county water and sewer district;

COUNTIES - Responsibility for expenses associated with giving notice of county water and sewer district tax levies;

MUNICIPAL GOVERNMENT - Authority of municipality to provide sewer services within county water and sewer district;

PROPERTY, PUBLIC - County water and sewer district's right of eminent domain with respect to municipal property used by municipality to provide sewer service;

TAXATION AND REVENUE - Applicability of Initiative No. 105 and 1987 Montana Laws, chapter 654 to a county water and sewer district created after tax year 1986;

TAXATION AND REVENUE - Responsibility of persons within county water and sewer district but receiving municipal sewer service to pay district tax levies;

URBAN RENEWAL - Entitlement of municipality to amounts attributable to county water and sewer district tax levies when tax increment provision applicable;

WATER AND SEWER DISTRICTS - Applicability of Initiative No. 105 and 1987 Montana Laws, chapter 654 when created after tax year 1986;

WATER AND SEWER DISTRICTS - Authority of municipality to provide sewer service within county water and sewer districts;

WATER AND SEWER DISTRICTS - Entitlement of municipality to amounts attributable to county water and sewer district tax levies when tax increment provision applicable;

WATER AND SEWER DISTRICTS - Responsibility for expenses associated with giving notice of property tax levy on its behalf;

WATER AND SEWER DISTRICTS - Responsibility of persons within county water and sewer district but receiving municipal sewer service to pay district tax levies;

WATER AND SEWER DISTRICTS - Right of eminent domain with respect to municipal property used by municipality to provide sewer service;

MONTANA CODE ANNOTATED - Sections 7-13-2202, 7-13-2204 to 7-13-2206, 7-13-2208, 7-13-2210, 7-13-2211, 7-13-2213, 7-13-2214, 7-13-2218, 7-13-2231, 7-13-2301, 7-13-2302, 7-13-2304 to 7-13-2307, 7-13-2351, 7-13-4301, 7-13-4304, 7-13-4311, 7-13-4312, 7-13-4314, 7-13-4321, 7-13-4322, 7-13-4341, 7-15-4282 to 7-15-4292, 7-15-4286, 7-15-4288, 15-10-401 to 15-10-412, 70-30-103;

MONTANA LAWS OF 1987 - Chapter 654;

OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 109 (1988).

- HELD: 1. A municipality retains all authority granted to it under sections 7-13-4301 to 4345, MCA, with respect to providing water and sewer services after a county water and sewer district has been incorporated which includes the municipality.
2. A county water and sewer district may not exercise the right of eminent domain with respect to municipal property located within the district and utilized by the municipality to provide sewer services.
3. Persons receiving municipal sewer services but residing within a county water and sewer district are required to pay that portion of property taxes imposed pursuant to section 7-13-2302, MCA, with respect to the district's expenditures unrelated to principal and interest payments for bonded indebtedness. Whether those persons are sufficiently benefited by expenses associated with bonded indebtedness so as to be responsible for property tax amounts attributable to such indebtedness is a question of fact inappropriate for resolution through an Attorney General's Opinion.
4. The board of county commissioners must assume the expense attendant to providing notice of intent to levy property taxes on behalf of a county water and sewer district.
5. If a tax increment provision exists in a municipality's urban renewal plan, the municipality will receive revenue for use in the

urban renewal area attributable to application of a county water and sewer district's property tax levy upon the incremental taxable value.

6. The property tax limitations in Initiative No. 105 and 1987 Montana Laws, chapter 654 do not apply to taxing jurisdictions formed after tax year 1986.

May 22, 1989

Jim Nugent
Missoula City Attorney
201 West Spruce
Missoula MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion concerning various questions which I have rephrased as follows:

1. If a county water and sewer district is created which includes a municipality already providing sewer service, may the municipality continue to operate its sewer system?
2. May a county water and sewer district exercise the right of eminent domain with respect to a municipal sewer system located within such district?
3. Are persons receiving municipal sewer service required to pay property taxes levied on behalf of a county water and sewer district within which they reside?
4. Is a county water and sewer district or the county responsible for the cost associated with mailing notices concerning a public hearing on a proposed tax levy on behalf of the district?
5. Is a municipality entitled to any taxes paid with respect to properties within an urban renewal area attributable to tax levies on behalf of a county water and sewer district?
6. Are property tax levies on behalf of a county and water sewer district not attributable to the expense of bonded indebtedness subject to the tax limitations in Initiative No. 105 and 1987 Montana Laws, chapter 654?

Your questions are resolved by specific statutory provisions or prior Attorney General Opinions except as to one element of the third inquiry which is inappropriate for resolution through the opinion process.

The questions arise from the proposed creation of a county water and sewer district ("county district") within Missoula County. The district would have included the city of Missoula and a large area outside the city. The city has its own sewer system, and some property within the proposed district but outside the city is also connected to that system. The affected residents voted against creation of the county district in November 1988, but the city nonetheless remains interested in the questions which you pose because a similar proposal may be voted upon later this year. Before I address your individual questions, a brief summary of the statutes governing county districts and provision of municipal water and sewer service is helpful.

The procedure for forming a county district is initiated by filing with the involved board of county commissioners a petition signed by at least 10 percent of the residents within the proposed district. § 7-13-2204, MCA. The county board must then publish notice of the petition and hold a hearing concerning it. §§ 7-13-2205, 7-13-2206, MCA. If the board concludes the petition complies with statutory requirements, it must finally determine the proposed district's boundaries and give notice of an election on the issue of whether the district should be incorporated. §§ 7-13-2208, 7-13-2210, 7-13-2211, MCA. Approval requires a majority vote from at least 40 percent of all registered voters within the district. §§ 7-13-2213, 7-13-2214, MCA. Once incorporated, a county district has broad powers with respect to undertaking water and sewer projects. § 7-13-2218, MCA. These powers are exercised through a board of directors. § 7-13-2231, MCA. The board is required, *inter alia*, to establish charges for services which the county district provides and may cause taxes to be levied for any district expenses in excess of the amounts collected from the service charges. §§ 7-13-2301, 7-13-2302, MCA. The board of county commissioners is responsible for actually levying the county district's property taxes (§ 7-13-2302(2), MCA) and must give notice of its intent to do so through several means, including forwarding such notice "addressed to the owners and the purchasers under contracts for deed of taxable real property within the district" (§ 7-13-2304(2)(c), MCA). Most importantly for present purposes, section 7-13-2202, MCA, states that "[n]othing in this part and part 23 shall be so construed as repealing or in any wise modifying the provisions of any other act relating to water or sewers or the supply of water to or the acquisition thereof by counties or municipalities within this state."

A municipality is granted authority to establish sewer and water systems in section 7-13-4301, MCA, upon a majority vote of its registered electors. The municipality may provide service not only within its own boundaries but also outside those boundaries. §§ 7-13-4311, 7-13-4312, MCA. Section 7-13-4314, MCA, further permits a municipality to condition service to a person

located outside its boundaries upon consent to annexation. Municipal sewer and water systems are financed through service charges (§ 7-13-4304, MCA) and revenue and revenue refunding bonds (§§ 7-13-4321, 7-13-4322, 7-13-4341, MCA). Unlike county districts which can be dissolved (§ 7-13-2351, MCA), no express provision is made for the sale or other termination of a municipal system.

Section 7-13-2202, MCA, directly answers your first question. That provision disclaims any intent to supersede through formation of a county district a municipality's authority with respect to maintenance or even creation of a sewer and water system. Moreover, nothing in the statutes governing a county district's or a municipal system's operation suggests that a municipality's powers as to its sewer and water system are somehow diminished by inclusion within a county district. An included municipality therefore has the same legal rights and obligations after a county district has been established as before.

Although county districts may exercise eminent domain powers under appropriate circumstances (Lincoln/Lewis and Clark County Sewer District at Lincoln v. Bossing, 42 St. Rptr. 318, 696 P.2d 989 (1985)), section 70-30-103(1)(b), MCA, excludes from those forms of "private property" subject to condemnation municipal lands already "appropriated to some public use[.]" Obviously, land which is utilized for municipal sewer and water system purposes is so appropriated. The express exclusion of such lands from eminent domain proceedings thus controls over the more general provision in section 70-30-103(1)(c), MCA, which authorizes the taking of property previously appropriated to public use when the proposed use is "more necessary[.]" Permitting a county district to exercise eminent domain rights over property containing a municipal water or sewer system would also conflict with section 7-13-2202, MCA. The second question must be answered negatively.

You next ask whether persons receiving municipal sewer service are required to pay property taxes levied on behalf of a county district. Section 7-13-2302(3), MCA, states that "[s]uch taxes for the payment of any [principal or interest on] bonded debt shall be levied on the property benefited thereby, as stated by the board of directors in the resolution declaring the necessity therefor, and all taxes for other purposes shall be levied on all property in the territory comprising the district." Whether persons already receiving municipal services would be sufficiently "benefited" by county district activities financed through bonded indebtedness is a question of fact (Parker v. County of Yellowstone, 140 Mont. 538, 374 P.2d 328 (1962)) inappropriate for resolution through an Attorney General's Opinion. However, they would be subject to taxes imposed pursuant to section 7-13-2302, MCA, for expenses unrelated to bonded indebtedness.

Section 7-13-2304(1), MCA, requires the board of county commissioners to give notice of its intent to levy a property tax on behalf of a county district. Since the statutory responsibility is the county's and no provision is made for the county district to bear the expense associated with such notice, the county itself is responsible for that expense. This result is hardly anomalous because a principal purpose of the notice is to advise county district residents of a hearing before the county commissioners, at which protests to the proposed levy may be heard and resolved by them. §§ 7-13-2305, 7-13-2306(4), 7-13-2307, MCA. Consequently, while the financial benefit of the proposed levy flows to the county district, the notice and associated hearing relate to county commissioner responsibilities.

Your fifth question is presumably directed to the tax increment provisions relating to urban renewal areas in sections 7-15-4282 to 4292, MCA. If a tax increment provision has been included in a municipality's urban renewal plan, revenue from application of a county district's mill levy to "incremental taxable value," as defined in section 7-15-4283(3), MCA, must be segregated for use in connection with urban renewal projects and paid into a fund for use by the municipality. § 7-15-4282, 7-15-4286(2)(a), 7-15-4288, MCA. Absent a tax increment provision, none of the income attributable to a county district's ad valorem taxation of property within an urban renewal area will accrue to the municipality for expenditures in such area.

With respect to the final question, the proposed county district would not be subject to the property tax limitations in Initiative No. 105 and 1987 Montana Laws, chapter 654 (codified in §§ 15-10-401 to 412, MCA) because it would be created after tax year 1986. 42 Op. Att'y Gen. No. 109 (1988).

THEREFORE, IT IS MY OPINION:

1. A municipality retains all authority granted to it under sections 7-13-4301 to 4345, MCA, with respect to providing water and sewer services after a county water and sewer district has been incorporated which includes the municipality.
2. A county water and sewer district may not exercise the right of eminent domain with respect to municipal property located within the district and utilized by the municipality to provide sewer services.
3. Persons receiving municipal sewer services but residing within a county water and sewer district are required to pay that portion of property taxes imposed pursuant to section 7-13-2302, MCA, with respect to the district's expenditures unrelated to principal and interest payments for bonded indebtedness. Whether those persons are sufficiently benefited by expenses associated with bonded indebtedness so as to be responsible for property tax

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amounts attributable to such indebtedness is a question of fact inappropriate for resolution through an Attorney General's Opinion.

4. The board of county commissioners must assume the expense attendant to providing notice of intent to levy property taxes on behalf of a county water and sewer district.
5. If a tax increment provision exists in a municipality's urban renewal plan, the municipality will receive revenue for use in the urban renewal area attributable to application of a county water and sewer district's property tax levy upon the incremental taxable value.
6. The property tax limitations in Initiative No. 105 and 1987 Montana Laws, chapter 654 do not apply to taxing jurisdictions formed after tax year 1986.

Sincerely,

MARC RACICOT
Attorney General