

VOLUME NO. 44

OPINION NO. 35

COUNTY GOVERNMENT - Requirement to levy tax for noxious weed fund;
LOCAL GOVERNMENT - Requirement to levy tax for noxious weed fund;
PESTICIDES - Requirement of board of county commissioners to levy tax for noxious weed fund;
TAXATION AND REVENUE - Requirement of board of county commissioners to levy tax for noxious weed fund;
WEED CONTROL DISTRICTS - Requirement of board of county commissioners to levy tax for noxious weed fund;
MONTANA CODE ANNOTATED - Title 7, chapter 22, part 21; sections 7-6-2348, 7-22-2101(10), 7-22-2102, 7-22-2103, 7-22-2105, 7-22-2109, 7-22-2115, 7-22-2121, 7-22-2141 to 7-22-2146;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 63 (1990), 41 Op. Att'y Gen. No. 91 (1986), 39 Op. Att'y Gen. No. 5 (1981).

HELD: Section 7-22-2142, MCA, grants discretionary authority to the board of county commissioners to assess and levy a tax of up to two mills each fiscal year to fund the noxious weed program.

June 1, 1992

Mike McGrath
Lewis and Clark County Attorney
County Courthouse
228 Broadway
Helena MT 59623

Dear Mr. McGrath:

You have requested my opinion regarding the obligation of the board of county commissioners (hereinafter "commissioners") to fund the noxious weed program. Specifically, you have asked whether section 7-22-2142, MCA, requires the commissioners to assess and levy a tax of at least two mills each fiscal year to fund the weed management district created pursuant to section 7-22-2102, MCA.

The Montana Legislature has declared noxious weeds and the seed of any noxious weed to be a common nuisance. § 7-22-2115, MCA. In order to implement a program for the containment, suppression, and eradication of noxious weeds, the Legislature has directed that a weed management district be formed in every county of the state. §§ 7-22-2101(10), -2102, MCA. Each district is to be governed by a district weed board (hereinafter "weed board"), whose members are appointed by the commissioners. § 7-22-2103, MCA.

The weed board is responsible for the administration of the district's noxious weed program, which is based upon a management plan approved by the weed board. §§ 7-22-2109, 7-22-2121, MCA. The cost of the weed control program is to be paid from a noxious weed fund created by the commissioners. §§ 7-22-2109(1)(b), 7-22-2141, 7-22-2144, MCA.

There are several statutory sources of money for the noxious weed fund. Section 7-22-2117, MCA, provides that all fines, bonds, and penalties collected under the provisions of Title 7, chapter 22, part 21 are to be credited to the noxious weed fund by the county treasurer. In addition, section 7-22-2142, MCA, provides:

Sources of money for noxious weed fund. (1) The commissioners may create the noxious weed fund and provide sufficient money in the fund for the board to fulfill its duties, as specified in 7-22-2109, by:

(a) appropriating money from the general fund of the county;

(b) at any time fixed by law for levy and assessment of taxes, levying a tax not exceeding 2 mills on the dollar of total taxable valuation in the county. The tax levied under this subsection must be identified on the assessment as the tax that will be used for noxious weed control.

(c) levying a tax in excess of 2 mills if authorized by a majority of the qualified electors voting in an election held for this purpose pursuant to 7-6-2531 through 7-6-2536.

(2) The proceeds of the noxious weed control tax must be used solely for the purpose of managing noxious weeds in the county and must be designated to the noxious weed fund.

(3) Any proceeds from work or chemical sales must revert to the noxious weed fund and must be available for reuse within that fiscal year or any subsequent year.

(4) The commissioners may accept any private, state, or federal gifts, grants, contracts, or other funds to aid in the

management of noxious weeds within the district. These funds must be placed in the noxious weed fund.

Use of the term "may" in section 7-22-2142, MCA, is not determinative of the funding question, since "may" can be interpreted as either mandatory or permissive. See State ex rel. Griffin v. Greene, 104 Mont. 460, 469, 67 P.2d 995, 999 (1937). The ambiguity created by use of the term "may" is resolved by looking to the other provisions of Title 7, chapter 22, part 21, MCA, and comparing the respective powers granted to the commissioners and to the weed board. See 43 Op. Att'y Gen. No. 63 (1990) (the duty of a local governing body to levy the amount of tax certified annually by a local port authority is mandatory rather than discretionary under sections 7-14-1131 and 7-14-1132, MCA, where the local port authority had specifically been granted the power to certify the amount of tax to be levied); see also 41 Op. Att'y Gen. No. 91 (1986) (a board of county commissioners does not have the authority to refuse, within statutory millage limits, to levy some or all of the property taxes necessary to satisfy an annual budget adopted by county library trustees where the trustees' administrative powers were broad and exclusive and included the authority to adopt a budget); accord 39 Op. Att'y Gen. No. 5 (1981) (county commissioners' duty to levy a proper assessment for a conservation district is mandatory where district has express grant of authority to cause taxes to be levied).

A comparison of the commissioners' express powers with those of the weed board reveals that the commissioners' authority in budgetary matters is significantly broader than that of the weed board. The weed board is responsible for estimating the cost of the proposed weed management program in its noxious weed management plan and making budget recommendations to the commissioners based on those estimated costs. §§ 7-22-2121(2)(d), 7-22-2143, MCA. However, it is the commissioners who determine and fix the costs of noxious weed control, § 7-22-2143, MCA. In addition, the commissioners are responsible for setting the salary, per diem and mileage of weed board members, § 7-22-2105, MCA; creating a noxious weed management fund, § 7-22-2141, MCA; accepting private, state, or federal gifts, grants, contracts, or other funds for noxious weed control, § 7-22-2142, MCA; determining and fixing the cost of noxious weed control in the district, § 7-22-2143; approving warrant claims upon the weed fund, § 7-22-2145, MCA; and establishing cost-share programs in the district, § 7-22-2146, MCA.

The weed board's authority is readily distinguishable from that of library trustees, who have exclusive control over budgetary matters, as discussed in 41 Op. Att'y Gen. No. 91, *supra*, at 395:

The trustees' power under section 22-1-309(6), MCA, to adopt an annual budget forecloses the board of county commissioners from effecting changes in such budget. The obvious purpose of the trustees' authority in library budget matters is to allow

application of their informed judgment to fiscal issues. Such authority is, moreover, an integral aspect of the trustees' independence without which many of their other express powers would be rendered meaningless. The board of county commissioners' only role in library budget matters is to assign a property tax levy amount, which presently cannot exceed five mills, sufficient to satisfy the budgetary needs. The commissioners' function is thus purely ministerial with respect to the imposition of the levy.

In contrast, the weed board's recommendations in budget matters are subject to final approval by the commissioners. Furthermore, there is no means by which the weed board may compel the commissioners to assess and levy a tax or appropriate general funds to fund the noxious weed program as is the case with conservation districts. See 39 Op. Att'y Gen. No. 5, *supra*.

Although the weed board may cause the noxious weed fund to be expended in the manner and at the time it sees fit, § 7-22-2145, MCA, this power extends only to those funds from independent sources or to additional money which the commissioners, in their discretion, choose to make available. It does not empower the weed board to compel funding from the commissioners in one of the methods outlined in section 7-22-2142, MCA. I recognize that many of the weed board's statutorily mandated functions are jeopardized if the commissioners, in the exercise of their discretion, refuse to supplement the noxious weed fund by one of the methods outlined in section 7-22-2142, MCA. However, the relevant statutes lead to the conclusion that funding of the noxious weed program by tax levy is solely within the commissioners' discretion.

This conclusion is supported by the defeat of recently proposed amendments to section 7-22-2142, MCA. In the 1991 legislative session, House Bill 549 was introduced to provide funding for a full-time weed control supervisor for each district and increase the maximum tax levy to five mills. See Minutes of House of Representatives Committee on Agriculture, Livestock and Irrigation, February 8, 1991; Minutes of Senate Committee on Agriculture, Livestock and Irrigation, March 11, 1991. The original bill proposed that section 7-22-2142, MCA (1989), be amended to read: "The commissioners *shall* create the noxious weed fund *and provide sufficient money in the fund for the board to fulfill its duties*["] The term "shall" was later struck and replaced with the term "may" following opponents' suggestions that some districts did not need or could not afford a full-time supervisor, and that the maximum tax levy remain at two mills. See Minutes of House Committee, February 8, 1991, at 3-4, Exhibit 3; Minutes of Senate Committee, March 11, 1991, at 4, 9. Any attempt of the original bill drafters to mandate that weed districts "be funded at levels to allow for adequate development and implementation of the weed management program" by use of the term "shall" (House Committee Minutes, *supra*, at 2), was thus defeated by changes in statutory language. These proposed changes which

were rejected in committee give rise to a presumption that the Legislature did not intend to change what was previously a permissive duty to a mandatory duty in section 7-22-2142, MCA (1989). See Foster v. Kovich, 207 Mont. 139, 144, 673 P.2d 1239, 1243 (1983).

THEREFORE, IT IS MY OPINION:

Section 7-22-2142, MCA, grants discretionary authority to the board of county commissioners to assess and levy a tax of up to two mills each fiscal year to fund the noxious weed program.

Sincerely,

MARC RACICOT
Attorney General