

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2010-011

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Gregg Wood, Project Development Coordinator; Carla Krause, Special Services Administrator; Jolene Ellerton, PW Permit Specialist; Dan Jordan, GIS Manager; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Kelly Elam, City Clerk Secretary; Starr Sullivan, Wastewater Treatment Plant Superintendent

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE: August 18, 2010

RE: Municipal sanitary sewer fees may legally be charged to unconnected property owners

FACTS:

Recently during a City Council Monday night meeting, a city council member expressed concern about property owners whose properties with plumbed structure(s) but no connection to the City's public utility sanitary sewer main are charged the city's semi-annual public utility sanitary sewer fees.

A little more than 30 years ago the City of Missoula was a defendant in litigation before the Montana Public Service Commission (PSC) which addressed this very issue and ruled in favor of the City of Missoula. The PSC concluded the city could assess semi-annual sanitary sewer fees against properties within 200' of a sanitary sewer main if there was a plumbed structure on the property that was not currently connected to the city's public utility sanitary sewer system. The 200' distance was based on provisions of the Uniform Plumbing Code and City-County Health Department regulations requiring connection rather than an alternative sewage treatment method wherever a septic or cesspool failed or new construction development occurred.

ISSUE:

May a municipality legally assess sanitary sewer fees against property owners whose plumbed structures in proximity of a municipal sanitary sewer main are not connected to the public utility sanitary sewer main?

CONCLUSION:

Yes pursuant to the PSC's *Final Order* which states:

General sewage collection and processing facilities are of benefit to a community.
The existence of proximate sewage collection facilities is of benefit to property.
The benefitted property within the service area of the sewage systems should bear the cost associated with the service and benefit.

PSC *Final Order* (March 3, 1980)

LEGAL DISCUSSION:

Historically, when municipal sanitary sewer and water public utility rates were subject to PSC review, John Malikie represented by the Montana Consumer Counsel, initiated litigation before the PSC challenging the legality of whether the City of Missoula could assess a sanitary sewer use fee to property owners whose plumbed property is not connected to the city sanitary sewer system.

PSC member George Turman conducted a public hearing on this legal challenge. After the public hearing, the PSC issued a 4-0 *Final Order* upholding the legality and validity of the assessment of sewer use fees to property owners whose property is not connected to the city's sanitary sewer service.

At page 9 of the *Final Order*, the PSC relied on and quoted extensively from what it stated was "a clearly parallel case" from Ohio, Colley v. Village of Englewood, 71 N.E. 2d 524, 1947 Ohio App. LEXIS 736 (1947). In Colley, the Village of Englewood's sanitary sewer assessments against all properties within the Village's corporation limits regardless of whether the properties were users or non-users of the sanitary sewer system was upheld as a valid assessment regulation.

The Ohio court explained, supra at 725, the legal and factual reasoning for upholding the sanitary sewer assessment against all properties whether or not connected:

The trial court in the case at bar held, and we think properly so, that a sewage disposal system is a capital expenditure serving the entire community, which is true whether the property owners have an individual connection or not; that it would not be practical to install such a system for only those who cared to tap into it, and exclude others who did not care to make such a connection; that a garbage or rubbish removal, which consists of sending a truck around over the city, renders a service only to those who use it; that every property owner in the village of Englewood has a responsibility toward the public health of his community and since this can best be served by the sewage disposal system instead of individual cesspools, as long as the rates are fair, reasonable and indiscriminatory, that the

village has the right to make the charges set forth in ordinance No. 114.
(Emphasis added.)

A subsequent Ohio case, Kubicki v. The City of North Royalton, 741 N.E. 2d 411, 2000 Ohio App. LEXIS 1743 (2000) explained the holding in Colley stating:

In Colley, the appellate court held that residents with cesspools who did not use the village sewer system nonetheless were obligated to pay assessments for the sewer system since they received a benefit from the establishment of the sewer system. (Emphasis added.)

The PSC in its March 3, 1980 *Final Order* at page 11 concluded:

CONCLUSIONS OF LAW

General sewerage collection and processing facilities are of benefit to a community.

The existence of proximate sewerage collection facilities is of benefit to property.

The benefited property within the service area of the sewerage systems should bear the cost associated with the service and benefit.

A reasonable sewer fee imposed periodically is an appropriate medium by which to collect necessary revenues related to benefited properties. The revenues from these fees may include amounts which are necessary to service and retire revenue bond issues related to sewerage systems facilities.

The sewer fee complained of in this proceeding is just and reasonable.

ORDER

The Complaint of John Malikie is dismissed.

CONCLUSION(S):

Yes pursuant to the PSC's *Final Order* which states:

General sewage collection and processing facilities are of benefit to a community.
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