

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2009-015

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Gregg Wood, Engineering; Carla Krause, Engineering; Jolene Ellerton, Engineering; Dan Jordan, Public Works; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Kelly Elam, City Clerk Office; Starr Sullivan, Wastewater

CC: Dept. Atty.

FROM: Jim Nugent

DATE May 4, 2009

RE: Municipal Sanitary Sewage Collection Facilities are Capital Expenditures Serving and Benefit Public Health of Entire Community whether or not Structures Proximate to Sanitary Sewer Main are connected. Unconnected Property Owners whose Proximate Structures are not Connected, may Legally be Obligated to Pay Sanitary Sewer Assessments since they Receive a Benefit from the Establishment of the Sanitary Sewer System.

FACTS:

Nearly thirty years ago the City of Missoula was a Defendant in litigation before the Montana Public Service Commission in which the Montana Public Service Commission concluded that the City of Missoula could assess its semi-annual sanitary sewer assessments against proximate properties within two hundred feet of a sanitary sewer main if there was a plumbed structure on the property that was not currently connected to the sanitary sewer system. The two hundred foot distance was based on provisions of the Uniform Plumbing Code and City County Health Department regulations that would require connections rather than use an alternative sewage treatment wherever a septic or cesspool has failed or new construction development is occurring.

ISSUE(S):

May a Montana municipality legally assess sanitary sewer facility assessments against property owners whose proximate plumbed structures are not currently connected to municipal sanitary sewer mains.

CONCLUSION(S):

Yes, pursuant to a March 3, 1980 “Final Order” the Montana Public Service Commission concluded, that general sanitary sewage collection and processing facilities are of benefit to a community that the existence of proximate sanitary sewerage collection facilities is of benefit to property and that the benefitted property within the service area of the sanitary sewage system should bear the cost associated with the service or benefit even if the proximately plumbed property is not currently connected to municipal sanitary sewer.

LEGAL DISCUSSION:

Historically, when Montana municipal sanitary sewer and water public utility rates were subject to Montana Public Service Commission review, John Malikie, represented by the Montana Consumer Counsel, initiated litigation before the Montana Public Service Commission 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.

Montana Public Service Commission member George Turman conducted a public hearing on this legal challenge. Subsequent to the public hearing the Montana Public Service Commission issued a 4-0 “Final Order” upholding the legality and validity of the City of Missoula assessing its sewer use fee to property owners whose property is not connected to City of Missoula sanitary sewer service.

At page 9 of its “Final Order”, the Montana Public Service Commission 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) involving factual circumstances where 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 regulation.

The 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; 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; and 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, 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 v. Village of Englewood 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 Montana Public Service Commission 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.

(Emphasis added.)

CONCLUSION(S):

Yes, pursuant to a March 3, 1980 "Final Order" the Montana Public Service Commission concluded, that general sanitary sewage collection and processing facilities are of benefit to a community that the existence of proximate sanitary sewerage collection facilities is of benefit to property and that the benefitted property within the service area of the sanitary sewage system should bear the cost associated with the service or benefit even if the proximately plumbed property is not currently connected to municipal sanitary sewer.

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Jim Nugent, City Attorney

JN:jlw