

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2014-024

**TO:** Mayor John Engen; City Council; Mike Haynes; Dale Bickell; Marty Rehbein; Kevin Slovarp; Doug Harby; Leigh Griffing; and Scott Paasch.

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** September 10, 2014

**RE:** Expenditure of development impact fees must be reasonably related to the benefits accruing to the development paying the impact fees.

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### FACTS:

A city council member has inquired seeking a legal opinion concerning the potential use of development impact fees for Hillview Way Street improvements.

### ISSUE(S):

- (1) Does the expenditure of impact fees have to be related to benefits accruing to the development paying the impact fees?
- (2) Who determines benefit and the boundaries of any benefit determination?

### CONCLUSION(S):

- (1) Yes, pursuant to section 7-6-1603 MCA expenditure of development impact fees must be reasonably related to the benefits accruing to the development paying the impact fees.
- (2) While there are no Montana Supreme Court decisions pertaining to title 7, chapter 6, part 16 entitled "IMPACT FEES TO FUND CAPITAL IMPROVEMENTS", pursuant to Montana Supreme Court decisions pertaining to the creation of special improvement districts, it has been held that the city determines "benefit" and the city's judgment is conclusive absent mistake or fraud that precludes the exercise of sound judgment by the city.

## **LEGAL DISCUSSION:**

Title 7, chapter 6, part 16 Montana Code Annotated (MCA) pertains to development impact fees and is entitled “IMPACT FEES TO FUND CAPITAL IMPROVEMENTS”. Title 7, chapter 6, part 16 sets forth four sections of law in sections 7-6-1601 through 7-6-1604 MCA.

Pursuant to subsection 7—6-1603(1) MCA it is stated and required that expenditures of development impact fees must be reasonably related to the benefits accruing to the development paying the impact fees. Section 7-6-1603 MCA provides in its entirety as follows:

**7-6-1603. Collection and expenditure of impact fees -- refunds or credits -- mechanism for appeal required.** (1) The collection and expenditure of impact fees must comply with this part. The collection and expenditure of impact fees must be reasonably related to the benefits accruing to the development paying the impact fees. The ordinance or resolution adopted by the governmental entity must include the following requirements:

(a) Upon collection, impact fees must be deposited in a special proprietary fund, which must be invested with all interest accruing to the fund.

(b) A governmental entity may impose impact fees on behalf of local districts.

(c) If the impact fees are not collected or spent in accordance with the impact fee ordinance or resolution or in accordance with 7-6-1602, any impact fees that were collected must be refunded to the person who owned the property at the time that the refund was due.

(2) All impact fees imposed pursuant to the authority granted in this part must be paid no earlier than the date of issuance of a building permit if a building permit is required for the development or no earlier than the time of wastewater or water service connection or well or septic permitting.

(3) A governmental entity may recoup costs of excess capacity in existing capital facilities, when the excess capacity has been provided in anticipation of the needs of new development, by requiring impact fees for that portion of the facilities constructed for future users. The need to recoup costs for excess capacity must have been documented pursuant to 7-6-1602 in a manner that demonstrates the need for the excess capacity. This part does not prevent a governmental entity from continuing to assess an impact fee that recoups costs for excess capacity in an existing facility. The impact fees imposed to recoup the costs to provide the excess capacity must be based on the governmental entity's actual cost of acquiring, constructing, or upgrading the facility and must be no more than a proportionate share of the costs to provide the excess capacity.

(4) Governmental entities may accept the dedication of land or the construction of public facilities in lieu of payment of impact fees if:

(a) the need for the dedication or construction is clearly documented pursuant to 7-6-1602;

(b) the land proposed for dedication for the public facilities to be constructed is determined to be appropriate for the proposed use by the governmental entity;

(c) formulas or procedures for determining the worth of proposed dedications or constructions are established as part of the impact fee ordinance or resolution; and

- (d) a means to establish credits against future impact fee revenue has been created as part of the adopting ordinance or resolution if the dedication of land or construction of public facilities is of worth in excess of the impact fee due from an individual development.
- (5) Impact fees may not be imposed for remodeling, rehabilitation, or other improvements to an existing structure or for rebuilding a damaged structure unless there is an increase in units that increase service demand as described in 7-6-1602(2)(j). If impact fees are imposed for remodeling, rehabilitation, or other improvements to an existing structure or use, only the net increase between the old and new demand may be imposed.
- (6) This part does not prevent a governmental entity from granting refunds or credits:
  - (a) that it considers appropriate and that are consistent with the provisions of 7-6-1602 and this chapter; or
  - (b) in accordance with a voluntary agreement, consistent with the provisions of 7-6-1602 and this chapter, between the governmental entity and the individual or entity being assessed the impact fees.
- (7) An impact fee represents a fee for service payable by all users creating additional demand on the facility.
- (8) An impact fee ordinance or resolution must include a mechanism whereby a person charged an impact fee may appeal the charge if the person believes an error has been made. (Emphasis added).

Thus, the Montana state legislature has specifically required that “expenditures of impact fees must be reasonably related to the benefits accruing to the development paying the impact fees”. The existing factual circumstances on a case by case basis will have to be reviewed for whether or not the proposed impact fee expenditures are reasonably related to the benefits accruing to the development paying the development impact fees.

With respect to the determination of “benefit”, there are no Montana Supreme Court cases that have been decided pertaining to development impact fees pursuant to title 7, chapter 6, part 16 MCA entitled “IMPACT FEES TO FUND CAPITAL IMPROVEMENTS”. However, in a somewhat legally parallel set of laws, pursuant to Montana’s municipal special improvement laws set forth in title 7, chapter 12, parts 41 and 42 MCA, the Montana Supreme Court has held that it is the city that determines “benefits” and that absent any proof of mistake or fraud on the city’s part that precludes the exercise of sound judgment the determination of “benefit” is determined by the city. See *Enger v. City of Missoula*, 2001 Mt 142, 306 M 28, 29 P. 3d 514 (2001) and *Stevens v. City of Missoula*, 205 M 274, 667 P. 2d 440 (1983).

In *Enger v. City of Missoula*, supra, paragraph 6, the Montana Supreme Court citing the *Stevens v. City of Missoula* case stated:

“Nevertheless, IT IS A WELL ESTABLISHED RULE THAT A CITY’S JUDGMENT IN DETERMINING SPECIAL BENEFITS AND CREATION OF DISTRICT BOUNDARIES IS CONCLUSIVE ABSENT PROOF OF FRAUD OR MISTAKES WHICH PRECLUDE THE EXERCISE OF SOUND JUDGMENT, *Stevens* at 280”. (Emphasis added).

It should also be noted that the City of Missoula's Development fee ordinances are set forth in title 15. Chapter 15.66 Missoula Municipal Code (MMC) entitled "Development Impact Fee Procedures and Requirements".

**CONCLUSION(S):**

- (1) Yes, pursuant to section 7-6-1603 MCA expenditure of development impact fees must be reasonably related to the benefits accruing to the development paying the impact fees.
- (2) While there are no Montana Supreme Court decisions pertaining to title 7, chapter 6, part 16 entitled "IMPACT FEES TO FUND CAPITAL IMPROVEMENTS", pursuant to Montana Supreme Court decisions pertaining to the creation of special improvement districts, it has been held that the city determines "benefit" and the city's judgment is conclusive absent mistake or fraud that precludes the exercise of sound judgment by the city.

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Jim Nugent, City Attorney

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