

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2014-030

**TO:** Mayor John Engen; City Council; Bruce Bender; Mike Haynes; Jessica Morriss; Dale Bickel; Kevin Slovarp; Doug Harby; Marty Rehbein; Leigh Griffing; and Scott Paasch

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE:** November 14, 2014

**RE:** City Council conclusively determines benefit with respect to creation of special improvement districts and what properties to include within the boundaries of the special improvement district absent proof of mistake or fraud that precludes exercise of sound judgment.

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### FACTS:

A special improvement district is being proposed to fund part of a proposed street improvement project for Hillview Way in Missoula's South Hills. A public hearing on the proposed creation of a special improvement district will soon be held by the city council at a Monday evening city council meeting.

### ISSUE:

Who determines "benefit" or "benefitted" real properties with respect to establishing the boundaries and assessments of a special improvement district?

### CONCLUSION:

The city council conclusively determines "benefit" or "benefitted" real properties for creation of the boundaries of a special improvement district. The city council determination is conclusive absent proof of mistake or fraud that precludes the exercise of sound judgment.

### LEGAL DISCUSSION:

Montana municipal special improvement district law is set forth in title 7, chapter 12, parts 41 and 42 MCA. The term "benefitted" is important with respect to the creation of special improvement districts; because the purpose and intent of a special improvement district is to

provide a special improvement to real properties deemed to be benefited. For example the phrase “the number of benefited lots, tracts, parcels within the boundaries of the district during the term of the bonded indebtedness” appears in sections 7-12-4104 as well as 7-12-4106 MCA.

Sections 7-12-4104 and 7-12-4106 MCA provide as follows:

**7-12-4104. Resolution of intention to create special improvement district.** (1) Before creating any special improvement district for the purpose of making any of the improvements or acquiring any private property for any purpose authorized by this part, the city council shall pass a resolution of intention to do so.

(2) The resolution shall:

- (a) designate the number of such district;
- (b) describe the boundaries thereof;
- (c) state therein the general character of the improvement or improvements which are to be made and an approximate estimate of the cost thereof;
- (d) specify the method or methods by which the costs of the improvements will be assessed against property in the district; and
- (e) if the method of assessment is that described in 7-12-4162(3)(a), specify that if an increase occurs in the number of benefited lots, tracts, or parcels within the boundaries of the district during the term of the bonded indebtedness, the assessment per lot, tract, or parcel then in the district will be recalculated as provided in 7-12-4162(3)(b).

(3) When any improvement is to be made in paving, the city or town council may, in describing the general character of it in the resolution, describe several kinds of paving. (Emphasis added)

**7-12-4106. Notice of passage of resolution of intention -- exception.** (1) Except as provided in subsection (4), upon having passed the resolution of intention pursuant to 7-12-4104, the council shall give notice of the passage of the resolution of intention.

(2) The notice must be published as provided in 7-1-2121. A copy of the notice must be mailed to each person, firm, or corporation or the agent of the person, firm, or corporation having real property within the proposed district listed in the owner's name upon the last-completed assessment roll for state, county, and school district taxes, at the owner's last-known address, upon the same day that the notice is first published or posted.

(3) (a) The notice must describe the general character of the proposed improvements, state the estimated cost of the improvements, describe generally the method by which the costs of the improvements will be assessed, and designate the time when and the place where the council will hear and pass upon all written protests that may be made against the making or acquisition of the improvements or the creation of the district. If the method of assessment described in 7-12-4162(3)(a) is used, the notice must state that if an increase occurs in the number of benefited lots, tracts, or parcels within the boundaries of the district during the term of the bonded indebtedness, the assessment per lot, tract, or parcel then in the district will be recalculated as provided in 7-12-4162(3)(b).

(b) If the revolving fund is to be pledged to secure the payment of bonds and warrants, the notice must include a statement that, subject to the limitations in 7-12-4222:

(i) the general fund of the city or town may be used to provide loans to the revolving fund; or

(ii) a general tax levy may be imposed on all taxable property in the city or town to meet the financial requirements of the revolving fund.

(c) The notice must refer to the resolution on file in the office of the city clerk for the description of the boundaries. If the proposal is for the purchase of an existing improvement, the notice must state the exact purchase price of the existing improvement.

(4) The provisions of this section do not apply to a district that is created under 7-12-4114 following receipt of a petition as provided in 7-12-4102(3).

The Montana Supreme Court has considered “benefit” multiple times involving municipal special improvement districts. The Montana Supreme Court in *Enger et. al. v. City of Missoula* 2001 MT 142, 306 M 28, 29 P 3d 514(2001) stated in paragraph 6 that:

“...It is a well established rule that a City’s judgment in determining special benefits and creations of district boundaries is conclusive absent proof of fraud or mistakes which preclude the exercise of sound judgment.” (emphasis added)

The Montana Supreme Court in *Enger*, supra, relied in part on the earlier Montana Supreme Court decision in *Stevens v. City of Missoula* 205 Mont 274, 667 P 2d 440, 1983 Mont. LEXIS 779 (1983). The Montana Supreme Court in *Stevens* stated that:

“The 1972 Montana Constitution specifically provides that the powers of incorporated cities shall be liberally construed. We recognized that mandate in *Tipco Co-op Inc. v. City of Billings* (1982), 197 Mont. 339, 642 P 2d 1074, 39 St. Rep. 600 which involved the powers of a home rule municipality. A local government with general powers is entitled to the same liberal construction.” Supra at 443-444.

The Montana Supreme Court in *Stevens*, supra at 444 went on to state:

“Plaintiffs also challenge the City Council’s determination of special benefit and creation of district boundaries. The well established rules is that the City’s judgment is conclusive absent proof of fraud or mistake which preclude the exercise of sound judgment. *Schumacher v. City of Bozeman* (1977), 174 Mont. 519, 526, 571 P. 2d 1135, 1139. Neither this Court nor the trial court should substitute its judgment for a rational determination of the City.

Boundary lines should be drawn in such a way that the improvement brings a benefit to the included properties and that the benefit is substantially more intense than that which is realized by the properties outside of the district boundaries. 2 Antieau, Municipal Corporation Law, section 14.24, p. 14-46. The fact that outside property derives some general benefit should not affect the special benefit afforded the district properties.

Moreover, since properties within the district will bear the cost of improvements in proportion to the special benefit received, it would be very difficult to say that borderline properties have been unfairly burdened by their inclusion in the District.. Thus, greater scrutiny should not be required of such SIDs, though they may be extended in nature.” (emphasis added)

**CONCLUSION:**

The city council conclusively determines “benefit” or “benefitted” real properties for creation of the boundaries of a special improvement district. The city council determination is conclusive absent proof of mistake or fraud that precludes the exercise of sound judgment.

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/s/ \_\_\_\_\_  
Jim Nugent, City Attorney

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