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Legal Opinion 2014-032

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

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE: November 19, 2014

RE: Choice of assessable area as special improvement district manner of assessing special improvement district costs.

FACTS:

After the conclusion of the November 17, 2014 City Council Public Hearing pertaining to the proposed Hill View Way special improvement district (SID), the agenda item was referred to city council public works committee for further review, discussion and consideration.

ISSUE:

Generally, what real property land assessment options are primarily available for assessing special improvement district assessments?

CONCLUSION:

Pursuant to Montana municipal special improvement district law the statutory choices available as a manner of assessing special improvement district costs primarily include (1) land area option, (2) assessed valuation option, (3) equal amount option, (4) land frontage option, or (5) any combination of these options.

LEGAL DISCUSSION:

Title 7, chapter 12, parts 41 and 42 Montana Code Annotated (MCA) set forth Montana's municipal special improvement district laws. Section 7-12-4161 MCA entitled "CHOICE IN MANNER OF ASSESSING COSTS" authorizes a municipal city council to adopt one of the statutory methods of assessment or any combination of statutory methods of assessment in a single special improvement district. Section 7-12-4161 MCA provides as follows:

7-12-4161. Choice in manner of assessing costs. (1) Except as provided in subsection (2), to defray the cost of making or acquiring any of the improvements provided for in this part, including incidental expenses, the city council or commission shall adopt one of the methods of assessment, where applicable, provided in 7-12-4162 through 7-12-4165 for each improvement to be made or acquired for the benefit of the district.

(2) The city council may use one or any combination of methods of assessment in a single special improvement district, and if more than one improvement is undertaken, each lot or parcel of land in the district need not be assessed for the cost of all the improvements. If the method of assessment described in 7-12-4162(3)(a) is used, the resolution of intention under 7-12-4104 and notice under 7-12-4106 must provide 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). (emphasis added)

Three of the statutory methods of special improvement district assessments are set forth in section 7-12-4162 entitled "ASSESSMENT OF COSTS-AREA OPTION-ASSESSED VALUATION OPTION-EQUAL AMOUNT OPTION. Section 7-12-4162 MCA provides as follows:

7-12-4162. Assessment of costs -- area option -- assessed valuation option -- equal amount option. (1) (a) The city council or commission shall assess the entire cost of an improvement against benefited property in the district, each lot or parcel of land assessed within such district to be assessed for that part of the whole cost which its assessable area bears to the assessable area of all benefited lots or parcels in the district, exclusive of streets, avenues, alleys, and public places. For the purposes of this subsection, "assessable area" means an area of a lot or parcel of land representing the benefit conferred on the lot or parcel by the improvement. Assessable area may be less than but may not exceed the actual area of the lot or parcel.

(b) The council or commission, in its discretion, shall have the power to pay the whole or any part of the cost of any street, avenue, or alley intersection out of any funds in its hands available for that purpose or to include the whole or any part of such costs within the amount of the assessment to be paid by the benefited property in the district.

(c) In order to equitably apportion the cost of any of the improvements herein provided for between that land within the district which lies within 25 feet of the line of the street on which the improvement is to be made and all other benefited land within the district, the council or commission may, in the resolution creating any improvement district, provide that the amount of the assessment against the property in such district to defray the cost of such improvements shall be so assessed that each square foot of land within the district lying within 25 feet of the line of the street on which the improvements therein provided for are made shall bear double the amount of cost of such improvements per square foot of such land that each square foot of any other benefited land within the district shall bear.

(2) The city council or city commission may assess the cost of an improvement against each lot or parcel of land in the district based on the assessed value of the benefited lots or parcels of land within the district if the council or commission determines such assessment to be equitable and in proportion to and not exceeding the benefits derived from the improvement by the lot or parcel.

(3) (a) The city council or city commission may assess each lot or parcel of land in the district an equal amount based upon the total cost of the improvement.

(b) If the method specified for assessment is that described in subsection (3)(a) and an increase occurs in the number of benefited lots, tracts, or parcels within the boundaries of a district created as provided in this part during the term of bonded indebtedness that is payable from the assessments, the city council or city commission shall recalculate the amount assessable to each lot, tract, or parcel. The city council or city commission shall comply with the provisions of 7-12-4176 through 7-12-4178 in adopting the recalculated amount. The city council or city commission shall base the recalculation on the amount of the district's outstanding bonded indebtedness for the current fiscal year and shall spread the assessments across the district based on the number of benefited lots, tracts, or parcels within the boundaries of the district as of July 1 following the action that resulted in the increase in the number of benefited lots, tracts, or parcels. (emphasis added)

Subsection 7-12-4162(1)(c) MCA sets forth the land area or square foot option. Subsection 7-12-4162(2) MCA sets forth assessed valuation option. Subsection 7-12-4162(3)(a) MCA sets forth the equal amount option.

Section 7-12-4163 MCA is entitled "ASSESSMENT OF COSTS-FRONTAGE OPTION".
Section 7-12-4163 MCA provides as follows:

7-12-4163. Assessment of costs -- frontage option. (1) The city council or commission shall assess the cost of an improvement against benefited lots or parcels in the district, each lot or parcel of land within such district bordering or abutting upon a street or streets whereon or wherein the improvement has been made to be assessed in proportion to the lineal feet abutting or bordering the same.

(2) The council or commission, in its discretion, shall have the power to pay the whole or any part of the cost of any street, avenue, or alley intersections out of any funds in its hands available for that purpose or to include the whole or any part of such costs within the amount of the assessment to be paid by the benefited property in the district.

There also exists special improvement assessment options based on utility service connections pursuant to section 7-12-4164 as well as for off street parking options pursuant to section 7-12-4165; but these would not be applicable to the proposed Hill View Way street improvement project.

It also is important to recognize that the primary focal point of the creation of a special improvement district (SID) is to focus on "benefited" property or lands. The words "benefited" or "benefit" were noted and emphasized above when quoting sections 7-12-4161, 7-12-4162 and 7-12-4163 MCA.

The term "benefited" 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. Additional statutory examples in Montana municipal special improvement district law utilizing 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:

Pursuant to Montana municipal special improvement district law the statutory choices available as a manner of assessing special improvement district costs primarily include (1) land area option, (2) assessed valuation option, (3) equal amount option, (4) land frontage option, or (5) any combination of these options.

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/s/ _____
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