

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2023-010

**TO:** Mayor Jordan Hess, City Council, Dale Bickell, Department City Clerk, Jeremy Keene, Kevin Slovarp, Troy Monroe, Ross Mollenhauer, Monte Sipe, Andy Schultz, Eran Pehan, Mary McCrea, Leigh Griffing, Dave Degrandpre, Cassie Tripard, Alex Brmalette, Spencer Starke, Laval Means, Logan McInnis, Tracey Campbell

**CC:** Department City Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** May 18<sup>th</sup>, 2023

**RE:** Montana municipal special improvement district assessments must be reasonably and rationally made against property which is directly benefited by the special improvement district improvements.

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### FACTS:

City council members during city council committee meetings have recently had many questions about the future creation of a special improvement district with respect to potential improvements associated with the geographical area where the 3800 Lincoln Wood family transfer subdivision exemption is proposed.

### ISSUE(S):

What is the primary factor to consider with respect to special improvement district assessments?

### CONCLUSION(S):

Special improvement district assessments are to be made only against property which is directly benefitted by the special improvement district improvements as reasonably and rationally determined pursuant to the sound judgment of the city council.

## **LEGAL DISCUSSION:**

Initially with respect to the current proposed family transfer subdivision exemption proposed related to 3800 Lincolnwood, it should be noted that the Montana Subdivision and Platting Act with respect to the primary miscellaneous subdivision exemptions set forth in the Montana Subdivision and Platting Act states pursuant to § 76-3-201 MCA that the requirements of the Montana Subdivision and Platting Act may not apply to the divisions of land set forth in § 76-3-201 MCA. In addition, § 76-3-207 MCA states that the subdivision exemptions authorized in that section are not subdivisions under the Montana Subdivision and Platting Act; but are subject to applicable zoning regulations. § 76-3-207(1)(b) MCA is the basis for the family transfer exemption outside of a platted subdivision that is pending before the Missoula City Council with respect to 3800 Lincolnwood.

It should also be noted that pursuant to SB-158(2023) signed into law May 1, 2023 by the Governor with an immediate effective date, it now is also possible pursuant to amendments to § 76-3-207 MCA for a family transfer subdivision exemption to occur within a local governing body approved platted subdivision as long as the platted subdivision family transfer exemption creates parcels of a size allowed within the subdivision, and is gifted or sold to a member of the landowner's immediate family. SB-158(2023) amendments to § 76-3-207 MCA now in effect also require that the immediate family member or spouse of an immediate family member "may not transfer or otherwise convey the division of land for a period of up to 2 years after the date of this division unless the governing body sets a period of less than 2 years". This two year restriction would apply to the 3800 Lincolnwood family transfer subdivision exemption; since it is occurring after the May 1, 2023 effective date of SB-158(2023).

It should also be noted that SB-131(2023) that does not go into effect until October 1, 2023 also amends § 76-3-207 MCA and in part the amendments prohibit the imposition of certain new criteria for approval that includes that the governing body "may not impose conditions on the approval of a division of land" made pursuant to the statutory subdivision exemptions authorized pursuant to § 76-3-207 MCA, which includes the family transfer subdivision exemption.

Montana's municipal government special improvement district laws are set forth in title 7, chapter 12 parts 41 and 42 entitled "Special Improvement Districts". § 7-12-4162 MCA is entitled "Assessments of Costs – Area Option – Assessed Valuation Option – Equal Amount Option". This section of Municipal special improvement district law utilizes the words "benefit" and "benefitted" a dozen times in the text of the state law. The text also includes the phrases "in order to equitably apportion the cost of any of the improvements" as well as city council "determines such assessment to be equitable and in proportion to and not exceeding the benefits derived from the improvement". Two City of Missoula, Montana Supreme Court decisions have established Montana municipal special improvement district court case law with respect to special improvement district "benefit" to assessed properties.

The Montana Supreme Court in *Enger v. City of Missoula*, 29 P. 3d 514, 2001 MT 142, 306 Mont. 28, 2001 Mont. LEXIS 205 stated in paragraph 19 that "§ 7-12-4162(1)(a) MCA, provides that assessments for the costs of improvements shall be made only against property which is directly benefitted by the improvements.". In *Enger*, the Missoula City Council created a

special improvement district for the purpose of financing and constructing storm sewer drainage improvements for south east Missoula Farviews hillside and the southeast valley floor area with respect to Pattee Creek ". The Missoula City Council special improvement district resolution created two Sub-Districts, one for the valley floor area and one for the Farviews. The Missoula City Council determined that the hillside properties within the Farviews Sub-District would benefit from the storm sewer drain project and accordingly assessed 23% of the cost of the project to those property owners. The southeast valley floor properties inside the boundaries of the special improvement district were then assessed 77% of the storm drain project costs. Three Farviews homeowners sued the City asserting that their hillside properties should not be included in the special improvement district assessments.

Historically, in part, some of the reasons for including the Farviews hillside in addition to the fact that their homes, garages, driveways and streets created impermeable land for absorption of water, shortly after the Mount St. Helen's volcano erupted in the State of Washington there was initially a lot of volcano ash arriving and then it rained steadily for about three days and a week after the volcano erupted Pattee Creek became a wide overflowing stream overflowing and taking over Pattee Creek Drive, closing Pattee Creek Drive for several days as well as closing all north/south streets such as Bancroft, Russell and Paxson until as far west as the former K-Mart(now Kohls) store. Thousands of sandbags were filled and placed along Pattee Creek Drive by the residents and Pattee creek water was primarily directed into Play Fair Park. Also, subsequently, a few years later during a steady winter rain storm when there was a lot of snow on Farviews hillside and the hillside ground was frozen and could not absorb water, Pattee Creek flood waters flooded the girls soft ball fields several feet deep as contained by the earthen dam the city had constructed between the girls and boys fields after Mount St. Helen's volcano.

The Montana Supreme Court relied on the prior City of Missoula special improvement district case in Stevens v. City of Missoula (1983), 205 Mont. 274, 667 P. 2d 440, stating in paragraph 18 of the Enger decision that earlier in Stevens the Montana Supreme Court had "held that a city's determination of benefit and creation of special improvement district boundaries is conclusive absent proof of fraud or mistake which preclude the exercise of sound judgment". The Montana Supreme Court in Enger in paragraph 9 approved the District Court finding in Enger finding "the benefits presented by the City to be reasonably and rationally related to the storm sewer drainage project and that Plaintiffs failed to prove otherwise under the 'fraud or mistakes standard'".

Earlier in the 1983 Stevens Montana Supreme Court decision, the Montana Supreme Court held that the City of Missoula's judgment was conclusive regarding the benefits and boundaries of the special improvement district, absent fraud or mistake precluding the exercise of sound judgment. The special improvement district in Stevens pertained to the creation of off-street parking spaces in downtown Missoula. The Missoula City Council resolution was to Create Special Improvement District Number 470 for the Purpose of Providing Off-Street Parking Improvements.

The Montana Supreme Court in Stevens when discussing the special benefits for the properties to be assessed stated that "The well-established rule is that the City's judgment is conclusive absent proof of fraud or mistakes which preclude the exercise of sound judgment. (citation omitted).

Neither this Court nor the trial court should substitute its judgment for a rational determination of the City.” With respect to the City of Missoula special improvement District boundary determination the Montana Supreme Court stated “The fact that outside property derives some general benefit should not affect the special benefit afforded district properties. Moreover, since properties within the district will bear the cost of the 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.”.

### **CONCLUSION(S):**

Special improvement district assessments are to be made only against property which is directly benefitted by the special improvement district improvements as reasonably and rationally determined pursuant to the sound judgment of the city council.

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A handwritten signature in black ink, appearing to read "Jim Nugent", is placed within a vertical rectangular box.

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Jim Nugent, City Attorney

JN: mcs