



VOLUME NO. 59

OPINION NO. 1

**MUNICIPALITIES:** Municipalities retain the right to require permits from a Water District which contracts with the city for water for excavation of city water lines in city streets and rights-of-way;

**WATER DISTRICTS:** A water district which contracts to receive its water from a municipality must obtain a permit from the city to excavate waterlines within the city;

**MONTANA CODE ANNOTATED:** §§ 7-1-112 (3), 7-13-2201, 7-13-2218, 7-13-2219, 7-13-2220, 7-13-4104, 7-14-116, 7-14-4121.

**HELD:** The Water District must apply and pay for permits from the city prior to excavating in the right-of-way on property owned by and under city management.

November 17, 2023

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Ms. Dahl:

**[P1]** You have requested an Attorney General Opinion on a question I have restated as follows:

Whether § 7-13-2220 MCA, and § 7-1-112(3) MCA, prohibit the City of Billings (City) from requiring a county water district to obtain a permit from the City to excavate in City streets and other public rights-of-way pursuant to City ordinances and state law?

**[P2]** In preparing this Opinion, I have considered the analysis in your legal memorandum accompanying your request for an Attorney General Opinion and comments received in this office.

**[P3]** According to the City, the County Water District of Billings Heights (District) was created in 1958 under MCA § 7-13-2201 as a separate unit of local government distinct from the City. The District contracts with the City to receive municipal water service from the City's municipal water system.

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**[P4]** The City claims that the District traditionally obtained permits required by the city code to excavate in city streets and other rights-of-ways to access the water lines. The District recently decided that it will no longer apply for, or pay for, permits. The District cites MCA § 7-13-2220 and § 7-1-112(3) as authority exempting it from those permits.

**[P5]** I. The Law on Right-of-Ways, City Streets, and Utilities

Existing statutes define the *general powers* of a water district (MCA § 7-13-2217), and further define the *specific powers* related to construction of water projects (MCA § 7-13-2218).

**[P6]** The district board of directors may construct water works across natural and manmade obstacles. MCA § 7-13-2219.

The board of directors shall have power to construct works across any stream of water, watercourse, street, avenue, highway, railway, canal, ditch, or flume which the route of said works may intersect or cross; provided such works are constructed in such manner as to afford security for life and property; and said board shall restore the crossings and intersections to their former state as near as may be or in a manner not to have impaired unnecessarily their usefulness.

**[P7]** The legislature limited this authority by requiring the district "afford security for life and property" during construction. *Id.* And the district must "restore the crossing and intersections to their former state." *Id.*

**[P8]** The permitting process allows the City of Billings to ensure that life and property are not jeopardized during excavation, and that the road surface is restored to its former condition.

**[P9]** The legislature granted water districts a right-of-way across state owned lands for the construction and maintenance of district water works. MCA § 7-13-2220.

The right-of-way is given, dedicated, and set apart to locate, construct, and maintain district works over and through any lands which are the property of this state, and the district has the same rights and privileges relating to the right-of-way as are granted to municipalities.

**[P10]** The statutory language limits the rights and privileges to those granted to municipalities in MCA § 7-13-4101. That section in turn provides:

(1) The city or town council has power to permit the use of the streets and alleys, other property, rights-of-way, utility corridors, or easements of the city or town for the purpose of laying down gas, water, and other mains and broadband infrastructure, *but excavations may not be made for this*

*purpose without the permission of the council or its authorized officer.*  
(emphasis added)

**[P11]** The difference in the rights and privileges granted to municipalities is highlighted by MCA § 7-14-4121, which specifically grants to municipalities the power to regulate public grounds:

Maintenance and regulation of public grounds. The city or town council has power to provide for enclosing, improving, and regulating all public grounds belonging to the city or town.

**[P12]** Taken together, these statutes grant a county water district the power to construct and maintain water works across natural and manmade obstacles. The water district also possesses a right-of-way across state lands for this same purpose.

**[P13]** However, the power to regulate public grounds rests with the owner, and excavation may be made without the permission of an authorizing officer.

**[P14]** The statutes leave some ambiguity to the meaning of the "same rights and privileges" in MCA § 7-13-2220. One interpretation is that the phrase confers a like power to the water district board to authorize excavations just as the city council possesses in MCA § 7-13-4101. The other interpretation is that because both the municipality and water district possess a right-of-way over the same crossing, the municipality possesses a greater specific authority to permit excavations of that crossing. The second interpretation must be correct under current law.

**[P15]** The power of the City to impose upon the water district the duty to obtain a permit for excavation of a city street is granted in MCA § 7-1-112 (3) which provides in part:

A local government with self-government powers is prohibited the exercise of the following powers *unless the power is specifically delegated by law*:  
(3) the power to impose a duty on another unit of local government, except that nothing in this limitation affects the right of a self-government unit to enter into and enforce an agreement on interlocal cooperation; (emphasis added)

**[P16]** The legislature vested the City with the power to regulate public grounds, and to require permission from its council, or authorized officer, prior to excavation of its streets for any of the utilities identified in MCA § 7-13-4101. Notwithstanding the conditional grant of power and right-of-way to the water district, the City may lawfully impose the duty on the water district to obtain a permit prior to excavation.

**[P17]** Other statutes support the conclusion that cities retain authority over access to and construction in the right-of-way. For example, MCA § 7-14-4102 provides:

The city or town council may:

(1) except as provided in 7-14-4116, regulate and prevent the use or obstruction of streets, sidewalks, and public grounds by signs, poles, wires, posting handbills or advertisements, or any obstruction;

**[P18]** Similarly, MCA § 7-14-4104 supports this conclusion that the city has broad power to ensure the integrity and safety of its streets:

Except as provided in 7-14-4116, the city or town council may prevent the encumbering of streets, sidewalks, alleys, or public grounds with obstacles or materials.

**[P19]** This additional statutory evidence reflects the category of powers specifically delegated by law to cities in MCA § 7-1-112.

**[P20]** While there are no cases interpreting the statutes discussed above in the context of your question, cases discussing the liability of municipalities for defects in city owned property emphasize the role the police power to regulate has in imposing liability on municipalities for known defects caused by others.

**[P21]** In *Lazich v. Butte*, 116 Mont. 386, 154 P.2d 260 (1944), a case involving a damaged wooden sidewalk, the Montana Supreme Court found that the building permit process did not create an agency relationship between the city and the permit holder. Rather, the issuance of the permit provided constructive notice to the city of the construction. In recognition of the broad, nondelegable, power to police and administer city property, the court stated:

City ordinances enacted by municipal organizations requiring that a permit shall be obtained from the municipality before any building shall be erected or repaired, or any other work of a similar nature or kind is begun, within the corporate limits of the municipality, are regulations established pursuant to and in the exercise of the police powers vested in municipalities. . . . Section 5039.37 empowers city and town councils to prevent encumbering sidewalks with obstacles and material and such legislative grant carries the implied power to compel observance of such regulation. This means that the enforcement of this regulation must be made effective by the officers or employees of the municipality.

*Lazich*, 116 Mont. at 389, 154 P.2d at 261.

**[P22]** The rationale underlying the exercise of the police power to regulate construction, the requirement of building permits, and the city's liability for defects in city property it has knowledge of, applies equally to excavation of city streets by third parties.

**[P23]** II. Policy Considerations

Cities have the power and responsibility to regulate what goes on the streets within their jurisdiction which is entrusted to them by the State of Montana. While the District has the power to construct and maintain critical infrastructure on state land, that legal right does not change the activities on streets by the people of Montana. The people must still be able to go to work, places of worship, engage in commerce, go to school, and carry out their everyday lives. As the local level of governance, cities are in the best position to manage (and are the most answerable to) the competing interests that occur within their communities. They are simply the best choice to manage the day-to-day activities of the city and know how to use the streets in the most efficient way.

To facilitate this activity of the people, the State of Montana has vested authority in municipalities to regulate and police the activities occurring on these streets so they can be utilized in the most efficient and safest way possible. With the power to regulate the activity occurring on streets also comes the liability. Cities have a non-delegable public duty to keep city streets in a reasonably safe condition for public travel. A city cannot delegate its liability to the water district for potential mistakes that may occur. Since the City retains responsibility for maintaining the streets within its municipality, logic would suggest that the City must have the power to issue or deny permits for all road work done on the streets it is responsible for managing.

**[P24]** Both the legal and policy implications overwhelmingly support the conclusion that the City has the authority to require the District to apply for permits to excavate on streets managed by the City. The permit requirement is a simple recognition of the nature of the City's general police power and the corresponding power to regulate by requiring permits. Statutory and case law provide the City is responsible for, and therefore is the arbiter of, what occurs on streets entrusted to it by the State of Montana. Policy considerations suggest a contrary opinion would lead to adverse situations where excavation could occur without notice to the City and its inhabitants. Absent the advance notice afforded by the permit process the City would not be able to manage its exposure to liability, and restoration of the roadway affected by excavation.

THEREFORE, IT IS MY OPINION:

The District must apply for and pay for permits from the City to excavate city streets. MCA § 7-13-2220 can be reasonably read to not conflict with MCA § 7-13-4101. The requirement to obtain a permit to excavate water lines on city property does not infringe upon the Water District's right to lay and maintain their water lines.

Sincerely,

/s/ Austin Knudsen  
AUSTIN KNUDSEN  
Attorney General