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VOLUME NO. 45

OPINION NO. 5

COUNTY ATTORNEYS - Role in rejection of sample initiative petition;
INITIATIVE AND REFERENDUM - Application to amendment of service charges of solid waste management district;
INITIATIVE AND REFERENDUM - Rejection of sample petition;
SOLID WASTE - Amendment of management district service charges by initiative;
MONTANA CODE ANNOTATED - Sections 7-5-131, 7-5-132, 7-5-134, 7-5-135, 7-13-232, 7-13-233;
MONTANA CONSTITUTION - Article XI, section 8;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 73 (1982).

- HELD: 1. The initiative process may not be used to amend the resolution creating a county solid waste management district where the district encompasses an area smaller than the entire county and the initiative petition seeks to alter the method of establishing and collecting service charges.
2. The county election administrator, upon the advice of the county attorney, may reject a sample initiative petition where it does not involve a matter subject to the initiative or referendum process.

May 3, 1993

Mr. Robert Slomski
Sanders County Attorney
P.O. Box 519
Thompson Falls, MT 59873-0519

Dear Mr. Slomski:

You have requested my opinion on two questions I have phrased as follows:

1. May the initiative process be used to amend the resolution creating the Sanders County Solid Waste Refuse Disposal District to alter the method of establishing and collecting service charges?

2. If not, may the county election administrator, upon the advice of the county attorney, reject the sample petition, or is a suit in district court to determine the validity and constitutionality of a petition the county's sole remedy to prevent submission of the initiative to the electors?

Sanders County is a local government unit with general government powers. You have informed me that there are currently three solid waste management districts in Sanders County: the Hot Springs Refuse Disposal District, the Dixon Refuse Disposal District, and the Sanders County Solid Waste Refuse Disposal District (hereinafter the Sanders County district). The Sanders County district encompasses the western two-thirds of the county.

The only method authorized by law for assessing service charges at the time the Sanders County district was created was a fee "based upon a family residential unit." MCA § 7-13-232(1) (1989). The sole procedure for collection of the fees was placing them on tax notices and collecting them with property taxes. MCA § 7-13-233 (1989). In 1991, the statutes were amended to allow alternative methods for assessment and collection of the charges. MCA § 7-13-232(3) now authorizes service charges based on a family residential unit or "based on the size of a vehicle used to dispose of the waste; the volume or weight of the waste; or the cost, incentives, or penalties applicable to waste management practices." MCA § 7-13-232(3) (1991). The procedure for collection of the service charges has been expanded to include establishment of a system other than by tax notices to property owners. MCA § 7-13-232(4) (1991).

The Sanders County district did not alter its fee structure after MCA § 7-13-232 was amended. Consequently, an individual who is a resident and taxpayer in Sanders County and who owns property within the Sanders County district has submitted a sample initiative petition to the Sanders County election administrator. The petition is intended to alter the establishment and collection of refuse disposal fees from a fee based upon a family residential unit, collected with property taxes, to a fee to be assessed only against people actually using the service, at the time of use.

The powers of initiative and referendum are reserved to the people in the Montana Constitution: art. III, §§ 4 and 5; art. V, § 1; and art. XI, § 8. Pursuant to these constitutional provisions, the Legislature enacted MCA §§ 7-5-131 to -137. Those sections set forth the procedures by which the electors of each local government may exercise the powers of initiative and referendum. Section 7-5-131 states, in part: "Resolutions and ordinances within the legislative jurisdiction and power of the governing body of the local government ... may be proposed or amended ... in the manner provided in 7-5-132 through 7-5-137." Section 7-5-132 allows the filing of a petition for an initiative signed by 15 percent of the

registered electors of the local government. MCA § 7-5-132(3). Before the petition is circulated for signatures, however, a sample petition must be submitted to the county election administrator for approval as to form. MCA § 7-5-134(2). The election administrator then refers the sample petition to the local government attorney, who must review the sample petition for form and compliance with MCA §§ 7-5-131 and -132 and prepare a ballot statement and a statement of the implication of a vote for or against the ballot issue. MCA § 7-5-134(3), (4).

It is my conclusion that the general power of initiative provided in the Montana Constitution and enacted in sections 7-5-131 to -137 does not apply to an attempt to amend the resolution creating the Sanders County district to alter the method of establishing and collecting service charges.

The Sanders County district encompasses only two-thirds of Sanders County. Thus, there are qualified voters in the county who could vote on the initiative but are not physically or financially affected by the district's fees. In City of Shelby v. Sandholm, 208 Mont. 77, 80-81, 676 P.2d 178, 180 (1984), the Montana Supreme Court held that a referendum was not a proper means of challenging the creation of a special improvement district affecting less than all of the area in the city, and less than all of the property owners in the city. The Court reasoned that the initiative and referendum procedures do not apply to resolutions or ordinances establishing street improvements because such ordinances or resolutions affect only the people within the improvement district rather than the people of the municipality as a whole. 208 Mont. at 81, 676 P.2d at 180. The same rationale applies in this matter. The initiative procedure is not a proper method to amend a resolution establishing the service charges for a solid waste management district that encompasses less than the entire county.

I further conclude that the proposed action is not a legislative act subject to initiative or referendum. The Montana Supreme Court has consistently held that initiative and referendum procedures are applicable to those acts that are legislative in character and are not applicable to procedures that are administrative in character. City of Shelby, 208 Mont. at 81, 676 P.2d at 180; Dieruf v. City of Bozeman, 173 Mont. 447, 449, 568 P.2d 127, 129 (1977); Chouteau County v. Grossman, 172 Mont. 373, 377, 563 P.2d 1125, 1127 (1977); City of Billings v. Nore, 148 Mont. 96, 104, 417 P.2d 458, 463 (1966). The Court in City of Billings v. Nore distinguished legislative from administrative action, stating:

[O]ne reasonable test to be used in making such differentiation is whether the act was one creating a new law (legislative) or executing an already existing law (administrative).

148 Mont. at 104, 417 P.2d at 463. In Nore the question before the Court was whether an ordinance establishing sewer rates for the city of Billings, pursuant to Rev. Codes Mont. (1947) § 11-2219, was an administrative act of the city council. The Court found that it was an administrative act and therefore not subject to the initiative or referendum process. Similarly, in Dieruf, the Court held that passage of a city ordinance adopting a formula for assessing property for the purpose of creating an off-street parking facility was an administrative function and not a legislative function. Therefore, the ordinance was not subject to the referendum or initiative process. See also 39 Op. Att'y Gen. No. 73 (1982).

Here, the initiative involves the assessment and collection of service charges. It does not involve the more fundamental decision of whether a waste management district should be created. See Chouteau County v. Grossman, 172 Mont. at 378, 563 P.2d at 1128. The Sanders County commissioners passed a resolution establishing the Sanders County district. In the resolution, pursuant to MCA §§ 7-13-232 and -233, the county commissioners set forth the procedures for establishing and collecting the service charges. Like the actions in Nore and Dieruf, the commissioners' actions were administrative actions executing the existing law. They are not subject to the initiative or referendum process.

Your second question concerns whether the county election administrator, upon the advice of the county attorney, may reject the sample petition because of the flaws discussed above, or whether a suit in district court is the county's sole remedy to prevent submission of the initiative to the electors.

The county election administrator must approve or reject the petition as to form and send written notice to the person who submitted the sample petition within 21 days after its submission. MCA § 7-5-134(5), (6). During the review period, the election administrator must refer the sample petition to the attorney for the local government unit--here, the county attorney--for review. MCA § 7-5-134(3). If the petition is approved as to form, the governing body may direct that a suit be brought in district court within 14 days of the date of its approval to determine whether the proposed action would be valid and constitutional. MCA § 7-5-135.

MCA § 7-5-135 thus provides a method for the governing body to challenge the validity and constitutionality of a proposed petition. However, it is not the sole means for review of the petition. MCA § 7-5-134(3) expressly provides that the county attorney shall review the sample petition for form and "*compliance with 7-5-131 and 7-5-132*" (emphasis added). MCA § 7-5-131 authorizes the proposal of resolutions and ordinances "within the legislative jurisdiction and power of the governing body of the local government." I must presume that the Legislature would not pass

meaningless legislation and I must harmonize the statutes relating to the same subject, giving effect to each. Crist v. Segna, 191 Mont. 210, 622 P.2d 1028 (1981). It is my opinion that, while he or she may not advise rejection of a sample petition because the proposed action will not be valid or constitutional, the county attorney may advise rejection of a petition where the resolution or ordinance is outside the powers of initiative or referendum. As discussed above, the initiative petition in this case involves a proposal that is not within the legislative jurisdiction of the governing body. The inquiry of the county attorney being directed to compliance with MCA §§ 7-5-131 and -132, a sample petition may be rejected if it does not involve a matter subject to the initiative or referendum process.

THEREFORE, IT IS MY OPINION:

1. The initiative process may not be used to amend the resolution creating a county solid waste management district where the district encompasses an area smaller than the entire county and the initiative petition seeks to alter the method of establishing and collecting service charges.
2. The county election administrator, upon the advice of the county attorney, may reject a sample initiative petition where it does not involve a matter subject to the initiative or referendum process.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/kcs/brf

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