

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2016-004

**TO:** Mayor John Engen, Dale Bickell, Steve Johnson, Leigh Griffing, Scott Paasch, Mike Haynes, Don Verrue, Jolene Ellerton, Kevin Slovarp, Marty Rehben, Kirsten Hands, City Council

**CC:** Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE:** February 17, 2016

**RE:** Municipal Water and Sanitary Sewer System Development Fees authorized by Montana Supreme Court many years ago based on state laws. A subsequent 2005 Impact Fee law to fund certain Capital Improvements was not applicable to sewer and water system development fees already authorized by Montana law.

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### FACTS:

Some factual confusion has arisen concerning the 1990 Montana Supreme Court's recognizing and approving Montana municipal water and sanitary sewer system development fees as being already authorized by Montana law compared to a subsequent 2005 Montana State Legislative enactment authorizing Montana local government impact fees to fund certain other capital improvements. Pursuant to subsection 7-6-1601(5)(b)(iii) MCA, the Montana state Impact Fee law is limited in applicability and it explicitly excludes sewer and water districts and systems authorized by law. Local government sewer and water system development fees were already authorized by Montana law many years prior to the enactment of the 2005 impact fee for capital improvements law.

### ISSUE(S):

- (1) Does Montana state law authorize Montana municipal system development fees to fund a portion of the cost to fund future expansion of municipal water and sanitary sewer systems?
- (2) Was the subsequent 2005 Montana local government impact fee law authorizing Montana local government impact fees to fund some capital improvements intended to subject previously authorized water and sanitary sewer system development fees to the provisions of the subsequent 2005 new state law?

## **CONCLUSION(S):**

(1) Yes. The Montana Supreme Court, pursuant to its 1990 decision in *Lechner. v. City of Billings*, determined that existing Montana municipal utility laws, pursuant to Sections 69-7-101 and 7-13-4304 MCA, authorized Montana municipalities to establish water and sanitary sewer system development fees to fund a portion of the cost of future expansion of municipal water and sanitary sewer systems.

(2) No. The subsequent 2005 Montana local government impact fee law to fund some capital improvements was not needed to authorize previously authorized municipal water and sanitary sewer system development fees. Pursuant to the subsequent 2005 law's definition of "impact fee" set forth in subsection 7-6-1601(5)(b)(iii) MCA the term "impact fee" for the purposes of the 2005 Montana state law explicitly excluded both sewer and water districts and systems and therefore did not subject sanitary sewer and water districts and systems to the state impact fee law.

## **LEGAL DISCUSSION:**

Sewer and water system development fees were authorized by Montana municipal government state laws many years prior to the Montana State Legislature's 2005 enactment of an impact fee law to fund certain capital improvements.

Title 69, chapter 7 MCA is entitled MUNICIPAL UTILITIES. Part 1 of title 69, chapter 7 MCA is entitled "REGULATION OF RATES BY MUNICIPALITY. Section 69-7-101 MCA authorizes a Montana municipality to regulate, establish and charge "rates, charges, and classifications" imposed by municipal utility services. Section 69-7-101 MCA states:

**69-7-101. Municipal utilities -- regulation by municipality.** A municipality has the power and authority to regulate, establish, and change, as it considers proper, rates, charges, and classifications imposed for utility services to its inhabitants and other persons served by municipal utility systems. Rates, charges, and classifications must be reasonable and just. (emphasis added)

Water and sanitary sewer rates, charges and classifications, including system development fees, are authorized by law. Specifically, they are authorized by both sections 69-7-101 and 7-13-4304 MCA. Also, municipal changes in municipal rates, charges and classifications may occur as the municipality "considers proper". Section 69-7-101 MCA. In addition to title 69, chapter 7 entitled LOCAL GOVERNMENT, title 7, chapter 13 MCA is entitled UTILITY SERVICES". Part 43 of title 7, chapter 13 MCA is entitled "MUNICIPAL SEWAGE AND/OR WATER SYSTEMS. Section 7-13-4304 MCA authorizes Montana municipalities fix and establish and collect rates, rentals and charges for municipal water or sanitary sewer services. Section 7-13-4304 MCA states:

**7-13-4304. Authority to charge for services.** (1) The governing body of a municipality operating a municipal water or sewer system shall fix and establish, by ordinance or resolution, and collect rates, rentals, and charges for the services, facilities, and benefits

directly or indirectly afforded by the system, taking into account services provided and benefits received.

(2) Sewer charges may take into consideration the quantity of sewage produced and its concentration and water pollution qualities in general and the cost of disposal of sewage and storm waters. The charges may be fixed on the basis of water consumption or any other equitable basis the governing body considers appropriate. The rates for charges may be fixed in advance or otherwise and shall be uniform for like services in all parts of the municipality. If the governing body determines that the sewage treatment or storm water disposal prevents pollution of sources of water supply, the sewer charges may be established as a surcharge on the water bills of water consumers or on any other equitable basis of measuring the use and benefits of the facilities and services.

(3) An original charge for the connecting sewerline between the lot line and the sewer main may be assessed when the connecting sewerline is installed.

(4) The water and sewer rates, charges, or rentals shall be as nearly as possible equitable in proportion to the services and benefits rendered. (emphasis added)

The City of Missoula initiated City of Missoula sanitary sewer system development fees in the mid-1980s. Subsequently the Montana Supreme Court in *Lechner v. City of Billings*, 244 Mont. 195, 797 P 2d 191, 1990 Mont. LEXIS 252 (1990), held that Montana municipal system development fees for municipal water and sanitary sewer systems were a reasonable extension of the city's express authority to operate municipal water and sanitary sewer systems. The Montana Supreme Court ruled that the water and sanitary sewer system development fees were not taxes; but instead were service charges which a Montana municipality with self-government powers was not prohibited from adopting pursuant to section 7-1-112(1) MCA. Section 7-1-112 MCA is entitled "POWERS REQUIRING DELEGATION". As noted above Montana municipalities are specifically authorized to establish municipal water and sanitary sewer rates, charges, classifications, and rentals pursuant to sections 69-7-101 MCA as well as 7-13-4304 MCA. The 1990 Montana Supreme Court in *Lechner v. City of Billings* cited and relied on both sections 69-7-101 and 7-13-3404 MCA when holding that municipal sewer and water system development fees were authorized by Montana state law.

The Montana Supreme Court in *Lechner*, supra indicated at page 193 that water and sanitary system development fees in the City of Billings case are due and payable at the time the customer applies for the service... The Montana Supreme Court went on to state:

*"The fees are revenue raising measures adopted to fund construction of new water and wastewater facilities needed to meet the demands placed on the existing facilities by new growth in the City. They are placed in a special fund, which is used solely for the construction of expansion oriented, general benefit, water and wastewater facilities or for the retirement of bonds sold for such purpose."*

After discussing and quoting section 69-7-101 MCA to the effect that a Montana municipality has power and authority to regulate, establish and change, as it considers proper, rates, charges, and classifications imposed for utility services; the Montana Supreme Court in *Lechner* went on to discuss section 7-13-4304 MCA stating

*"Montana statutes give municipalities the authority to acquire, construct and maintain various undertakings, including the authority to establish and maintain water and sewer systems. Section 7-7-4404 and 7-13-4301 MCA. Statutory law also allows municipalities to "prescribe and collect rates, fees, and charges for the services, facilities and commodities furnished by such undertaking. "Section 7-7-4404, MCA. See also § 7-13-4304, MCA. The rates, fees and charges collected should produce sufficient revenue to pay bonds issued to finance the construction, improvements or extension of any undertaking and to "provide for all expenses of operation and maintenance of such undertaking, including reserves therefore." Section 7-7-4424 MCA. Considering the above statutes, we hold that the system development fee is a reasonable extension [\*\*\*\*15] of the city's express statutory authority to operate and fund municipal water and sewer systems. "* (emphasis added)

The subsequent 2005 Montana local government law set forth in title 7, chapter 6, part 16 MCA entitled "IMPACT FEES TO FUND CAPITAL IMPROVEMENTS does not apply to Montana municipal water and sanitary sewer districts and systems. Pursuant to the statutory definition of "impact fee" both sewer and water districts and systems are explicitly excluded from the statutory definition of impact fees. The plain meaning of the statutory language is to explicitly exclude water and sewer systems from the application of the 2005 state impact fee laws. Further, pursuant to the Montana rules of statutory construction, Section 1-4-101, a person may not insert omitted language into their interpretation of a law. The statutory definition of impact fees explicitly does not include water and sanitary sewer districts and systems, system development fees already authorized by Montana law. Pursuant to subsection 7-6-1601(5)(b)(iii) MCA. Sewer and water systems are explicitly excluded from the statutory definition of impact fees.

**Subsection 7-6-1601(5) MCA states:**

- (5) (a) "Impact fee" means any charge imposed upon development by a governmental entity as part of the development approval process to fund the additional service capacity required by the development from which it is collected. An impact fee may include a fee for the administration of the impact fee not to exceed 5% of the total impact fee collected.
- (b) The term does not include:
- (i) a charge or fee to pay for administration, plan review, or inspection costs associated with a permit required for development;
  - (ii) a connection charge;
  - (iii) any other fee authorized by law, including but not limited to user fees, special improvement district assessments, fees authorized under Title 7 for county, municipal, and consolidated government sewer and water districts and systems, and costs of ongoing maintenance; or
  - (iv) onsite or offsite improvements necessary for new development to meet the safety, level of service, and other minimum development standards that have been adopted by the governmental entity.

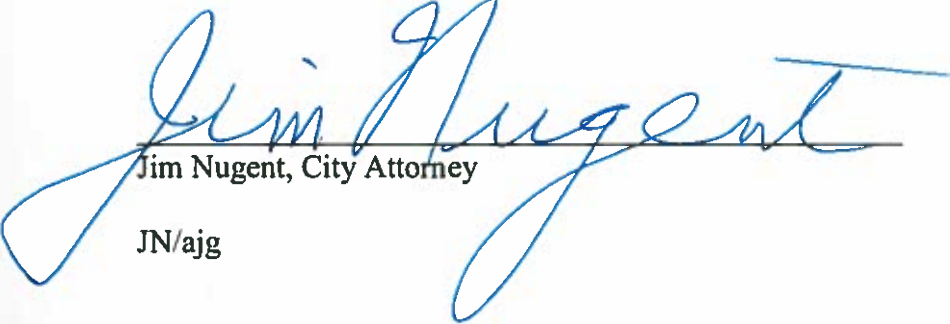
The 1990 Montana Supreme Court decision in *Lechner v City of Billings* determined that Sections 7-13-4304 and 69-7-101 MCA authorized municipal power and authority to establish sewer or water system development fees for a municipal utility system. (emphasis added)

**CONCLUSION(S):**

(1) Yes. The Montana Supreme Court, pursuant to its 1990 decision in *Lechner. v. City of Billings*, determined that existing Montana municipal utility laws, pursuant to Sections 69-7-101 and 7-13-4304 MCA, authorized Montana municipalities to establish water and sanitary sewer system development fees to fund a portion of the cost of future expansion of municipal water and sanitary sewer systems.

(2) No. The subsequent 2005 Montana local government impact fee law to fund capital improvements was not needed to authorize previously authorized municipal water and sanitary sewer system development fees. Pursuant to the subsequent 2005 law's definition of "impact fee" set forth in subsection 7-6-1601(5)(b)(iii) MCA the term "impact fee" for the purposes of the 2005 Montana state law explicitly excluded both sewer and water districts and systems and therefore did not subject sanitary sewer and water districts and systems to the 2005 state impact fee law

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