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Legal Opinion 2017-014

TO: Mayor Engen; Dale Bickell; John Wilson; Mike Haynes; Kevin Slovarp; Jolene Ellerton; Denise Alexander; Leigh Griffing; Scott Paasch; Steve Johnson; Jason Diehl; Dennis Bowman; Lori Hart; Marty Rehbein

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE May 31, 2017

RE: 1990 Montana Supreme Court held that municipal public utility system development fees were allowable public utility fees that could be implemented and collected to fund a portion of future expansion of municipal water and/or sanitary sewer service.

FACTS:

Municipal public utility system development fees are not subject to, nor governed by the 2005 Montana local government impact fees to fund capital improvements law. It is important for city officials and staff to understand that municipal public utility system development fees for municipal public utilities, such as water and sanitary sewer were recognized and allowed by the Montana Supreme Court in 1990 litigation in Lechner v. City of Billings 244 Mont. 195, 797 P.2d 191, 1990 Mont. LEXIS 252(1990) as part of the established fees that a municipal public utility was allowed to implement and collect pursuant to section 7-13-4304 MCA.. This Montana Supreme Court ruling was issued fifteen (15) years prior to the 2005 Montana local government impact fee law being enacted. Further, the Montana local government impact fee state law states that it does not include any other fees authorized by law nor does it include municipal sewer and water systems.

ISSUE(S):

Are municipal public utility water and sanitary sewer system development fees subject to or governed by Montana's local government impact fees to fund capital improvements that was enacted in 2005?

CONCLUSION(S):

No. Montana municipal public utility water and sanitary sewer system development fees are not subject to and are not governed by Montana's local government impact fees to fund capital

improvements law enacted in 2005. Montana municipal public utility system development fees implemented and collected to fund a portion of the cost of future expansion of municipal water and sanitary sewer public utilities were recognized by the Montana Supreme Court as legal allowable public utility fees in 1990 in Lechner v. Billings, 244 Mont. 195, 797 P. 2d 191, 1990 Mont. LEXIS 252(1990). Further, the statutory definition of “impact fee” that is set forth in subsection 7-6-1601(5) MCA, of Montana’s local government impact fees to fund capital improvements law explicitly provides that the term “impact fee” does not include any other fee authorized by law and does not include municipal sewer or water systems.

LEGAL DISCUSSION:

In 1990 the Montana Supreme Court in Lechner v. Billings, supra, 244 Mont. 195, 197-200, held that municipal public utility water and sanitary sewer system development fees were an allowable form of financing future expansions of city water and sanitary sewer systems. The Montana Supreme Court in *Lechner* held that it was a reasonable implementation of municipal public utility authority and power for a municipal public utility to implement and collect system development fees to fund a portion of the cost of future expansion of municipal water and sanitary sewer systems. The Montana Supreme Court indicated that such municipal public utility fees are proper as long as they are based on reasonably anticipated future costs of the city and the revenue generated from the public utility system development fees are used solely to fund public utility facility expansion or to pay for bonds sold for that purpose.

The Montana Supreme Court at *Lechner* supra at 244 Mont. 195, 197 stated:

“Montana statutes give municipalities the authority to acquire, construct and maintain various undertakings, including the authority to establish and maintain water and sewer systems. Sections 7-7-4404 and 7-13-4301, MCA. Statutory law also allows municipalities to ‘prescribe and collect rates, fees, and charges for services, facilities and commodities furnished by such undertaking.’ Section 7-7-4404, MCA. See also section 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 of the City’s express statutory authority to operate and fund municipal water and sewer systems.”

Section 7-13-4304 MCA is entitled AUTHORITY TO CHARGE FOR SERVICES and 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.

This 1990 Montana Supreme Court holding in *Lechner* occurred fifteen (15) years prior to the enactment of the Montana local government impact fee to fund capital improvement law in 2005. Further, and importantly, the Montana local government impact fee law does not pertain to, nor does it govern Montana municipal water and/or sanitary sewer system development fees. The statutory definition of “impact fee” set forth in the Montana local government impact fee law excludes other fees authorized by law as well as excludes municipal sewer and water systems. See subsection 7-6-1601(5) MCA which states as follows:

7-6-1601. Definitions

...

(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.

CONCLUSION(S):

No. Montana municipal public utility water and sanitary sewer system development fees are not subject to and are not governed by Montana's local government impact fees to fund capital improvements law enacted in 2005. Montana municipal public utility system development fees implemented and collected to fund a portion of the cost of future expansion of municipal water and sanitary sewer public utilities were recognized by the Montana Supreme Court as legal allowable public utility fees in 1990 in Lechner v. Billings, 244 Mont. 195, 797 P. 2d 191, 1990 Mont. LEXIS 252(1990). Further, the statutory definition of "impact fee" that is set forth in subsection 7-6-1601(5) MCA of Montana's local government impact fees to fund capital improvements law explicitly provides that the term "impact fee" does not include any other fee authorized by law and does not include municipal sewer or water systems.

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/s/

Jim Nugent, City Attorney

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