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Legal Opinion 2020-019

TO: City Council, Mayor John Engen, Dale Bickell, Rob Gannon, Leigh Griffing, Eran Pehan, Jaeson White, Scott Hoffman, Ginny Merriam, Kevin Slovarp, Marty Rehbein, Kirsten Hands

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE: December 17, 2020

RE: Montana local governments with self-government powers may exercise any power not expressly prohibited by the Montana Constitution, Montana state law or its own charter.

FACTS:

There have been recent general inquiries by city officials as to the scope of power a Montana self-government local government might possess.

ISSUE:

What are the limitations set forth in Montana law applicable to self-government local governments?

CONCLUSION:

Montana local government units exercising self-government powers may exercise any power not prohibited by the Montana Constitution, Montana state law, or the local government's self-government charter.

LEGAL DISCUSSION:

Pursuant to Article XI, section (4)(2) of Montana's Constitution, a Montana Constitutional mandate is established for all Montana local governments that their respective powers "SHALL BE LIBERALLY CONSTRUED". (emphasis added). Article XI, section (4)(2) of Montana's Constitution provides:

“Section 4. General powers. (1) A local government unit without self-government powers has the following general powers:

- (a) An incorporated city or town has the powers of a municipal corporation and legislative, administrative, and other powers provided or implied by law.
- (b) A county has legislative, administrative, and other powers provided or implied by law.
- (c) Other local government units have powers provided by law.

(2) **THE POWERS OF INCORPORATED CITIES AND TOWNS AND COUNTIES SHALL BE LIBERALLY CONSTRUED.**” (emphasis added)

Several Montana Supreme Court decisions have recognized that pursuant to Article XI, section (4)(2) of the Montana Constitution there is a Constitutional mandate that the powers of Montana local governments “shall be liberally construed”. See for examples: *Tipco Corp. Inc. v. City of Billings*, (1982) 107 M 339, 642 P 2d 1074; *Stevens v. City of Missoula* (1983) 205 Mont. 274, 280, 667 P 2d 440, 444, 1983 Mont. LEXIS 779; *Town of Ennis v. Stewart* (1991) 247 Mont. 355, 807 P 2d 179, 1991 Mont. LEXIS 57; and *Associated Students University of Montana v. City of Missoula* (1993) 261 Mont. 231, 862 P 2d 380, 382, 1993 Mont. LEXIS 304.

Article XI, section 6 of Montana’s Constitution is entitled “**SELF-GOVERNMENT POWERS** and states as follows:

“Section 6. **SELF-GOVERNMENT POWERS.** A local government unit adopting a self-government charter **MAY EXERCISE ANY POWER NOT PROHIBITED** by this constitution, law or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided or in section 3.” (emphasis added)

Section 7-1-101 MCA of Montana’s self-government laws also states:

“7-1-101. **SELF-GOVERNMENT POWERS.** As provided by Article XI, section 6, of the Montana constitution, a local government unit with self-government powers may exercise any power not prohibited by the constitution, law or charter. These powers include but are not limited to the powers granted to general power governments.”

Section 7-1-106 MCA is entitled “**CONSTRUCTION OF SELF-GOVERNMENT POWERS**” and states:

“7-1-106. **CONSTRUCTION OF SELF-GOVERNMENT POWERS.** The powers and authority of a local government unit with self-government powers **SHALL BE LIBERALLY CONSTRUED. EVERY REASONABLE DOUBT AS TO THE EXISTENCE OF A LOCAL GOVERNMENT POWER OR AUTHORITY SHALL BE RESOLVED IN FAVOR OF THE EXISTENCE OF THAT POWER OR AUTHORITY.**” (emphasis added)

A prominent example of a Montana Supreme Court approved exercise of self-government powers is the Montana Supreme Court decision in *Lechner v. City of Billings*, (1990) 244 M 195, 797 P 2d 191, held that a system development fee was allowable for financing future

expansion of city water and sanitary sewer systems. The Montana Supreme Court indicated that it is within the power of a self-government municipality as well as is a reasonable extension of a City's express statutory authority to implement the collection and accumulation of system development fees to fund a portion of the cost of future expansion of municipal water and sanitary sewer service.

The Montana Supreme Court in *Lechner* stated in part that "a self-governing municipality, such as the City of Billings, may exercise any power not expressly prohibited by the Montana Constitution, statutory law, or its own charter. . . . Furthermore, a self-governing municipality's powers are to be liberally construed, and all reasonable doubts regarding the existence of a municipality's power are to be resolved in favor of finding that the power exists. . . . ", *supra*, at 197.

Many statutory examples of Montana state law Montana state legislature adopted statutory restrictions on Montana local government self-government powers are set forth in sections 7-1-111 (Powers denied); 7-1-112 (Powers requiring delegation); 7-1-113 (Consistency with state regulation required); and 7-1-114 (Mandatory provisions) MCA.

7-1-111. Powers denied. A local government unit with self-government powers is prohibited from exercising the following:

- (1) any power that applies to or affects any private or civil relationship, except as an incident to the exercise of an independent self-government power;
- (2) any power that applies to or affects the provisions of 7-33-4128 or Title 39, except that subject to those provisions, it may exercise any power of a public employer with regard to its employees;
- (3) any power that applies to or affects the public school system, except that a local unit may impose an assessment reasonably related to the cost of any service or special benefit provided by the unit and shall exercise any power that it is required by law to exercise regarding the public school system;
- (4) any power that prohibits the grant or denial of a certificate of compliance or a certificate of public convenience and necessity pursuant to Title 69, chapter 12;
- (5) any power that establishes a rate or price otherwise determined by a state agency;
- (6) any power that applies to or affects any determination of the department of environmental quality with regard to any mining plan, permit, or contract;
- (7) any power that applies to or affects any determination by the department of environmental quality with regard to a certificate of compliance;
- (8) any power that defines as an offense conduct made criminal by state statute, that defines an offense as a felony, or that fixes the penalty or sentence for a misdemeanor in excess of a fine of \$500, 6 months' imprisonment, or both, except as specifically authorized by statute;
- (9) any power that applies to or affects the right to keep or bear arms, except that a local government has the power to regulate the carrying of concealed weapons;
- (10) any power that applies to or affects a public employee's pension or retirement rights as established by state law, except that a local government may establish additional pension or retirement systems;

- (11) any power that applies to or affects the standards of professional or occupational competence established pursuant to Title 37 as prerequisites to the carrying on of a profession or occupation;
- (12) except as provided in 7-3-1105, 7-3-1222, or 7-31-4110, any power that applies to or affects Title 75, chapter 7, part 1, or Title 87;
- (13) any power that applies to or affects landlords, as defined in 70-24-103, when that power is intended to license landlords or to regulate their activities with regard to tenants beyond what is provided in Title 70, chapters 24 and 25. This subsection is not intended to restrict a local government's ability to require landlords to comply with ordinances or provisions that are applicable to all other businesses or residences within the local government's jurisdiction.
- (14) subject to 7-32-4304, any power to enact ordinances prohibiting or penalizing vagrancy;
- (15) subject to 80-10-110, any power to regulate the registration, packaging, labeling, sale, storage, distribution, use, or application of commercial fertilizers or soil amendments, except that a local government may enter into a cooperative agreement with the department of agriculture concerning the use and application of commercial fertilizers or soil amendments. This subsection is not intended to prevent or restrict a local government from adopting or implementing zoning regulations or fire codes governing the physical location or siting of fertilizer manufacturing, storage, and sales facilities.
- (16) subject to 80-5-136(10), any power to regulate the cultivation, harvesting, production, processing, sale, storage, transportation, distribution, possession, use, and planting of agricultural seeds or vegetable seeds as defined in 80-5-120. This subsection is not intended to prevent or restrict a local government from adopting or implementing zoning regulations or building codes governing the physical location or siting of agricultural or vegetable seed production, processing, storage, sales, marketing, transportation, or distribution facilities.
- (17) any power that prohibits the operation of a mobile amateur radio station from a motor vehicle, including while the vehicle is in motion, that is operated by a person who holds an unrevoked and unexpired official amateur radio station license and operator's license, "technician" or higher class, issued by the federal communications commission of the United States;
- (18) subject to 76-2-240 and 76-2-340, any power that prevents the erection of an amateur radio antenna at heights and dimensions sufficient to accommodate amateur radio service communications by a person who holds an unrevoked and unexpired official amateur radio station license and operator's license, "technician" or higher class, issued by the federal communications commission of the United States;
- (19) any power to require a fee and a permit for the movement of a vehicle, combination of vehicles, load, object, or other thing of a size exceeding the maximum specified in 61-10-101 through 61-10-104 on a highway that is under the jurisdiction of an entity other than the local government unit;
- (20) any power to enact an ordinance governing the private use of an unmanned aerial vehicle in relation to a wildfire.

7-1-112. Powers requiring delegation. A local government with self-government powers is prohibited the exercise of the following powers unless the power is specifically delegated by law:

- (1) the power to authorize a tax on income or the sale of goods or services, except that, subject to 15-10-420, this section may not be construed to limit the authority of a local government to levy any other tax or establish the rate of any other tax;
- (2) the power to regulate private activity beyond its geographic limits;
- (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;
- (4) the power to exercise any judicial function, except as an incident to the exercise of an independent self-government administrative power;
- (5) the power to regulate any form of gambling, lotteries, or gift enterprises.

7-1-113. Consistency with state regulation required. (1) A local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.

(2) The exercise of a power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.

(3) An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency.

7-1-114. Mandatory provisions. (1) A local government with self-government powers is subject to the following provisions:

- (a) all state laws providing for the incorporation or disincorporation of cities and towns, for the annexation, disannexation, or exclusion of territory from a city or town, for the creation, abandonment, or boundary alteration of counties, and for city-county consolidation;
- (b) Title 7, chapter 3, part 1;
- (c) all laws establishing legislative procedures or requirements for units of local government;
- (d) all laws regulating the election of local officials;
- (e) all laws that require or regulate planning or zoning;
- (f) any law directing or requiring a local government or any officer or employee of a local government to carry out any function or provide any service;
- (g) except as provided in subsection (3), any law regulating the budget, finance, or borrowing procedures and powers of local governments;
- (h) Title 70, chapters 30 and 31.

(2) These provisions are a prohibition on the self-government unit acting other than as provided.

(3) (a) Notwithstanding the provisions of subsection (1)(g) and except as provided in subsection (3)(b), self-governing local government units are not subject to the mill levy limits established by state law.

(b) The provisions of 15-10-420 apply to self-governing local government units.

CONCLUSION:

Montana local government units exercising self-government powers may exercise any power not prohibited by the Montana Constitution, Montana state law, or the local government's self-government charter.

OFFICE OF THE CITY ATTORNEY

/s/ Jim Nugent

Jim Nugent, City Attorney

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