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Legal Opinion 2011-024

TO: Mayor John Engen, City Council, Bruce Bender, Steve King, Kevin Slovarp, Gregg Wood, Phil Smith, Doug Harby, Brentt Ramharter

CC: Dept. Atty.

FROM: Jim Nugent, City Attorney

DATE: November 21, 2011

RE: Public sidewalks, curbs, and gutters should be included within construction, reconstruction, maintenance, and repair of public streets that may be funded with local-option motor-fuel excise tax revenues.

FACTS:

City Attorney legal opinion 2011-022 issued November 17, 2011 pertaining to a statutorily authorized voter election for a local-option county-wide motor-fuel excise tax up to 2 cents per gallon generated multiple inquires as to whether public sidewalks, curbs, and gutter construction, reconstruction, maintenance, and repair could be included in the statutory language authorizing local-option county-wide motor-fuel excise tax revenues to be used for the construction, reconstruction, maintenance, and repair of public streets and roads.

ISSUE:

Pursuant to Montana state law, may local-option motor-fuel excise tax revenues be utilized for construction, reconstruction, maintenance, and repair of public sidewalks, curbs, and gutters located within a public street?

CONCLUSION:

Yes, pursuant to the Montana state law definitions of “highway” as including rights-of-way and “sidewalk” defined as a portion of a street, local-option motor-fuel tax revenues may be utilized for construction, reconstruction, maintenance, and repair of public sidewalks, curbs, and gutters.

LEGAL DISCUSSION:

Montana's state highway and transportation highway code definition in title 60 MCA does not specifically answer the inquiry. Title 60 MCA is entitled "Highways and transportation." Chapter I of title 60 is entitled "Highway Code."

60-1-103(5) MCA of Montana's highway code defines the term "construction" as follows.

"60-1-103. General definitions. Subject to additional definitions contained in this title that are applicable to specific chapters or sections and unless the context otherwise requires, the following definitions apply: [. . .] (5) 'Construction' means supervising, inspecting, actual buildings, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, mapping, and costs of right-of-way or other interests in land and elimination of hazards at railway grade crossings."

This general definition section goes on to define the term "highways" and "highway" in 60-1-103(18) and (19) MCA as follows.

"(18) 'Highway. Includes the rights-of-way or other interests in land, embankment, retaining walls, culvert, sluice, drainage structure, bridge, railroad-highway crossing, tunnel, signs, guardrail, and protective structures."

"(19) 'Highway', 'road', and 'street' whether the terms appear together or separately or are preceded by the adjective 'public', are general terms denoting a public way for purposes of vehicular travel and include the entire area within the right-of-way."

There also is a definition of "highway" in 61-1-101 MCA. Title 61 MCA is entitled "Motor Vehicles." Chapter 1 of title 61 is entitled "Definitions." 61-1-101(27) MCA defines the term highways as follows.

"61-1-101, Definitions. As used in this title, unless the context indicates otherwise, the following definitions apply: . . . (27) 'Highway' or 'public highway' means the entire width between the boundary lines of every publicly maintained way when any part of the publicly maintained way is open to the use of the public for purposes of vehicular travel."

There is no definition of "sidewalk" in the Montana highway code or in 61-1-101 MCA. However, there is a definition of "sidewalk" in Montana state law that is set forth in Montana's traffic regulations. Title 61, chapter 8 is entitled "Traffic Regulations." 61-8-102(2)(s) MCA defines the term "sidewalk" as follows.

"(2) As used in this chapter, unless the context requires otherwise, the following definitions apply: [. . .] (s) 'Sidewalk' means that a portion of a street that is between curb lines or the lateral lines of a roadway and the adjacent property lines and that is intended for use by pedestrians." (Emphasis added).

Since this definition of “sidewalk” is the only definition of “sidewalk” set forth in Montana state law, it is important to note what the Montana rules of statutory construction provide with respect to definitions set forth in Montana statutes.

Title 1, MCA is entitled “General laws and Definitions.” Chapter 2 of title 1 is entitled “Statutory Construction.” 1-2-107 MCA pertaining to statutory construction provides as follows:

“1-2-107. Applicability of definitions. Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.”

This means that the Montana state law definition of “sidewalk” set forth in 61-8-102(2)(s) MCA is the definition of “sidewalk” that must be generally utilized, unless a specific law indicates otherwise. Since the definition of “highways” includes the entire width of the public right-of-way, and Montana’s statutory definition of “sidewalk” defines “sidewalk” as being a “portion of a street,” it seems that public sidewalks, curbs, and gutters located within the public right-of-way are items that could be included in the use of local option motor fuel excise tax revenues used “only for the construction, maintenance and repair of public streets and roads”; because a sidewalk is defined as being a portion of the street.

In Montana’s building construction standards law there is a definition of public sidewalk in 50-60-101(15) MCA defining a “public sidewalk” which provides that “‘Public sidewalk’ means a sidewalk located in a public right-of-way.”

CONCLUSION:

Yes, pursuant to the Montana state law definitions of “highway” as including rights-of-way and “sidewalk” defined as a portion of a street, local-option motor-fuel tax revenues may be utilized for construction, reconstruction, maintenance, and repair of public sidewalks, curbs, and gutters.

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_____/s/
Jim Nugent, City Attorney

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