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Legal Opinion 2014-007

TO: Mayor John Engen, City Council, Bruce Bender, Marty Rehbein, Leigh Griffing,
Department Heads

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE January 31, 2014

RE: Primary Montana state legislative prohibitions, restrictions and limitations on
Montana local government powers.

FACTS:

There are four (4) new Missoula City Council members commencing as of the first Monday of January 2014. There are multitudes of complexities associated with Montana municipal government laws, operations, management and administration. Even Montana local governments with self-governing powers have many limitations that are imposed on their respective powers by the Montana Constitution, Montana state laws or the local government entity's own self-government charter. The purpose of this legal opinion is to primarily provide legal information pertaining to four (4) Montana state law statutes that generally prohibit, restrict or limit a Montana local self-government entity's powers with respect to numerous areas of law in order to provide City of Missoula elected officials with information as to many of the general prohibitions, restrictions or limitations with respect to their municipal local government powers.

ISSUE(S):

Has the Montana State Legislature adopted laws prohibiting, restricting or limiting the powers of Montana self-government local governments?

CONCLUSION(S):

Yes, the Montana State Legislature has adopted numerous laws prohibiting, restricting or limiting the powers of Montana self-government local governments. As examples, generally there are four primary state laws at the beginning of title 7 Montana Code Annotated (MCA) that prohibit, restrict or limit the powers of Montana self-government local governments.

LEGAL DISCUSSION:

The 1972 Montana Constitution established a Montana Constitutional mandate that the powers of cities, towns and counties “shall be liberally construed”. Article XI of the Montana Constitution is entitled “LOCAL GOVERNMENT”. Article XI, section 4 of the Montana Constitution pertains to the general powers of city, town and county local governments and is the Montana Constitutional provision that establishes a Montana Constitutional mandate that the powers of Montana cities, towns and counties “shall be liberally construed”.

Article XI, section 4 of the Montana Constitution states as follows:

“Section 4. General powers. (1) A local government unit with 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)

These Montana Constitutional grants of local government powers “implied by law” and mandating that city, town and county powers “shall be liberally construed” basically meant that the historical Dillon Rule that existed with respect to local government structures in Montana as well as other states that indicated that a local government only possessed the power or authority expressly granted to it, was eliminated/repealed or replaced with Montana local governments non possessing “implied powers” as well as a Montana Constitutional mandate that their respective powers “shall be liberally construed”. The Dillon Rule with respect to local government powers no longer exists in Montana, having been replaced with Article XI, section 4, of the Montana Constitution recognizing implied powers and liberal construction of powers.

However, local government self-government powers may be limited by Constitutional provisions, Montana state laws or by the self-government charter. The Montana State Legislature has adopted quite a number of Montana state laws prohibiting, restricting or limiting the powers of Montana local government self-government entities. A prime example of Montana State Legislative adopted prohibitions, restrictions or limitations on the powers of Montana self-government local governments are set forth in four Montana state laws near the beginning of title 7 MCA.

Title 7 MCA is entitled “LOCAL GOVERNMENT”. Title 7, chapter 1 is entitled “GENERAL PROVISIONS” and part 1 of chapter 1 is entitled “NATURE OF SELF-GOVERNMENT LOCAL GOVERNMENTS”. The four (4) Montana state laws near the beginning of title 7 MCA that extensively prohibit, restrict, and limit the powers of Montana self-government local governments are:

- (1) 7-1-111 POWERS DENIED;

- (2) 7-1-112 POWERS REQUIRING DELEGATION;
- (3) 7-1-113 CONSISTENCY WITH STATE REGULATION REQUIRED; AND
- (4) 7-1-114 MANDATORY PROVISIONS.

These four sections, 7-1-111 through 7-1-114 MCA provide in their entirety as follows:

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 (labor, collective bargaining for public employees, unemployment compensation, or workers' compensation), 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 public convenience and necessity;
- (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 (professions and occupations) 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 (streambeds), or Title 87 (fish and wildlife);
- (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) 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;

(17) 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.

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(S):

Yes, the Montana State Legislature has adopted numerous laws prohibiting, restricting or limiting the powers of Montana self-government local governments. As examples, generally there are four primary state laws at the beginning of title 7 Montana Code Annotated (MCA) that prohibit, restrict or limit the powers of Montana self-government local governments.

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/s/

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