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Legal Opinion 2019-024

TO: Mayor John Engen, Dale Bickell, Jeremy Keene, Dennis Bowman, Kevin Slovarp, Troy Monroe, Eric Andersen, Mary McCrea, Denise Alexander, Jen Gress, Marty Rehbein, Kirsten Hands, Kelly Elam, Donna Gaukler, David Selvage, Morgan Valiant, Chase Jones, Department Attorney

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE September 9, 2019

RE: 69-4-101 MCA establishes a public utility right to utilize public rights-of-way for their respective utility lines and facilities; but Montana municipal governments have the ability to regulate and prevent encumbrances and obstructions within public rights-of-way as well as to require a public utility to obtain a permit for its public right-of-way facility work, such as excavations, location of poles and signs, etc. as long as it does not prevent the reasonable functioning of the public utility.

FACTS:

Recently there have been inquiries and discussions pertaining to public utility facilities located in public rights-of-way and what limited regulatory authority the City of Missoula might be able to exercise with respect to public rights of way that public utilities have a statutory right-to-utilize.

ISSUE:

- (1) What is the primary statutory basis for allowing public utility use of the public rights-of-way?
- (2) Are there provisions of Montana state law that empower a municipal local government to regulate public right of way use and to prevent obstructions or encumbrances from being located within the public right-of-way.

CONCLUSION:

- (1) Section 69-4-101 pertaining to utility lines and utility facilities authorizes public utility use of public rights-of-way. The existence of public utilities is in the public interest. Section 69-4-101 MCA facilitates a public utility's operation at lower economic cost , because the public utility avoids the cost of land or easement acquisition for their public utility services.

(2) Montana municipal local governments do retain some ability to regulate and prevent encumbrances and obstructions in the public right-of-way with respect to public utilities as long as it does not prevent the public utility from reasonably functioning and operating in promoting the general welfare.

LEGAL DISCUSSION:

Public utilities generally have special protections provided by law based on their importance in promoting the health, safety and general welfare. The provision of public utility services is necessarily intended to be in the general public interest to provide a public utility service necessary for the public health, safety and general welfare of the customers the public utility serves. Therefore, it is common for public utilities to be afforded special stature, statutory protections, sometimes preemptive status, protective court decisions, with respect to their public utility operations and as well as respective public utility poles, wires, pipes, or facilities utilized to provide public utility service. These protections for public utilities are generally intended to better assure the public utility is able to reasonably function as well as uniformly provide safe, proper and adequate public utility service throughout the public utility's service area.

Pursuant to Montana state law, title 69, chapter 4 MCA is entitled "UTILITY LINES AND FACILITIES". Title 69, chapter 4, part 1 is entitled "GENERAL PROVISIONS" and includes section 69-4-101 MCA entitled "USE OF PUBLIC RIGHT-OF-WAY FOR UTILITY LINES AND FACILITIES".

69-4-101. Use of public right-of-way for utility lines and facilities. A telegraph, telephone, electric light, or electric power line corporation or public body or any other person owning or operating such is hereby authorized to install its respective plants and appliances necessary for service and to supply and distribute electricity for lighting, heating, power, and other purposes and to that end, to construct such telegraph, telephone, electric light, or electric power lines, from point to point, along and upon any of the public roads, streets, and highways in the state, by the erection of necessary fixtures, including posts, piers, and abutments necessary for the wires. The same shall be so constructed as not to incommode or endanger the public in the use of said roads, streets, or highways, and nothing herein shall be so construed as to restrict the powers of city or town councils. (emphasis added)

However, Montana municipal governments do retain some authority to regulate and prevent encumbrances and obstructions within the public rights-of-way as well as to issue permits for public utility work that is occurring within public rights-of-way as long as it does not prevent the reasonable functioning of the public utility. Sections 7-14-4102 and 7-14-4104 MCA provide Montana municipalities with regulatory authority to regulate as well as prevent obstructions or encumbrances in the public right-of-way pertaining to signs, poles, wires, etc.

Sections 7-14-4102 and 7-14-4104 MCA state as follows:

7-14-4102. Regulation of trafficways and public grounds. The city or town council may:

- (1) except as provided in 7-14-4116, regulate and prevent the use or obstruction of streets, sidewalks, and public grounds by signs, poles, wires, posting handbills or advertisements, or any obstruction;
- (2) regulate and prohibit traffic and sales upon the streets, sidewalks, and public grounds;
- (3) regulate or prohibit the fast driving of horses, animals, or vehicles within the city or town;
- (4) provide for and regulate street crossings, curbs, and gutters;
- (5) prevent horseracing or immoderate driving or riding in the streets of the city or town and regulate and provide for the hitching of all animals on the streets;
- (6) regulate or prohibit coasting, skating, sliding, skateboarding, rollerblading, or tobogganing on the streets or alleys or other amusements dangerous or annoying to the inhabitants or having a tendency to frighten animals. (emphasis added)

7-14-4104. Prevention of obstructions on trafficways and public grounds.

Except as provided in 7-14-4116, the city or town council may prevent the encumbering of streets, sidewalks, alleys, or public grounds with obstacles or materials. (emphasis added)

Section 7-14-4116 cross-referenced to within 7-14-4102 MCA is the 2015 state legislative preemption of local government to require a fee or permit for oversized vehicles on state highway routes.

In addition sections 7-13-4101 and 7-13-4106 MCA provide Montana municipal governments with authority and power to permit laying of public utilities in the public rights-of-way as well as to regulate the erection of poles, wires, rods and cables located in the public rights of way.

7-13-4101. Authority to permit laying of utility mains. (1) The city or town council has power to permit the use of the streets and alleys of the city or town for the purpose of laying down gas, water, and other mains, but no excavations must be made for such purpose without the permission of the council or its authorized officer.

(2) The streets and alleys must be placed in as good condition by the person or corporation making the excavation as they were before the excavation was made and the mains laid down. In default thereof, the council may order the same to be done at the expense of such person or corporation. (emphasis added)

7-13-4106. Erection of poles, wires, rods, and cables. The city or town council has power to regulate or suppress the erection of poles and the stringing of wires, rods, or cables in the streets or alleys or within the limits of any city or town. (emphasis added)

It must also be noted that the Montana Supreme Court held that a City of Billings franchise fee on several public utilities and telecommunications corporations with facilities located in the public right-of-way was an illegal tax. The Montana Supreme Court indicated that the franchise

fee was separate from the city's police power over streets and alleys that while unilaterally imposed revenue-generating gross revenue fees unrelated to the use or occupancy of the public right-of-way and was in fact a tax based exclusively on the sale of a product or service within the city. Montana/Dakota Utility co. v. City of Billings, 2003 MT332, 318MT407, 80 P3d 1247 (2003).

Subsection 7-1-112(1) MCA prohibiting the exercise of certain specific powers unless the Montana State Legislature has authorized the power prohibits local governments with self-government powers from exercising the power to impose a tax on income or the sale of goods and services.

CONCLUSION:

- (1) Section 69-4-101 pertaining to utility lines and utility facilities authorizes public utility use of public rights-of-way. The existence of public utilities is in the public interest. Section 69-4-101 MCA facilitates a public utility's operation at lower economic cost, because the public utility avoids the cost of land or easement acquisition for their public utility services.
- (2) Montana municipal local governments do retain some ability to regulate and prevent encumbrances and obstructions in the public right-of-way with respect to public utilities as long as it does not prevent the public utility from reasonably functioning and operating in promoting the general welfare.

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/s/

Jim Nugent, City Attorney

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