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Legal Opinion 2022-003

TO: City Council, Mayor John Engen, Dale Bickell, Ginny Merriam, Leigh Griffing, Eran Pehan, Mary Mccrea, Aaron Bowman, Montana James, Donna Gaukler, Ryan Applegate, David Selvage, Morgan Valiant, Nathan Mccleod, Jeremy Keene, Kevin Slovarp, Troy Monroe, Logan Mcinnis, Ross Mollen Hauer, Ellen Buchanan, Dept. City Clerk Carl Horton

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE February 4, 2022

RE: Increasing Trends of State Government Preempting Local Government Regulatory Authority and Powers.

FACTS:

There currently is a trend evolving pursuant to which state legislatures throughout the United States are more frequently and more breadth topic wise preempting local government authority and power of local governments with respect to local community issues. During October 2019, the National League of Cities paid my way to Arizona to attend a one day symposium/conference of local government attorneys from the western United States for the purpose of informing local government attorneys of the evolving propensity throughout the United States of state preemption occurring.

Historically, in recent decades there were numerous instances of state preemption that directly affected the City of Missoula. There already had been quite a wide spectrum of State of Montana preemptively intervening into Missoula City Council and Missoula community issues. As was forecast at the October 2019 symposium, the 2021 Montana State Legislature extensively participated in the state preemption trend. preemptively intervening with respect to numerous issues of potential interest to Missoula local government and Missoulians. The 2021 Montana State Legislature preemptively intervened into more than a half dozen issues of potential local government regulatory interest and/or potential regulatory interest to some Missoulians.

This city attorney legal opinion is intended to inform and provide city elected officials and staff within awareness of the state preemption trend as well as to provide numerous examples of state preemptions affecting Missoula, both historically as well as pursuant to 2021 Montana State Legislative actions.

LEGAL DISCUSSION:

Set forth below are examples of numerous state preemption of local government instances or that some citizens have asked Missoula local government officials to address.

- (1) ZONING: In mid-1970's some local residents in the university area were concerned about the University of Montana acquiring residential properties in land areas zoned residential on the east side of Arthur Avenue between Beckwith north to the Clark Fork River.: In a February 14, 1975 four (4) page informal legal opinion, Montana Attorney General Robert Woodahl to George L. Mitchell, administrative vice president at the University of Montana, Montana Attorney General Woodahl, relying on the general legal principle established in other states that governments are not subject to local municipal zoning regulations, unless specific law requires compliance with local zoning regulations, concluded that:

THEREFORE, IT IS MY OPINION that: The University of Montana is not subject to local municipal zoning ordinances or regulations of the City of Missoula in acquiring and utilizing real property contiguous to the central campus for University purposes.

- (2) ZONING. A subsequent attempt to negate Montana Attorney General Robert Woodahl's informal Attorney General legal opinion was unsuccessful. The unsuccessful effort did result in a requirement that other government agencies proposing to use land contrary to local zoning regulations were to have a public forum hearing before the local zoning board of adjustment; but the proposed government project could not be denied. The 2021 Montana State Legislature pursuant to HB-496 (2021) ENTITLED AN ACT REVISING COUNTY ZONING LAWS REQUIRING A LOCAL GOVERNING BODY TO HOLD A PUBLIC HEARING ON CERTAIN PUBLIC LAND USE, REMOVING A LOCAL BOARD OF ADJUSTMENTS PROHIBITION TO DENY A PUBLIC LAND USE THAT IS CONTRARY TO ZONING REGULATIONS AND AMENDING SECTION 76-2-402 MCA revised the public hearing location; but did not specifically state that other governments were required to comply with local government zoning regulation.
- (3) ZONING: 1974 Montana State Legislature mandated that community residential facilities as defined by Montana state law are allowed in any residential area and are exempt from local zoning regulations; including single family residential zones. In *Thelen v. City of Missoula* 168 M 375, 543 P 2d 173(1975) the legal controversy was a potential sale of a single family residence in a city single family residence zoning district as a home for developmentally disabled to a nonprofit entity Missoula Developmentally Disabled Community Home Council. Montana state law required that there be no more than 8 developmentally disabled persons and that they receive 24 hour care. Neighbors opposed to the land use brought the issue to the Missoula City Council who instructed the city attorney to challenge the legality of the Montana state law. The Montana Supreme Court upheld the Montana state law stating that the Montana state law superseded city zoning ordinances that restrict land uses of residential zoning districts to one-family dwellings only and that it was the responsibility of the City of Missoula to revise its zoning regulation accordingly. The Montana state "community residential facility" laws are set forth in sections 76-2-411 and 76-2-412 MCA.

- (4) **BUILDING CODES/ENERGY CONSERVATION.** Montana state building code law pertaining to municipal building codes and the applicability of the state code formerly stated “A municipal building code shall require standards equal to those of the state building code or higher standards.” 69-2112 Revised Codes of Montana 1947. Some city council members and Missoula citizens publicly suggested that the Missoula City Council require that any residential dwelling unit rental must possess insulation to make the residence more energy efficient. The 1977 Montana State Legislature then replaced the above quoted statutory language with the new statutory language “A municipal or county building code may include only the codes adopted by the department” (State of Montana). The Montana Attorney General then issued a 1977 Attorney General opinion that local governing bodies are prohibited from adopting building codes more stringent than those adopted by the state of Montana 37 A. G. Op. 81(1977). The state law is now set forth in 50-60-301(2) MCA and now includes a 2009 amendment that allowed local governments to adopt voluntary incentive based energy conservation standards for new construction.
- (5) **BUILDING CODES/JURISDICTIONAL AREA.** Montana state building code laws formerly provided that a city could exercise extraterritorial building code jurisdiction within 4 ½ miles of the city limits if the county did not have building code of its own. Husband wife residing outside the city limits; if I recall correctly on the way to Lolo vigorously publicly opposed city building code jurisdiction on their real property and drew news media as well as state legislative attention to their cause. The Montana State Legislature then removed a city’s extraterritorial building code jurisdiction and in 2003 adopted section 50-60-304 MCA that in part states that a city enforce its building code within its incorporated limits of the city.
- (6) **ZONING.** The Montana State Legislature defines “community residential facility” statutorily and the definition term has been expanded several times over the years to include additional facilities that are residential district zoning exempt that are not subject to local government residential zoning classifications. A Missoula residential neighborhood controversy pertaining to Mrs. Hershey’s child day care residence on Dixon Street just off of Southwest Higgins led to the 1987 Montana State Legislature expanding the statutory definition of “community residential facility” to include family day-care homes, group day care homes as well as a day-care home serving 12 or fewer children and prohibiting a city from requiring a conditional use permit to maintain a day care home registered by the Department of Family Services. Mrs. Hershey had been operating a child day care residence and a residence next door to her day care went up for sale. Mrs. Hershey expressed interest in purchasing the next door residence. Neighbors opposing a potential for two child day care residences side by side on Dixon brought their vigorous opposition to the city council and successfully convinced the Missoula City Council to rezone the residential neighborhood the most restrictive single family zoning district the city had which did not allow day cares and interestingly causing several duplexes a short distance to the east to become legal nonconforming for zoning regulation purposes. The Montana State Legislature then expanded the statutory definition of “community residential facility” to include a day care home serving 12 or fewer children in any residential area in the State of Montana.
- (7) **ZONING:** The Montana State Legislature has since also expanded the statutory definition of “community residential facility” to include facilities including licensed personal care facility, assisted living facility, for foster home, kinship foster home, youth shelter care facility, a transitional living program and previously earlier “youth group home”. Pursuant to the Montana state law definition of “community residential facility” these facilities also may be located in

any residential zoned location anywhere in the State of Montana. See sections 76-2-411 and 76-2-412 MCA.

- (8) **LICENSURE AND REGULATION OF LANDLORD TENANT ACTIVITIES. POWERS DENIED** section 7-1-111(13) MCA. Missoula City Council passed an ordinance requiring that every residential dwelling unit rental must have a city business license. The mayor line item vetoed several provisions of the ordinance. The city council only overrode some of the vetoed line items. The Missoula Landlords association successfully challenged the city landlord licensing ordinance and invalidated the ordinance. The landlords associations also went to Montana State Legislature and successfully had subsection 7-1-111(13) MCA amended to deny local governments with self-government powers any power that applies to or affects exercise of any power intended to license landlords or regulates their activities with regard to tenants.
- (9) **AMATEUR RADIO ANTENNAS.** Some citizens expressed concern to City of Missoula officials about amateur ham radio antennas located in residential neighborhoods. The Missoula City Council did not take any action. However, the 2013 Montana State Legislature did take preemptive action by denying local governments the power to regulate amateur radio antennas. See **POWERS DENIED** subsection 7-1-111(17) and (18) as well as Montana state municipal **ZONING LAW** section 76-2-310 MCA providing that a local governments resolution or rule pursuant to zoning regulations may not prevent the erection of an amateur radio antenna at heights and dimensions sufficient to accommodate amateur radio communications. The 2013 Montana State Legislature set forth state laws at two locations to protect amateur radio operations.
- (10) **OVERSIZE MOTOR VEHICLE LOADS-- NO LOCAL GOVERNMENT FEES MAY BE CHARGED.** Very large oversize vehicle loads were utilizing Reserve Street on their way to Canada oil fields. The passage of the oversize vehicles through Missoula was required to be in the middle of the night; but was still burdensome for city staffs to facilitate; especially because there often were protestors who would get in front of the oversize vehicles to obstruct their passage. The city commenced charging a \$300.00 fee which the Montana State Legislature then preempted pursuant to the 2015 enactment of section 7-14-4116 MCA entitled **NO AUTHORITY TO REQUIRE FEE AND PERMIT FOR OVERSIZE VEHICLES** as well as the insertion of **POWERS DENIED** subsection (19) MCA. The 2015 Montana State Legislature enacted multiple sections of law to protect the oversize vehicles from local government fees.
- (11) 2021 Montana State Legislature repealed laws authorizing voter approved local option gas tax; after Missoula County voters adopted a local option gas tax.
- (12) 2021 **ZONING. LOCAL GOVERNMENT INCLUSIONARY ZONING** was prohibited pursuant to HB-259(2021) **AN ACT PROHIBITING LOCAL GOVERNMENT FROM REQUIRING HOUSING FEES ON THE DEDICATION OF REAL PROPERTY FOR THE PURPOSES OF PROVIDING HOUSING FOR SPECIFIED INCOME LEVELS OR SALE PRICES, PROHIBITING ZONING REGULATIONS THAT REQUIRE HOUSING FEES OR THE DEDICATION OF REAL PROPERTY FOR THE PURPOSES OF PROVIDING HOUSING FOR SPECIFIED INCOME LEVELS OR SALE PRICES, AMENDING SECTIONS 7-2-4203, 76-2203 AND 76-2-302 MCA AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.**
- (13) 2021 **POWERS DENIED, PREEMPTING ANY LOCAL ORDINANCE, RESOLUTION, INITIATIVE OR REFERENDUM REGULATING THE USE, DISPOSITION, SALE, PROHIBITIONS, FEES, CHARGES OR**

TAXES ON CERTAIN CONTAINERS. “Auxiliary container” is defined in pertinent part as meaning a bag, cup, bottle, can device, eating or drinking utensil or tool or other packaging, whether reusable or single use . . .” subsection 7-1-121(5)(a) MCA. Also, amends 7-1-111(21) MCA POWERS DENIED as well as 7-5-131(2)(F) MCA by prohibiting elector ballot initiatives.

- (14) 2021 POWERS DENIED LOCAL GOVERNMENT CARBON FEES, TAXATION OR PENALTIES subsection 7-1-11(22) MCA and 7-1-116 MCA
- (15) 2021 POWERS DENIED subsection 7-1-111(23) MCA denying self-government local governments “any power to require an employer, other than the local government unit, itself, to provide an employee or class of employees with a wage or employment benefit that is not required by state or federal law. Basically, a local government may not enact a local minimum wage for any entities other than itself.
- (16) 2021 POWERS DENIED RETRIBUTIVE ACTIONS. 7-1-111(24) MCA denies local government any power to enact an ordinance or resolution to bring a retributive action against a private business owner. Also, see prohibitions in 7-5-103(2)(d)(iv) MCA and 7-5-121(2)(c)(iv) MCA.
- (17) 2021 POWERS DENIED HEALTH 7-1-111(25) MCA denies local governments “any power to prohibit the sale of alternative nicotine products or vapor products as provided in 16-11-313(1) MCA A part of HB-257(2021) that also amends several other sections of Montana state laws; especially health laws.
- (18) 2021 HEALTH. HB-257(2021) generally revising many Montana state laws relating to PROHIBITING ACTIONS THAT IMPEDE PRIVATE BUSINESS ABILITY TO CONDUCT BUSINESS; PROHIBITING CERTAIN TYPES OF LOCAL GOVERNMENT ORDINANCES AND RESOLUTIONS, PROHIBITING EMERGENCY PLAN OR PROGRAM THAT RESTRICTS THE ABILITY OF PRIVATE BUSINESS TO CONDUCT BUSINESS, PROHIBITING A LOCAL BOARD OF HEALTH AND HEALTH OFFICER FROM CERTAIN ACTIONS THAT RESTRICT THE ABILITY OF A PRIVATE BUSINESS TO CONDUCT BUSINESS
- (19) 2021 HEALTH HB-121(2021) AN ACT REVISING LAWS RELATED TO LOCAL BOARDS OF HEALTH, REQUIRING THAT CERTAIN RULES, REGULATIONS, AND FEES BE PROPOSED BY A LOCAL BOARD OF HEALTH AND ADOPTED BY THE GOVERNING BODY, ALLOWING A LOCAL BOARD OF HEALTH TO ADOPT RULES TO IMPLEMENT A REGULATION ADOPTED BY A LOCAL GOVERNING BODY, ALLOWING A GOVERNING BODY TO AMEND AN ORDER GIVEN BY A LOCAL HEALTH OFFICER DURING A TIME OF EMERGENCY OR DISASTER, PROVIDING FOR RELIGIOUS FREEDOM REVISING PENALTIES ALLOWED FOR VIOLATION OF LOCAL BOARD RULE, REVISING AND PROVIDING DEFINITIONS.
- (20) 2021 HEALTH HB-702(2021) N ACT PROHIBITING DISCRIMINATION BASED ON A PERSON’S VACCINATION STATUS OR POSSESSION OF AN IMMUNITY [PASSPORT PROVIDING AND EXCEPTION AND AN EXEMPTION
- (21) 2021 HEALTH SB-370 AN ACT GENERALLY REVISING DISASTER AND EMERGENCY POWERS LAWS PROTECTING CERTAIN CONSTITUTIONAL RIGHTS DURING AN EMERGENCY REVISING THE DECLARATION OF POLICY CLARIFYING THE LIMITATIONS ON AUTHORITY DURING AN EMERGENCY, PROVIDING FOR CIVIL RELIEF

(22) 2021 FIREARMS HB-102(2021) AN ACT GENERALLY REVISING GUN LAWS, PROVIDING A LEGISLATIVE PURPOSE, INTENT AND FINDINGS, PROVIDING LOCATIONS WHERE CONCEALED WEAPONS MAY BE CARRIED AND EXCEPTIONS”

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/s/ Jim Nugent

Jim Nugent, City Attorney

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