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Legal Opinion 2010-008

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Mark Muir, Chief of Police; Mike Brady, Assistant Chief of Police; Chris Odlin, Police Captain; Gregg Willoughby, Police Captain; Scott Hoffman, Police Captain; Gail Verlanic, Human Resource Director; Donna Gaukler, Parks & Recreation Director; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Don Verrue, Building Division Superintendent; Steve Meismer, Building Plans Examiner; Mike Painter, Fire Chief; Jason Diehl, Assistant Fire Chief; Jeff Logan, Assistant Fire Chief; Brentt Ramharter, Finance Director; Ellen Leahy, City-County Health Department; Jim Carlson, City-County Health Department; Legal Staff

FROM: Jim Nugent, City Attorney

DATE April 9, 2010

RE: Questions concerning proposed anti-discrimination ordinance

Several questions arose with respect to the proposed anti-discrimination ordinance the Missoula City Council is considering. The purpose of this legal opinion is to provide legal answers to some of the questions raised.

Question #1

What impact will the proposed anti-discrimination ordinance have on existing Montana state criminal code pertaining to sexual offenses?

Answer #1

Municipal governments do not have the authority to revise Montana state criminal code. All Montana state criminal code offenses, including all sexual offenses, will not be affected by the anti-discrimination ordinance if adopted by the City of Missoula. Pursuant to Mont. Code Ann. § 7-1-111(8), entitled *Powers denied*, the legislature in pertinent part provided that a self-governing local government is prohibited from exercising any power that defines as an offense any conduct made criminal by state statute, or that defines any offense as a felony. Further, when the state has specifically addressed an area within the law, Mont. Code Ann. § 7-1-113 requires the local government to be consistent with Montana state law by prohibiting the exercise of any local government power inconsistent with state law. Thus, the proposed anti-discrimination ordinance does not and cannot change existing state criminal code. Montana's current criminal code will continue in full force and effect throughout the City of Missoula.

Question #2

Will the proposed anti-discrimination ordinance require anyone to perform same sex marriages?

Answer #2

No, the proposed anti-discrimination ordinance will not and cannot require anyone to perform same sex marriages. The proposed ordinance does not attempt to even address the issue of marriage. Most importantly, on November 2, 2004, pursuant to Constitutional Initiative 96, Montana's statewide electorate adopted Mont. Const. art. XIII, § 7 providing:

Section 7. Marriage. Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

No local government in Montana has any authority or jurisdiction to alter the Montana constitution. The existing constitutional provision is controlling on the subject of marriage in Montana.

Question #3

Does the proposed anti-discrimination ordinance require installation of a third set of public restrooms?

Answer #3

The proposed anti-discrimination ordinance does not require installation of a third set of public restrooms. However, it should be noted and emphasized, the Montana Department of Labor & Industry, through adoption of the International Building Code, adopted a code provision requiring a family public restroom when the building is used for assembly or mercantile use AND an aggregate (total) of six or more water closets are required as part of the public restroom facilities for the type of building being built.

Pursuant to Mont. Code Ann. § 50-60-301 a county, city or town may only adopt building codes adopted by the Montana Department of Labor & Industry. The family public restroom requirement has existed pursuant to adopted building code regulations for years.

Question #4

Does the proposed anti-discrimination ordinance require all health club type facilities to allow any individual of any sex or sexual orientation into any locker room or restroom area in the facility?

Answer #4

No, the proposed anti-discrimination ordinance does not require all health club type facilities to allow any individual of any sex or sexual orientation into any locker room or restroom area in the facility. The proposed definition of "public accommodation" is the same definition that exists in

Montana state law pertaining to unlawful discrimination. Mont. Code Ann. § 49-2-101(20) creates an exception in the definition of “public accommodation” for private clubs. Pursuant to § 49-2-101(20)(b) as well as proposed 9.64.020(15)(b) Missoula Municipal Code the identical definitions of “public accommodation” create exceptions for private clubs. Pursuant to these definitions, a private club is not a “public accommodation” and is exempt from the anti-discrimination laws, unless they lose their distinctly private status by providing for all of the following:

- (1) More than 100 members;
- (2) Provides regular meal service;
- (3) Receives payment for dues, fees, use of space, facilities, services, meals, or beverages.

Pursuant to the identical definitions in state law and the proposed anti-discrimination ordinance, all three of the above identified elements must be present in order for a club to become a “public accommodation.” If health club facilities do not “provide regular meal service” for a fee, or even provide regular meal service at all and/or have fewer than 100 members they will be exempt private clubs. Thus, health club facilities are generally not intended to be covered pursuant to the definition of “public accommodation.”

Question #5

Are there currently any federal, state or local laws or regulations that prohibit women from entering men’s public restrooms or that prohibit men from entering women’s public restrooms?

Answer #5

No, legal research has not disclosed or identified any existing federal, state or local laws or local health or building codes that prohibit women from entering into men’s public restrooms or prohibit men from entering into women’s public restrooms. In addition to reviewing state laws and local ordinances, the City-County Health Department and city building officials and police were consulted as part of this legal research.

Question #6

Does the proposed anti-discrimination ordinance affect the establishment of religion or the free exercise of religion?

Answer #6

No, the Montana Constitution provides that no law shall be made respecting either the establishment of religion or the free exercise of religion. Mont. Const. art. II, § 5 provides:

Section 5. Freedom of religion. The state shall make no law respecting an establishment of religion or prohibiting the exercise thereof.

The First Amendment to the United States Constitution also provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Montana

local governments do not have the authority or jurisdiction to modify or delete any provision of the Montana Constitution or the United States Constitution. Thus, the proposed anti-discrimination ordinance may not affect either the establishment of religion or the free exercise of religion.

Question #7

Does the proposed anti-discrimination ordinance require public schools to change existing policies pertaining to restrooms or locker rooms?

Answer #7

No, the proposed anti-discrimination ordinance does not require public schools to change any existing policies pertaining to restrooms or locker rooms. Further, Mont. Code Ann. § 7-1-111(3), pertaining to powers denied to self-governing local governments, prohibits local governments from exercising “any power that applies to or affects the public school system.”

Question #8

If the proposed anti-discrimination ordinance was placed on the election ballot, who would get to vote on the proposed ordinance?

Answer #8

Pursuant to Montana municipal statutes, state law requires that anyone voting in a city election pertaining to a city ordinance be an eligible city elector. “Elector” is defined pursuant to Mont. Code Ann. § 7-1-4121(3) as meaning: “a resident of the municipality qualified and registered to vote under state law.” Thus, in order to be an “elector” eligible to vote in a City of Missoula election pertaining to a city ordinance an elector is someone who is 1) a resident of the municipality; 2) qualified to vote; and 3) registered to vote pursuant to Montana state law.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent
City Attorney

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