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Legal Opinion 2013-019

TO: Mayor John Engen, City Council, Bruce Bender, Mike Haynes, Laval Means, Tom Zavitz, Denise Alexander, Marty Rehbein, Nikki Rogers, Kevin Slovarp

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE September 3, 2013

RE: Confusion of Legislative Applicability Date Provision with Legislative Effective Date Provision

FACTS:

There appears to be some confusion concerning legislative applicability dates compared with legislative effective dates with respect to a specific legislative proposal.

ISSUE(S):

May proposed legislation have an applicability date that is different from the effective date of the legislation?

CONCLUSION(S):

Yes, a legislative proposal may have an applicability date that is different than its effective date. Subject to limited Constitutional restrictions, a legislative body may specify that the legislation may apply either retroactively or prospectively and thereby have an applicability date that is different than the effective date of the legislative proposal.

LEGAL DISCUSSION:

A legislative proposal of a legislative body may specify an applicability date for the legislation that is different than the effective date of the legislative enactment. Montana's "BILL DRAFTING MANUAL 2012" published by Montana Legislative Services Division in section 4-26 on pages 72-73 states as follows:

4-26. APPLICABILITY DATE:

DO NOT CONFUSE AN APPLICABILITY DATE WITH AN EFFECTIVE DATE. A BILL MAY APPLY RETROACTIVELY OR PROSPECTIVELY. TO APPLY RETROACTIVELY, A LAW MUST EXPRESSLY STATE THAT FACT(section 1-2-109, MCA). However, see Article II, section 31, of the Montana Constitution for types of law that may not be retroactive. IN ORDER FOR A BILL OR SECTIONS OF A BILL TO APPLY RETROACTIVELY, THE BILL OR SECTIONS SHOULD HAVE AN IMMEDIATE EFFECTIVE DATE.

EXAMPLE NEW SECTION. SECTION 18. RETROACTIVE APPLICABILITY. (Sections 1 through 5 and 7 through 9) apply retroactively, within the meaning of 1-2-109, to all occurrences on or after December 1, 2012.”

EXAMPLE NEW SECTION. SECTION 18. APPLICABILITY. (This act) applies to years beginning after December 31, 2013.”

EXAMPLE NEW SECTION. SECTION 18. APPLICABILITY (This act) applies to contracts or policies issued or renewed on or after January 1, 2014”

EXAMPLE NEW SECTION. SECTION 18, APPLICABILITY. (This act) applies to notarial acts performed on or after (the effective date of this act).” (emphasis added)

The above quoted text and examples are from “BILL DRAFTING MANUAL 2012”, pages 72-73.

Section 1-2-109 MCA that is cross referenced to within the above quote from the “BILL DRAFTING MANUAL 2012” states as follows:

1-2-109. WHEN LAWS RETROACTIVE. No law contained in any of the statutes of Montana is retroactive UNLESS EXPRESSLY SO DECLARED.” (emphasis added).

The Montana Constitutional provision, Article II, section 31 that is cross referenced to in the above quote from the “BILL DRAFTING MANUAL 2012” states as follows:

“Section 31. EX POST FACTO, OBLIGATION OF CONTRACTS, AND IRREVOCABLE PRIVILEGES. No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature.”

The “BILL DRAFTING MANUAL 2012” also sets forth a couple of additional examples of an Applicability provision as compared to an effective date in sample legislation that it sets forth in its manual. See for example

Page 140 “NEW SECTION. SECTION 3. EFFECTIVE DATE-APPLICABILITY. (This act) is effective on passage and approval and applies to tax years beginning after December 31, 2013.”

Page 167. NEW SECTION. SECTION 40. RETROACTIVE APPLICABILITY.
(This act) applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2014."

The legality of a legislative body's applicability date could of course be legally challenged in the courts on a specific legislative act by legislative act enactment basis, such as legally challenging the constitutionality or potentially some other legal reason. There is no guarantee that an applicability date adopted by a legislative body will be upheld by the courts. However, legislators may propose an applicability date that is different than the effective date of a legislative proposal and the legislative body as a whole may consider the differing applicability provision from the effective date as part of the legislative body's review.

CONCLUSION(S):

Yes, a legislative proposal may have an applicability date that is different than its effective date. Subject to limited Constitutional restrictions, a legislative body may specify that the legislation may apply either retroactively or prospectively and thereby have an applicability date that is different than the effective date of the legislative proposal.

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/s/

Jim Nugent, City Attorney

JN:tfa