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Legal Opinion 2014-006

TO: Mayor John Engen, City Council, Bruce Bender, Leigh Griffing, Scott Paasch, and Department Heads

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE January 31, 2014

RE: Montana state legislative prohibitions on Montana local government's power to tax, except when such power is specifically authorized to or specifically delegated to municipal local government by Montana state legislature.

FACTS:

The upcoming budget games exercise occurring in the Missoula community concerning the City of Missoula general fund that some City of Missoula elected officials may be attending in February 2014 could involve some participant inquiries or suggestions pertaining to Montana municipal government taxing authority.

ISSUE(S):

Does Montana state law establish statutory restrictions on a Montana self-government local government's power to exercise tax authority?

CONCLUSION(S):

Yes, the Montana State Legislature enacted section 7-1-112 MCA entitled "POWERS REQUIRING DELEGATION" providing that Montana local governments with self-government powers are prohibited the power to exercise authority to adopt a tax on income, sale of goods, or services unless the power is specifically delegated by Montana law to the Montana local government.

LEGAL DISCUSSION:

While Article XI, Section 4 of the 1972 Montana Constitution provides a Constitutional mandate that the powers of Montana incorporated cities, towns and counties "shall be liberally construed"; the Montana State Legislature has adopted numerous provisions of Montana state

law that prohibit, restrict or limit the powers of Montana local governments, including the powers of Montana local government self-government entities.

With respect to Montana local government self government powers, section 7-1-112 MCA entitled “POWERS REQUIRING DELEGATION” is one example of the Montana State Legislature prohibiting Montana local government self-government entities the power to exercise certain authority. In the case of section 7-1-112 MCA it is the Montana local government self-government power and authority to exercise power to authorize a tax on income or sale of goods or services that is prohibited, unless the power and authority has been specifically authorized through delegation to Montana local government entities.

Section 7-1-112 MCA entitled “POWERS REQUIRING DELEGATION” provides in its entirety as follows:

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. (emphasis added)

The cross reference within subsection 7-1-112(1) MCA to section 15-10-420 MCA is a cross reference to the lengthy Montana state law pertaining to the procedure for calculating property tax mill levies specifically authorized by the Montana State Legislature.

The City of Billings has learned directly through multiple Montana Supreme Court decisions that attempting to label a local government revenue enactment as a “fee” does not avoid this Montana state law prohibition in Section 7-1-112, MCA on the exercise of the power to tax income or the sale of goods or services.

Pursuant to its 1983 decision in Montana Innkeepers Association v. City of Billings, 206 M 425, 671 P2d 21 (1983), the Montana Supreme Court held that a City of Billings hotel/motel fee of \$1 for each adult each day who occupied a hotel or motel room was illegal and void. The Montana Supreme Court indicated that the fact that the purported fee is imposed on the occupant as part of renting the hotel/motel room did not make the hotel/motel fee legal.

Later, in a 2003 decision in Montana Dakota Utility Co. v. City of Billings, 2003 MT 332, 318 M 407, 80 P2d 1247(2003) the Montana Supreme Court held that a Billings ordinance that

established a franchise fee on several utilities and telecommunications corporations with facilities located in public rights-of-way was an illegal tax on goods and services. The City of Billings ordinance characterized the fee as a franchise fee based on 4% of gross annual revenue generated by each utility that occupied the public right-of-way within the city limits of Billings. The revenue to be collected was not earmarked for right-of-way maintenance or regulation, but was intended to be used to reduce general property taxes and to fund transportation improvement projects, public safety operations and park maintenance. The fee created was determined to be separate from the City of Billings general police power over streets and alleys. The Montana Supreme Court held that the revenue generating gross revenue fee was 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 and was therefore a prohibited tax pursuant to section 7-1-112 MCA.

In between these two unsuccessful City of Billings new “fee” ordinance adoption attempts, the City of Billings also lost a Montana Supreme Court decision that struck down a City of Billings ordinance imposing an annual tax on the sale of attorney’s services. The Montana Supreme Court held the City of Billings tax on the sale of attorney services invalid in *Brueggemann v. City of Billings*, 221 M 375, 719 P.2d (1986). The City of Billings ordinance attempted to impose an annual tax on every lawyer or law firm carrying on the practice of law. The tax was to be calculated on the basis of gross revenue generated from attorney-client relationships and was held to be an unconstitutional sales tax. Note also that pursuant to 37 Montana Attorney General Opinion 71 (1977) the Montana Attorney General held that a City may not require real estate firms to obtain City business licenses.

An example of a Montana state law that specifically authorizes the authority of a Montana municipality to charge for services is section 7-13-4304 MCA entitled “AUTHORITY TO CHARGE FOR SERVICES” pertaining to municipal sewage and/or water systems. The City of Billings was able to successfully defend its sewage and water system development fees at the Montana Supreme Court in *Lechner v. City of Billings*, 244 M 195, 797 P2d 191(1990). The City of Billings sewage and water development fees were placed in a special fund that was earmarked for expanding the city’s sewer and water facilities or for retiring bonds issued for the purpose of sewage or water facility capital infrastructure.. The Montana Supreme Court indicated that the City of Billings sewage and water development fees were not being held as general revenue to be used on projects unrelated to the sewage and water operations; but instead were being earmarked for sewage and water development projects. Therefore, the sewage and water development fees were not prohibited by section 7-1-112 MCA; but were instead within the statutory authorizations set forth in sections 7-13-4304 through 7-13-4309 MCA.

The City of Missoula already has implemented a sanitary sewer development fee system. A couple of other examples of Montana State Legislatively authorized fees or assessments utilized by the City of Missoula already include; but are not limited to sections 7-6-1601 MCA et. seq. entitled “IMPACT FEES TO FUND CAPITAL IMPROVEMENTS” as well as sections 7-11-1001 MCA et. seq. entitled “SPECIAL DISTRICTS-CREATION AND GOVERNANCE”. Of course Montana local governments also have statutorily authorized budget powers pursuant to section 7-6-4001 et. seq. entitled “LOCAL GOVERNMENT BUDGET ACT”.

CONCLUSION(S):

Yes, the Montana State Legislature enacted section 7-1-112 MCA entitled “POWERS REQUIRING DELEGATION” providing that Montana local governments with self-government powers are prohibited the power to exercise authority to adopt a tax on income, sale of goods, or services unless the power is specifically delegated by Montana law to the Montana local government.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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