

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2014-010

TO: Mayor John Engen, City Council, Bruce Bender, Ginny Merriam, Marty Rehbein, Nikki Rogers, Kelly Elam, Mike Brady, Scott Hoffman, Chris Odlin, Mike Colyer, Rich Stepper, Kevin Slovarp, Ellen Buchanan, Robert Scheben, Andy Roy

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE February 27, 2014

RE: Constitutional challenges to ordinances/laws “as applied” different from “facial challenges” of unconstitutionality to ordinances.

FACTS:

During city council committee discussion pertaining to proposed amendments to city pedestrian interference and aggressive solicitation ordinances by city council members, there was city council member inquiry concerning the difference between a constitutional challenge to the ordinance as applied and a facial prima facie challenge to the ordinance.

ISSUE(S):

Generally, what is the difference between a constitutional challenge to an ordinance “as applied” from a “facial-prima facie” constitutional challenge to the ordinance?

CONCLUSION(S):

Generally a constitutional “as applied” legal challenge to an ordinance is a claim that although the ordinance might be constitutional, as the ordinance was applied in specific factual circumstances it had an unconstitutional effect as applied to those specific factual circumstances. A constitutional facial-prima facie challenge is a legal challenge that the ordinance language as adopted is unconstitutional on its face and/or always operates unconstitutionally.

LEGAL DISCUSSION:

The Constitutionality of a state law or municipal ordinance refers to the quality or state of the state law or municipal ordinance being constitutional. Black’s Law Dictionary, Eighth Edition,

page 330. The Constitutionality of a municipal ordinance could be legally challenged pursuant to either the United States Constitution or the Montana Constitution or both simultaneously. The United States Constitution is the most important and most fundamental law of our society. The United States Constitution is also referred to as the supreme law of the land.

The Montana Constitution is the most important and most fundamental law of Montana laws and is the supreme Montana law if there are conflicts between state or local government laws and the Montana Constitution.

A legal constitutional challenge to a municipal government ordinance would be a challenge to the legality of the municipal ordinance either 1) as applied to a specific set of factual circumstances and/or 2) on its face as just being unconstitutional based on conflicts with constitutional rights established pursuant to a Constitution.

Black's Law Dictionary, Eighth edition, page 244 when addressing challenges of a legal nature defines an "as applied challenge" and a "facial challenge" as follows:

"AS APPLIED CHALLENGE. A claim that a law or governmental policy, though constitutional on its face, is unconstitutional as applied, because of a discriminatory effect; a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party."

"FACIAL CHALLENGE. A claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally."

CONCLUSION(S):

Generally a constitutional "as applied" legal challenge to an ordinance is a claim that although the ordinance might be constitutional, as the ordinance was applied in specific factual circumstances it had an unconstitutional effect as applied to those specific factual circumstances. A constitutional facial-prima facie challenge is a legal challenge that the ordinance language as adopted is unconstitutional on its face and/or always operates unconstitutionally.

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/s/

Jim Nugent, City Attorney

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