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Legal Opinion 2015-008

TO: City Council; Mayor John Engen; Bruce Bender; Dale Bickell; Leigh Griffing; Mike Haynes; Jessica Morriss; Kevin Slovarp; Doug Harby; Marty Rehbein; and Jolene Ellerton

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE February 6, 2015

RE: A self-governing municipality in Montana may exercise any power not expressly prohibited by the Montana Constitution, Montana state law or its own charter. All reasonable doubts regarding the existence of a Montana municipality's power are to be resolved in favor of finding that the power exists.

FACTS:

City council member inquiry was made during a city council committee meeting on February 4, 2015 concerning a Montana municipality's power to establish by ordinance a localized impact type fee collected at the time a building permit for new construction is applied for to assist in paying for the funding, retiring or paying back City debt incurred for street improvements for Hillview Way in Missoula's south hills.

Historically, there are several examples of instances where the City of Missoula established mechanisms for collecting some funding to assist with paying for capital improvement projects. Some examples include: (1) Mullan Road Interceptor; (2) Rattlesnake Interceptor fee; (3) A sanitary sewer main connection fee based on front foot distance along the side of the real property where the connection is occurring. This fee has existed since the 1960's to pay back general obligation bond debt incurred for properties that were not within the original boundaries of the original sanitary sewer service boundaries when municipal sanitary sewer service boundaries were created; (4) special improvement district 544 to assess real properties that originally opted out of the SID, to be paid when they eventually do connect. And (5) Private sanitary sewer rebates to a developer who put in the sanitary sewer line, that other properties connect to in the future.

ISSUE:

Do Montana municipalities have the power to establish development fee programs to assist in the funding of, retirement of or pay back the city for capital infrastructure improvements made by a Montana municipality?

CONCLUSION:

Yes, Montana municipalities have power and authority to establish a capital infra-structure development fee program for assisting with the funding of the improvement or expansion of city capital infrastructure projects. Montana's Constitution provides a Constitutional mandate that the powers of all Montana local governments "shall be liberally construed". The Montana Supreme Court in *Lechner v. City of Billings* (1990), 244 Mont. 195, 797 P 2d 191, 1990 Mont. LEXIS 252 has stated that a Montana municipality may exercise any power not expressly prohibited by the Montana Constitution, Montana state law or the municipality's own charter.

LEGAL DISCUSSION:

Pursuant to Article XI, section (4)(2) of Montana's Constitution, a Montana Constitutional mandate is established for all Montana local governments that their respective powers "SHALL BE LIBERALLY CONSTRUED". (emphasis added). Article XI, section (4)(2) of Montana's Constitution provides:

"Section 4. General powers. (1) A local government unit without self-government powers has the following general powers:

- (a) An incorporated city or town has the powers of a municipal corporation and legislative, administrative, and other powers provided or implied by law.
- (b) A county has legislative, administrative, and other powers provided or implied by law.
- (c) Other local government units have powers provided by law.

(2) THE POWERS OF INCORPORATED CITIES AND TOWNS AND COUNTIES
SHALL BE LIBERALLY CONSTRUED." (emphasis added)

Several Montana Supreme Court decisions have recognized that pursuant to Article XI, section (4)(2) of the Montana Constitution there is a Constitutional mandate that the powers of Montana local governments "shall be liberally construed". See for examples: *Tipco Corp. Inc. v. City of Billings*, (1982) 107 M 339, 642 P 2d 1074; *Stevens v. City of Missoula* (1983) 205 Mont. 274, 280, 667 P 2d 440, 444, 1983 Mont. LEXIS 779; *Town of Ennis v. Stewart* (1991) 247 Mont. 355, 807 P 2d 179, 1991 Mont. LEXIS 57; and *Associated Students University of Montana v. City of Missoula* (1993) 261 Mont. 231, 862 P 2d 380, 382, 1993 Mont. LEXIS 304.

Article XI, section 6 of Montana's Constitution is entitled "SELF-GOVERNMENT POWERS" and states as follows:

"Section 6. SELF-GOVERNMENT POWERS. A local government unit adopting a self-government charter MAY EXERCISE ANY POWER NOT PROHIBITED by this constitution, law or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided or in section 3." (emphasis added)

Section 7-1-101 MCA of Montana's self-government laws also states:

“7-1-101. SELF-GOVERNMENT POWERS. As provided by Article XI, section 6, of the Montana constitution, a local government unit with self-government powers may exercise any power not prohibited by the constitution, law or charter. These powers include but are not limited to the powers granted to general power governments.”

Section 7-1-106 MCA is entitled “CONSTRUCTION OF SELF-GOVERNMENT POWERS” and states:

“7-1-106. CONSTRUCTION OF SELF-GOVERNMENT POWERS. The powers and authority of a local government unit with self-government powers SHALL BE LIBERALLY CONSTRUED. EVERY REASONABLE DOUBT AS TO THE EXISTENCE OF A LOCAL GOVERNMENT POWER OR AUTHORITY SHALL BE RESOLVED IN FAVOR OF THE EXISTENCE OF THAT POWER OR AUTHORITY.” (emphasis added)

The Montana Supreme Court in *Lechner v. City of Billings*, (1990) 244 M 195, 797 P 2d 191, held that a system development fee was allowable for financing future expansion of city water and sanitary sewer systems. The Montana Supreme Court indicated that it is within the power of a self-government municipality as well as is a reasonable extension of a City's express statutory authority to implement the collection and accumulation of system development fees to fund a portion of the cost of future expansion of municipal water and sanitary sewer service.

The Montana Supreme Court in *Lechner* stated in part that “a self-governing municipality, such as the City of Billings, may exercise any power not expressly prohibited by the Montana Constitution, statutory law, or its own charter. . . . Furthermore, a self-governing municipality's powers are to be liberally construed, and all reasonable doubts regarding the existence of a municipality's power are to be resolved in favor of finding that the power exists. . . .”, *supra*, at 197.

One of the Montana state laws cited by the Montana Supreme Court in support of the City of Billings power to establish a system development fee as an allowable form of financing future expansion of the municipal water or sanitary sewer systems was a general language state law, section 7-7-4404 MCA entitled “AUTHORITY TO ACQUIRE, CONSTRUCT, MAINTAIN, AND OPERATE VARIOUS UNDERTAKINGS. This Montana municipal government debt management state law states as follows:

“7-7-4404. AUTHORITY TO ACQUIRE, CONSTRUCT, MAINTAIN, AND OPERATE VARIOUS UNDERTAKINGS. A municipality under this part may:

- (1) CONSTRUCT, RECONSTRUCT, IMPROVE OR EXTEND ANY UNDERTAKING, within or outside of the municipality or partially within or partially outside of the municipality and acquire by gift, purchase, or the exercise of

the right of eminent domain pursuant to title 70, chapter 30, any undertaking and land or water rights in connection with the undertaking;

(2) OPERATE AND MAINTAIN ANY UNDERTAKING AND FURNISH THE SERVICE, FACILITIES, and commodities of the undertaking for its own use and for the use of public and private consumers within or outside of the territorial boundaries of the municipality; and

(3) PRESCRIBE AND COLLECT RATES, FEES, AND CHARGES FOR THE SERVICES, FACILITIES, and commodities furnished by the undertaking. (emphasis added)

Clearly section 7-7-4404 MCA pertains to municipal undertakings other than water and sanitary sewer system capital infrastructure projects.

It should also be noted that in 1986, the Montana Supreme Court in *Diefender v. City of Billings*, (1986) 223 M 487, 726 P 2d 1362, held that a City of Billings ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the City of Billings' self-governing powers.

Some describe the Montana Constitution constitutional mandate that all Montana local governments powers "shall be liberally construed" as being a limited shared sovereignty with the State of Montana that is limited as to exercise of local government powers only by (1) express prohibitions set forth in the Montana Constitution, (2) express prohibitions set forth in state statutes, and/or (3) express prohibitions set forth in the respective local government charter itself. See *Billings Firefighters Local 521 v. City of Billings* (1985) 214 M 481, 694 P 2d 1335; *Billings Firefighters Local 521 v. City of Billings*, (1999), 1999 Mt 6, 293 M 41, 973 P 2d 222, and *State ex. Rel. Swart v. Molitor* (1981) 190 M 515, 621 P 2d 1100.

Also, it must be noted that now even more explicit or express statutory legal authority exists for local government development fees. Montana state law title 7, chapter 6, part 16 MCA is entitled "IMPACT FEES TO FUND CAPITAL IMPROVEMENTS". Since the 1990 *Lechner v. City of Billings* Montana Supreme Court decision, discussed earlier herein, the 2005 Montana State Legislature has enacted title 7, chapter 6, part 16 entitled "IMPACT FEES TO FUND CAPITAL IMPROVEMENTS" that specifically authorizes development fees for changes in use of land or construction actions that create additional demand for public facilities. Subsection 7-6-1602(7) MCA defines the term "public facilities" as in part including "a transportation facility, including roads, streets, rights-of-way, traffic signals, and landscaping".

Based on the legal authority discussed herein, the City of Missoula should have multiple legal grounds for adopting a localized development fee for new construction within the boundaries of a special improvement district.

CONCLUSION:

Yes, Montana municipalities have power and authority to establish a capital infra-structure development fee program for assisting with the funding of the improvement or expansion of city capital infrastructure projects. Montana's Constitution provides a Constitutional mandate that the

powers of all Montana local governments “shall be liberally construed”. The Montana Supreme Court in *Lechner v. City of Billings* (1990), 244 Mont. 195, 797 P 2d 191, 1990 Mont. LEXIS 252 has stated that a Montana municipality may exercise any power not expressly prohibited by the Montana Constitution, Montana state law or the municipality’s own charter.

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/s/

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