

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2015-026

**TO:** City Council; Mayor John Engen; Dale Bickell; Marty Rehbein; Kirsten Hands; Kelly Elam; Ellen Leahy; Mike Brady; Scott Hoffman; Mike Colyer; Chris Odlin; Richard Stepper; Laurie Clark; Jason Diehl; Jeff Brandt; Chad Nicholson

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** August 19, 2015

**RE:** Montana local government powers are constitutionally required to be liberally construed.

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### **FACTS:**

During the August 10, 2015 city council post hearing discussion of a proposed ordinance to make it unlawful for any person to cause or permit the display or performance of any wild and exotic animal for any commercial purpose on any public or private property within the City of Missoula, a legal question was raised concerning the municipal legal authority or power of the City of Missoula to adopt such an ordinance. The City of Missoula already has a similar ordinance in many respects adopted and codified at section 6.07.470 Missoula Municipal Code that currently provides an exception for circuses.

### **ISSUE:**

Do Montana local governments have the legal authority or power to adopt an ordinance that would make it unlawful for any person to cause or permit the display or performance of any wild and exotic animal for any commercial purpose?

### **CONCLUSION:**

Montana's Constitution pursuant to Article XI, Section 4, mandates that the powers of Montana local governments, county and city, shall be liberally construed. There is no Montana state law that appears to prohibit a Montana municipality from adopting an ordinance such as the ordinance the City of Missoula is considering.

## **LEGAL DISCUSSION:**

Article 11, Section 4 of Montana's Constitution establishes a constitutional mandate that the powers of Montana local governments shall be liberally construed. Montana's Constitution does not distinguish between Montana local governments exercising general powers or self-government powers. Montana Constitutional provision Article XI, section 4 states as follows:

**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.

Several Montana Supreme Court decisions decided after the 1972 Montana Constitution was adopted by Montana electors have stated or recognized that the 1972 Montana Constitution has established a Montana Constitutional mandate that the powers of Montana local governments "shall be liberally construed". For examples see (1) Tipco Corp. Inc. v. City of Billings (9182) 197 Mont. 339, 642 P 2d 1074; (2) Stevens v. City of Missoula (1983) 205 Mont. 274, 280, 667 P. 2d 440, 444, 1983 Mont. LEXIS 779; (3) Town of Ennis v. Stewart, 247 Mont. 355, 807 P 2d 179, 1991 Mont. LEXIS 57; (4) Associated Students University of Montana v. City of Missoula, 261 Mont. 231, 862 P 2d 380, 382, 1993 Mont. LEXIS 304

The City of Missoula city electors have adopted a form of Montana local government that includes self-government powers to be exercised by the City of Missoula local government. 1972 Montana Constitutional provision, Article XI, Section 6, constitutionally provides that Montana local governments with self-government powers may exercise any power not prohibited by the constitution, law or charter. Article XI, Section 6 states:

**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 for in section 3.

Also, Section 7-1-101 MCA entitled "SELF-GOVERNMENT POWERS. Provides that a Montana self-government power local government "may exercise any power not prohibited by the constitution, law, or charter". Section 7-1-101 MCA states as follows:

**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.

There do not appear to be any prohibitions on Montana self-government power local governments adopting an ordinance such as the one currently being considered by the Missoula City Council. This lack of a statutory prohibition on the exercise of such a Montana local government self-government power includes there being no prohibition in the four primary statutory limiting or restricting state laws set forth in (1) section 7-1-111 MCA powers denied; (2) 7-1-112 MCA powers requiring delegation; (3) 7-1-113 MCA consistency with state regulation required; and (4) 7-1-114 MCA mandatory provisions.

With respect to regulation of animals, it must also be noted and emphasized that the Montana State Legislature has expressly authorized municipal local governments to regulate circuses pursuant to section 7-21-4201 MCA which states:

**7-21-4201. Regulation of certain activities.** (1) The city or town council may license, tax, and regulate:

- (a) auctioneers, peddlers, pawnbrokers, and secondhand and junk shops;
- (b) motor vehicles and motor vehicle bodies, except those on commercial property, which are not otherwise taxed;
- (c) drivers, porters, tenpin alleys, shooting galleries, shows, circuses, street parades, theatrical performances, and places of amusement within the city or town.

(2) The power to license, tax, and regulate circuses and shows of like character extends 3 miles beyond the limits of the city or town.

(3) The council of any city or town may enact necessary ordinances providing for the licensing, taxation, and regulation of soft drink establishments and all pool and billiard halls. The city or town council may regulate and limit the number of such licenses issued and provide by ordinance that the total number of such licenses may not exceed the number fixed by the city or town council by ordinance.

Finally, it also must be noted and emphasized that Montana State law provides that the Montana State Fish Wildlife and Parks department of Montana state government regulates commercial activities involving menageries and zoos pursuant to title 87, chapter 4, part 8 MCA. One of the potential problems with the current City of Missoula Municipal Code provision in section 6.07.470 MMC is that it does not acknowledge or defer to Montana state law regulation of menagerie and zoos regulated by the Montana Fish Wildlife and Parks department. Further, there are several significant ambiguities in the current city ordinance provision.

## **CONCLUSION:**

Montana's Constitution pursuant to Article XI, Section 4, mandates that the powers of Montana local governments, county and city, shall be liberally construed. There is no Montana state law that appears to prohibit a Montana municipality from adopting an ordinance such as the ordinance the City of Missoula is considering.

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/s/

Jim Nugent, City Attorney

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