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VOLUME NO. 45

OPINION NO. 7

CITIES AND TOWNS - Authority of self-governing city to enact photo-radar ordinance;

HIGHWAYS - Authority of self-governing city to enact photo-radar ordinance;

MOTOR VEHICLES - Authority of self-governing city to enact photo-radar ordinance;

MUNICIPAL GOVERNMENT - Authority of self-governing city to enact photo-radar ordinance;

TRAFFIC - Authority of self-governing city to enact photo-radar ordinance;

MONTANA CODE ANNOTATED - Sections 7-1-111 to 7-1-114, 7-5-4101, 7-14-4102, 7-14-4103, 45-2-301, 45-2-302, 61-8-303, 61-8-306, 61-8-309, 61-8-310, 61-8-312, 61-8-313, 61-8-353 to 61-8-356, 61-8-711, 61-12-101;

OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 42 (1992), 44 Op. Att'y Gen. No. 34 (1992), 43 Op. Att'y Gen. No. 53 (1990), 43 Op. Att'y Gen. No. 41 (1989), 37 Op. Att'y Gen. No. 68 (1977).

HELD: The City of Billings, under its self-government charter, is not precluded by statute from enacting a photo-radar ordinance providing either for accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission, or for a permissive inference that the registered owner was the speeding violator.

June 7, 1993

Mr. James L. Tillotson  
Billings City Attorney  
P.O. Box 1178  
Billings, MT 59103

Dear Mr. Tillotson:

You have requested my opinion on a question which I have rephrased as follows:

May the City of Billings, under its self-government charter, enact a photo-radar ordinance providing for either accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission or for a permissive inference that the registered owner was the speeding violator?

I have used the term "accountability" in place of "vicarious liability" because Montana's criminal code, MCA title 45, recognizes legal accountability as the only method by which one individual may be held responsible for the criminal conduct of another.

I understand that by photo-radar, you mean a sophisticated device which not only records the actual speed of passing vehicles but which also takes a photograph of each vehicle in conjunction with the radar reading. The photographs would show the vehicle's license plate, the speed of the vehicle, the time and date the speed reading was made and the location of the speed reading. The photograph would also identify the officer operating the unit at the time the speed reading and photograph were made and provide a good image of the driver's face, even after dark.

The City of Billings proposes to enact an ordinance which would provide for the mailing of a complaint and summons to the registered owner of a vehicle which was determined by the photo-radar device to have been illegally speeding. Under your proposal, the registered owner would either: (a) be accountable for a speeding violation committed by any driver using the vehicle with the owner's permission, or (b) face a permissive inference that the owner was, in fact, the illegal speeder.

Previous opinions from this office have held that, in determining whether a self-government city is authorized to exercise a particular power, it is necessary to engage in a three-part analysis:

- (1) consult the charter and consider constitutional ramifications;
- (2) determine whether the exercise is prohibited under the various provisions of title 7, chapter 1, part 1, MCA, or other statute specifically applicable to self-government units; and
- (3) decide whether it is inconsistent with state provisions in an area affirmatively subjected to state control as defined by section 7-1-113.

44 Op. Att'y Gen. No. 34 (1992), 43 Op. Att'y Gen. No. 53 at 184, 185-86 (1990), 43 Op. Att'y Gen. No. 41 at 130, 132 (1989), and 37 Op. Att'y Gen. No. 68 at 272, 274 (1977).

Regarding the first step of this analysis, in adopting the Billings city charter the city has reserved all powers available to a self-government city under the Constitution and the laws of Montana. See City of Billings Charter, Art. I. All reserved powers are vested in the city council, which, together with the mayor, constitutes the legislative branch. See City of Billings Charter, Art. III. I can find no provision in the charter itself denying the city council's authority to enact either version of the proposed ordinance.

With respect to the constitutional ramifications of the proposals, the constitutionality of a proposed legislative act is not an appropriate subject for an Attorney General's Opinion. 44 Op. Att'y Gen. No. 42 (1992). A presumption exists that legislative acts are constitutional and as Attorney General I am routinely called upon to defend the validity of legislation. I therefore express no opinion on the constitutionality of the proposed ordinances.

The second step of the analysis requires consideration of MCA §§ 7-1-111 and -112 which limit the exercise of power by local governments with self-government powers, and MCA § 7-1-114, which enumerates those provisions of state law with which a local government with self-government powers must comply.

It could be argued that MCA § 7-1-111(8) prohibits the adoption of either version of the proposed ordinance. That provision denies to a local government unit with self-government powers the exercise of "any power that defines as an offense conduct made criminal by state statute." State law places the criminal responsibility for speeding on the person who actually violates speeding laws. MCA § 61-8-711. See also MCA §§ 61-8-303, -306, -309, -310, -312 and -313. Since either version of the proposed ordinance would make it theoretically possible for a registered owner to be convicted of speeding when the owner had not driven the vehicle in violation of the speed limit, the ordinance could be viewed as redefining the offense of speeding, which is what MCA § 7-1-111(8) appears designed to prevent.

That same prohibitory statute, however, also includes language which allows a local government unit with self-government powers to exercise such powers in regard to conduct made criminal by state statute if "specifically authorized by statute." All cities and towns have broad legislative power for the general management of their affairs. MCA § 7-5-4101. They also have legislative authority to regulate motor vehicles and their speed. MCA §§ 7-14-4102 and -4103; see also MCA §§ 61-8-310 and -12-101. In addition to these powers which are applicable to any city or town, the authority of a local government entity with self-government powers is to be liberally construed. MCA § 7-1-111.

These statutory provisions, when taken together, clearly constitute specific authorization for the City of Billings to regulate the speed of vehicles within its proper jurisdiction. What remains is the question of whether the city may so regulate in a manner which is inconsistent with state law.

In City of Missoula v. Shea, 202 Mont. 286, 661 P.2d 410 (1983), the Montana Supreme Court upheld a parking ordinance which provided for accountability (vicarious liability) on the part of a registered owner for any illegal parking of the vehicle. This decision was reached despite the fact that state law imposes criminal responsibility only on the person who actually illegally parks the vehicle. MCA § 61-8-711. See also MCA §§ 61-8-353 to -356. Critical to this decision was a recognition that the type of accountability at issue has been historically accepted in regard to traffic regulations. The Court also noted that Montana law provides for the criminal responsibility of one person for the criminal act of another. MCA §§ 45-2-301 and -302.

It appears, therefore, that under the Shea rationale, the proposed ordinance providing for accountability of a registered owner for illegal speeding by any person operating the vehicle with the owner's permission would be lawful despite the language of MCA § 7-1-111(8). Such an ordinance would not be prohibited by the other provisions of MCA § 7-1-111 or by MCA §§ 7-1-112 and -114.

In regard to the alternative proposal that the ordinance create a permissive inference that the registered owner was driving at the time the speeding occurred, the holding in City of Missoula v. Shea appears to authorize such an ordinance. Although that case dealt with an ordinance imposing accountability, it recognized a city's ability to legislate broadly in the area of traffic regulation. In addition, State v. Leverett, 245 Mont. 124, 799 P.2d 119 (1990), acknowledged the propriety of using a permissive inference in relation to an element of a criminal offense.

The third step of the analysis requires consideration of MCA § 7-1-113 which prohibits a self-governing local government from exercising any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control. Stated conversely, this statute "allows a local government with self-government powers to enact any ordinance unless the ordinance (1) is inconsistent with state law or regulation and (2) concerns an area affirmatively subjected by law to state control." 44 Op. Att'y Gen. No. 34 (1992), citing 43 Op. Att'y Gen. No. 53 at 184, 186-87 (1990), and 43 Op. Att'y Gen. No. 41 at 130, 134 (1989) (emphasis in original). Neither version of the proposed ordinance would be prohibited by this statute as the regulation of speeding is clearly not an area affirmatively subjected to exclusive state control. MCA § 7-1-113(3) provides that a subject matter is "affirmatively subjected to state control if a state agency or officer is directed

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to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency." No state agency is given exclusive power to establish administrative rules governing speed of traffic in cities and towns, nor is enforcement of speed regulations exclusively vested in a state agency. MCA § 7-1-113 therefore does not apply in this area.

THEREFORE, IT IS MY OPINION:

The City of Billings, under its self-government charter, is not precluded by statute from enacting a photo-radar ordinance providing either for accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission, or for a permissive inference that the registered owner was the speeding violator.

Sincerely,



JOSEPH P. MAZUREK  
Attorney General

JPM/PF/brf