VOLUME NO. 46 OPINION NO. 7

CITIES AND TOWNS - Authority of self-governing local government to charge fire service fee upon state property in fire service area;
FIRE DEPARTMENTS - Authority of self-governing local government to charge fire service fee upon state property in fire service area;
LOCAL GOVERNMENT - Authority of self-governing local government to charge fire service fee upon state property in fire service area;
MUNICIPAL GOVERNMENT - Authority of self-governing local government to charge fire service fee upon state property in fire service area;
TAXATION AND REVENUE - Authority of self-governing local government to charge fire service fee upon state property in fire service area;
MONTANA CODE ANNOTATED - Sections 7-1-101, -102, -106, -111, -112, -113, -114, 15-6-201(1)(a)(ii);
MONTANA CONSTITUTION - Article VIII, section 5; article XI, sections 5, 6;
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 34 (1992), 43 Op. Att'y Gen. No. 53 (1990), 43 Op. Att'y Gen. No. 46 (1989), 43 Op. Att'y Gen. No. 41 (1989), 42 Op. Att'y Gen. No. 73 (1988), 42 Op. Att'y Gen. No. 21 (1987), 37 Op. Att'y Gen. No. 68 (1977).

HELD: The City of Helena, a self-governing city, is precluded from assessing fire service fees to state property located in the City of Helena fire service area, since the fees are in reality a tax rather than an assessment commensurate with a specific benefit conferred on the property assessed.

July 7, 1995

Ms. Lois A. Menzies, Director
Department of Administration
Mitchell Building, Room 155
P.O. Box 200101
Helena, MT 59620-0101

Dear Ms. Menzies:

You have requested my opinion on the following question:

May the City of Helena charge a fire service fee upon state property included in the City of Helena fire service area?

In order to provide fire protection for the City of Helena, the City has enacted a series of resolutions establishing a City of Helena fire service area. The cost of maintaining the fire service area will be covered by levying a fire service fee on all real property in the fire service area. Property in the fire service area, including state property, will be assessed as follows: (1) $.008 per square foot of floor area of structure, including basements, garages, etc. ($2 minimum); (2) $2 for each parcel of vacant property; and (3) $6 for each trailer space within a trailer court (to be assessed against the court owner). The revenue from the fire service fees will cover the entire expense of the city fire department's budget.

The City has adopted a charter form of government with self-government powers pursuant to article XI, section 5, of the Montana Constitution. The Montana Constitution allows local governments which have adopted a self-government charter to "exercise any power not prohibited by this constitution, law, or charter." Mont. Const. art. XI, § 6; Mont. Code Ann. § 7-1-101. Under the above constitutional provision, "the assumption is that local government *possesses* the power unless it has been specifically denied." D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 445, 713 P.2d 977, 982 (1986). A self-governing local government may also provide "any services or perform any functions not expressly prohibited by the Montana constitution, state law, or its charter." Mont. Code Ann. § 7-1-102; D & F Sanitation, 713 P.2d at 982 (statutory preemption of self-government powers of municipality requires express prohibition by statute forbidding local governments with self-government powers from acting in certain area). The powers and authority of a self-governing local government are to be liberally construed and "[e]very 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." Mont. Code Ann. § 7-1-106; Lechner v. City of Billings, 244 Mont. 195, 200, 797 P.2d 191, 195 (1990); Diefenderfer v. City of Billings, 223 Mont. 487, 490, 726 P.2d 1362, 1364 (1986).

As explained in 43 Op. Att'y Gen. No. 53 at 184, 185 (1990), "the Legislature has provided specific statutory limitations on the exercise of power by a unit of local government with self-government powers." Mont. Code Ann. §§ 7-1-111 and -112 set forth specific powers that a self-governing local government is prohibited from exercising, and Mont. Code Ann. § 7-1-114 lists the state laws with which a self-governing local government must comply. 43 Op. Att'y Gen. No. 53 at 184, 186 (1990); 43 Op. Att'y Gen. No. 41 at 130, 132 (1989). In addition, Mont. Code Ann. § 7-1-113 prohibits self-governing local governments 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." 43 Op. Att'y Gen. No. 53 at 186; 43 Op. Att'y Gen. No. 41 at 132.

Previous Attorney General's Opinions have held that in determining whether a self-governing local government is authorized to exercise a specific power, it is necessary to engage in the following three-part analysis:

> (1) consult the [local government's] 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, MCA].

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

Before I begin my analysis of whether the City has the authority to adopt the resolutions in question, I emphasize that my review in this opinion is limited to whether the City has the authority to charge a fire service fee to state property in a fire service area. Regarding the first step of this analysis, in adopting the Helena City Charter, the City has reserved all powers not prohibited by the Montana Constitution, state law or its charter. See City of Helena Charter, art. I, § 1.01. The City's charter contains no provision which would prohibit it from creating a fire service area and levying fees on the state property in that fire service area.

With respect to consideration of constitutional ramifications, you maintain that the fees levied on the state property in the fire service area are in reality taxes and, therefore, these fire service fees charged by the City are in violation of the constitutional and statutory provisions which exempt state property from taxation. Mont. Const. art. VIII, § 5 provides, among other things, that the legislature may exempt state property from taxation. The legislature implemented the above constitutional provision by enacting Mont. Code Ann. § 15-6-201(1)(a)(ii), which specifically exempts state property from taxation. Conversely, the City claims that the fire service fees are not taxes but instead are "assessments," and therefore these fire service fees levied on state property are not prohibited by Mont. Code Ann. § 15-6-201(1)(a)(ii).

In Vail v. Custer County, 132 Mont. 205, 217, 315 P.2d 993, 1000 (1957), the Montana Supreme Court explained the differences between a property tax and an assessment:

> A tax is levied for the general public good. It creates a lien. An assessment is imposed against specific property to defray the cost of a specific benefit to the property, the benefit to be commensurate with the assessment.

See 42 Op. Att'y Gen. No. 21 at 76, 82-83 (1987).

The difference between a "tax" and an "assessment" is not determined by how it is referenced, but rather how it is calculated and whether it benefits the public generally or operates to benefit a specific piece of property. 42 Op. Att'y Gen. No. 73 at 289, 291-92 (1988), held that regular and special assessments levied by a conservation district were taxes and not "assessments" as the term was defined by the court in Vail and used in 42 Op. Att'y Gen. No. 21 (1987). The conservation district apportioned the amount of the assessments levied on the basis of the property's taxable valuation. 42 Op. Att'y Gen. No. 73 at 291. The opinion closely examined whether the conservation district assessments were intended "to compensate the district for benefits directly conferred upon a particular piece of property within its jurisdiction in direct proportion to the cost of those benefits." Id. at 291, quoting 42 Op. Att'y Gen. No. 21. The opinion concluded that the assessments on the property were a tax because the amount of the assessment levied could not be directly related to the value of the benefits conferred on the assessed property. Id.

Similarly, 43 Op. Att'y Gen. No. 46 (1989), relying on the rationale in 42 Op. Att'y Gen. No. 73 (1988), held a water and sewer assessment levy was a tax rather than an "assessment" as defined by the Court in Vail. The opinion explained that the water and sewer district levied the assessments to meet general federal loan obligations. 43 Op. Att'y Gen. No. 46 at 158, 159 (1989). The water and sewer assessment levy was "assessed on the basis of proportional land size or valuation and without reference to whether the amount taxed bears a direct relationship to the benefit specially conferred on the particular taxpayer's property." 43 Op. Att'y Gen. No. 46 at 160. The opinion concluded that there was no close relationship between the assessment levy amount and the actual benefit conferred on the assessed property. 43 Op. Att'y Gen. No. 46 at 160.

Here, I conclude that the fire service fees assessed by the City upon the property in the fire service area are taxes rather than assessments as defined by the Court in Vail. The fire service fees are similar to those assessments in 42 Op. Att'y Gen. No. 73 (1988) and 43 Op. Att'y Gen. No. 46 (1989). A direct correlation does not

exist between the amount of fire service fees charged each piece of property in the fire service area and the value of the fire protection benefit conferred on the property. For instance, the City charges a flat rate of $2 for fire protection for each parcel of vacant property regardless of the size of the vacant property or the potential fire hazard that may be lurking on the property. An owner of a vacant gravel lot, which logically would not create a grave fire hazard, would be charged the same fire service fee as the owner of a wooded lot or an owner who stored flammable material on his or her lot. The $2 fire service fee does not accurately reflect the specific cost of providing fire protection to every vacant piece of property in the fire service area.

Similarly, structures are charged $.008 per square foot without any consideration of the unique potential fire hazards in each structure. Under the City's fire service fee a one-story building with the same square footage as a two-story building is charged the same fire service fee, even though the two-story building may present a more difficult fire-fighting situation because of its height. The charging of a fire service fee on a flat square-footage rate for every structure does not consider that different structures, based on their location, dimensions and building materials, may cost more to provide fire protection than other structures with the same square footage. The fire service fees charged for structures are clearly not always commensurate with the benefit to those structures. The fire service fees cannot be considered assessments because the fees are not necessarily based on the value of the fire protection rendered to a specific structure.

Even the $6 rate for each trailer space cannot be considered an assessment as defined in Vail. The owner of a trailer court pays a flat $6 rate for each trailer space, regardless of the size of the lot or of the trailer which occupies it. The fees are inexact and do not reflect in every instance the true cost of providing protection to each trailer space.

Furthermore, the fire service fees simply cannot be traced to the cost of providing the specific benefit of fire protection to each specific piece of property or structure within the city limits. The revenue from the fire service fees covers not only the cost of providing fire suppression services to property and structures within the city limits but also the city fire department's entire budget. In addition to suppressing fires, the fire department also provides emergency medical response services, responds to hazardous waste spills, extricates accident victims from their automobiles, educates the public on fire safety, and conducts fire safety inspections of buildings open to the public. The general public, rather than a specific property owner, benefits from these worthy and necessary services, and clearly the cost of these benefits cannot be calculated on the basis of square footage of a structure. These services paid for by the fire service fees are provided for

the general public good and not to any specific piece of property and, therefore, the fire service fees levied to pay for these services must be considered a tax. Vail, supra.

I conclude that the fire service fees assessed by the City of Helena upon state property in the fire service area are prohibited by Mont. Code Ann. § 15-6-201(1)(a)(ii) because the fire service fees are taxes rather than assessments. In light of this conclusion, it is not necessary to examine the remaining two factors in the three-part analysis regarding the powers of self-governing local government units.

THEREFORE, IT IS MY OPINION:

> The City of Helena, a self-governing city, is precluded from assessing fire service fees to state property located in the City of Helena fire service area, since the fees are in reality a tax rather than an assessment commensurate with a specific benefit conferred on the property assessed.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/msw/dm