

46 Op. Att'y Gen. No. 13

CITIES AND TOWNS - Authority of self-governing local government to require garbage haulers to contract with local government before collecting garbage within city limits;

CONTRACTS - Authority of self-governing local government to require garbage haulers to contract with local government before collecting garbage within city limits;

LOCAL GOVERNMENT - Authority of self-governing local government to require garbage haulers to contract with local government before collecting garbage within city limits;

PUBLIC SERVICE COMMISSION - Authority of self-governing local government to require garbage haulers with certificates of public convenience and necessity to contract with local government before collecting garbage within city limits;

SOLID WASTE - Authority of self-governing local government to require garbage haulers to contract with local government before collecting garbage within city limits;

ADMINISTRATIVE RULES OF MONTANA - Rules 38.3.1201 to 38.3.1207;

MONTANA CODE ANNOTATED - Sections 7-1-111 to -114, 7-14-4105(2), 69-12-201, -314(2), -323(2), -501 to -503,

MONTANA CONSTITUTION - Article XI, section 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. 41 (1989), 37 Op. Att'y Gen. No. 68 (1977).

HELD:

A self-governing city has the authority to establish conditions for garbage collection companies within its city limits, unless the city's conditions are established in a manner that: (1) is prohibited by constitution or charter, (2) prohibits the grant or denial of a certificate of public convenience and necessity, or (3) is inconsistent with state law or regulation.

February 28, 1996

Mr. William A. Schreiber
Belgrade City Attorney
5 North Broadway
Belgrade, MT 59714

Dear Mr. Schreiber:

You have requested my opinion on the following question:

Does a self-governing city have the authority to regulate the business of a garbage collection company within the city limits if the collection company has been issued a certificate of public convenience and necessity by the Public Service Commission?

The City of Belgrade (City) adopted a self-government charter effective July 1, 1987. The city charter contains no mention of garbage collection. On July 1, 1992, the City executed a nonexclusive contract with Waste Management Partners of Bozeman, Ltd. (WMP) for garbage collection in the City. You state that it is the City's policy to contract with only those garbage collection companies which enter into contracts with the City that have terms comparable to or more favorable than those set forth in the contract with WMP. Under the policy, companies that have no contract with the City are prohibited from collecting or hauling garbage within the Belgrade city limits.

The contract with WMP contains clauses which: (1) specify rates and procedures for increasing rates; (2) permit WMP to bill customers directly; (3) require WMP to indemnify the City from any of WMP's willful or negligent acts or omissions; (4) require WMP to maintain policies for worker's compensation, automobile, and liability insurance at specified levels; and (5) require WMP to furnish a performance bond in the amount of \$250,000.

On December 12, 1994, the Montana Public Service Commission issued Customized Services (CS) a certificate of public convenience and necessity authorizing the collection of garbage in parts of Madison and Gallatin counties, including the City. CS has refused to sign a contract with the City, but has acquired customers within the City. The City is now considering action to prohibit CS from operating in the City until it signs a contract with the City, and has asked for my opinion regarding the legality of this action, and the contract upon which it is based. While an Opinion of the Attorney General cannot interpret the particular clauses of a contract, it is within the scope of my authority and the scope of your question to examine the powers granted by the statutes to self-governing cities such as Belgrade, and give my opinion on their lawful exercise.

Any discussion of the authority of a city with self-government powers to establish conditions of this nature for garbage collection within its city limits must take place against the background of the discussion of the Montana Supreme Court in D & F Sanitation Service v. City of Billings, 219 Mont. 437, 713 P.2d 977 (1986). That case clarified many fundamental distinctions that have formed the basis for a number of Opinions of the Attorney General cited below.

All cities have the power to regulate the "disposition and removal" of garbage "in any street or alley, on public grounds, or on any premises" within their city limits. Mont. Code Ann. § 7-14-4105(2). Furthermore, the Montana Supreme Court has said that under Mont. Const. art. XI, § 6, "the assumption is that local government [with self-government powers] **possesses** the power, unless it has been specifically denied." D & F Sanitation Serv. v. City of Billings, 219 Mont. at 445, 713 P.2d at 981-82. In determining whether a self-government power is authorized, previous opinions from this office have engaged 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 [Mont. Code Ann. tit. 7, ch. 1, pt. 1] 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. 41 at 130, 132 (1989), citing 37 Op. Att'y Gen. No. 68 at 272, 274 (1977).

With respect to the first factor, neither the charter nor the constitution prevents the City from prohibiting garbage collection companies that refuse to contract with the City from operating within the City. The city charter has placed no restrictions (beyond recognizing those that may exist in state and federal law) on the City's power to establish conditions for garbage collection. Similarly, I find no constitutional provision that would be implicated by a self-governing city exercising authority to establish conditions for the business of garbage collection within its city limits.

The second part of the three-part analysis calls for an examination of the relevant statutes to determine if the actions being considered by the City are prohibited by law. The major limitations on the powers of local governments with self-government powers are listed in Mont. Code Ann. §§ 7-1-111 to -114. The issue that presents itself here concerns the relative powers of a city with self-government powers and those of the Montana Public Service Commission (PSC), which is charged by statute with the duty to supervise and regulate every motor carrier in the State of Montana, Mont. Code Ann. § 69-12-201. The specific prohibition on local government units with self-government powers is stated as follows:

A local government unit with self-government powers is prohibited from exercising the following:

. . .

(4) any power that prohibits the grant or denial of a certificate of public convenience and necessity;

(5) any power that establishes a rate or price otherwise determined by a state agency;

Mont. Code Ann. § 7-1-111. It is my opinion that neither of these prohibitions applies. Concerning the limitation stated in (4) above, the argument might be made that regardless of how the City describes its

action, the effect is to deny a certificate of public convenience and necessity within the corporate limits of the City. I disagree; the voters of the City have determined that the City should establish conditions for garbage haulers operating within the city limits, and my review of those conditions (especially the indemnity, insurance, and bonding requirements) leads me to conclude that the conditions do not conflict with the PSC's certificate of authority and do not have the effect of preventing properly certificated companies from operating within the city limits of Belgrade, nor allowing non-certificated companies to operate in the City.

The conditions under which garbage may be transported are not pervasively regulated through the PSC certificate of convenience process. The factors that the PSC must consider in granting or denying a certificate of public convenience and necessity are:

(a) . . . the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency[,], . . . the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

(b) For purposes of Class D certificates, a determination of public convenience and necessity may include a consideration of competition.

Mont. Code Ann. § 69-12-323(2). These limited factors leave ample room for local regulation of rates, routes, and services which must be provided by garbage collectors within a local jurisdiction. The City considered its interests and established conditions for garbage haulers seeking to operate within the City. The conditions do not have the effect of completely precluding a certificated carrier from serving the area. To the contrary, Belgrade's policy apparently will allow any certificated carrier to compete for the business of local residents as long as the carrier meets the required conditions of service.

A certificate of public convenience and necessity simply grants a carrier the right to haul over the roadways of the certificated service area. Barney v. Board of R.R. Comm'rs, 93 Mont. 115, 138, 17 P.2d 82, 88 (1932). In the context of garbage hauling, a certificate has not been construed by the Montana Supreme Court to guarantee the carrier the right to compete for hauling business throughout the area for which the carrier is certificated. In D & F Sanitation, the Montana Supreme Court upheld a local ordinance, adopted under the same class of self-government powers exercised by the City here, that had the effect of excluding a certificated carrier from competing for a portion of the service to be provided in the area where the carrier was allowed to haul under its certificate. D & F Sanitation compels the conclusion that the City's policy does not prohibit the grant or denial of a certificate of public convenience and necessity in violation of Mont. Code Ann. § 7-1-111(4).

Considering the second limitation stated in (5) above, the Montana Public Service Commission does not possess any power to establish a rate for the transportation of garbage, Mont. Code Ann. §§ 69-12-501 to -503. Therefore, subsection (5) will not be violated by the actions being considered by the City. I find no other section of the law constraining cities with self-government powers to be implicated by the conditions which the City is considering here, and conclude that this exercise of self-government power is not prohibited by any statute limiting the exercise of local self-government powers.

The final part of the three-part analysis comes directly from Mont. Code Ann. § 7-1-113, and in the words of a previous Opinion of the Attorney General,

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), citing 43 Op. Att'y Gen. No. 41 at 130, 134 (1989) (emphasis in original).

Examining the first element of this test, the statute explains:

The exercise of a power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.

Mont. Code Ann. § 7-1-113(2). The requirements established by the City are certainly not "lower or less stringent" than those imposed by state law. Many of the requirements deal with matters for which state law imposes no conditions at all. Indeed, the problem here has arisen because the City's indemnity, insurance, and bonding requirements are **more** stringent than any imposed by the PSC. I conclude that the action being considered by the City is not inconsistent with state law.

Regarding the second element of the test, Mont. Code Ann. § 7-1-113(3) explains that an area is affirmatively subjected to state control "if a state agency or officer is directed 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." The only state regulations dealing with the transportation of garbage deal with the statutory requirement that garbage haulers must engage in the business of hauling garbage "on a regular basis as part of the motor carrier's usual business operation." Mont. Code Ann. § 69-12-314(2). See Mont. Admin. R. 38.3.1201 to .1207. The Montana statutes establish no standards or requirements for matters covered by the City's contract. I find neither element of the final part of the three-part analysis. In sum, as long as local governments with self-government powers do not contravene any of the parts of the three-part test of authorized powers, the presumption is that they may exercise powers.

THEREFORE, IT IS MY OPINION:

A self-governing city has the authority to establish conditions for garbage collection companies within its city limits, unless the city's conditions are established in a manner that: (1) is prohibited by constitution or charter, (2) prohibits the grant or denial of a certificate of public convenience and necessity, or (3) is inconsistent with state law or regulation.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/rfs/bjh