48 Op. Att'y Gen. No. 15

CITIES AND TOWNS - Authority of city or town to levy additional tax for firefighters' disability and pension fund beyond special tax levy of four mills authorized by statute;
FIRE DEPARTMENTS - Special tax levy for firefighters' disability and pension fund;
MUNICIPAL GOVERNMENT - Authority of city or town to levy additional tax for firefighters' disability and pension fund beyond the special tax levy of four mills authorized by statute;
RETIREMENT SYSTEMS - Special tax levy for firefighters' disability and pension fund;
TAXATION AND REVENUE - Special tax levy for firefighters' disability and pension fund;
MONTANA CODE ANNOTATED - Sections 19-18-503, -504.

HELD:

If the city council has already imposed the maximum mill levy authorized by statute in order to fund the firefighters' disability and pension fund, it may not levy an additional special tax or seek voter approval for an additional special tax, even if the fund's value is less than 4 percent of the taxable valuation of all taxable property within the city.

June 27, 2000

Mr. Gerard M. Schuster
Wolf Point City Attorney
112 Main Street
Wolf Point, MT 59201

Dear Mr. Schuster:

You have requested my opinion concerning the authority of the Wolf Point City Council to seek voter approval for an additional special tax levy for the firefighters' disability and pension fund when the fund falls below 4 percent of the taxable valuation of all taxable property in the city.

Montana law authorizes the creation of a fire department relief association by the confirmed members of a local fire department. Mont. Code Ann. § 19-18-102. Whenever a fire department relief association is formed, the city or town must establish a "disability and pension fund" for the benefit of its members. Mont. Code Ann. § 19-18-105. The fund consists of moneys received from the state, monthly membership fees, moneys from other sources, interest and other income earned, and the proceeds of any tax levy authorized by statute. Mont. Code Ann. § 19-18-501.

There are two statutes relevant to the tax levy: Mont. Code Ann. §§ 19-18-503 and -504. The first authorizes a special tax levy as a means of maintaining a firefighters' disability and pension fund at a level equal to at least 4 percent but no more than 10 percent of the taxable valuation of all taxable property within the limits of the city or town. Mont. Code Ann. § 19-18-503(1). Whenever the fund contains less than 4 percent of the taxable valuation of all taxable property within the city limits, the governing body is *required* to levy a special tax as provided in Mont. Code Ann. § 19-18-504. Mont. Code Ann. § 19-18-503(2).

The amount of the special tax levy is discussed in Mont. Code Ann. § 19-18-504. That statute provides:

Whenever the fund contains an amount that is less than four percent of the taxable valuation of all taxable property in the city or town, the city or town council shall levy an annual special tax of not less than one mill and not more than four mills on each dollar of taxable valuation of all taxable property within the city or town. When the fund contains an amount that is less than ten percent but more than four percent of the taxable valuation of all taxable property in the city or town, the city or town council may, if authorized by the voters, levy an annual special tax of not less than one mill and not more than four mills on each dollar of taxable valuation.

As this statute indicates, the council is obligated to impose a levy if the fund falls below 4 percent. Voter approval is required only if the fund is between 4 percent and 10 percent of the taxable valuation of all taxable property in the city. In either instance, however, the maximum that may be imposed is four mills on each dollar of taxable valuation. You question whether the voters may approve an additional special tax levy if the fund falls below the 4 percent mark even though the council has already imposed the four-mill levy. This question must be answered in the negative.

As an incorporated city with general government powers, Wolf Point is a municipal corporation vested with "legislative, administrative, and other powers provided or implied by law." Mont. Const. art. XI, § 4(1)(a). Even though the powers of incorporated cities and towns must be liberally construed, Mont. Const. art. XI, § 4(2), this rule of construction does not "of its own force confer new powers on local governments." 40 Op. Att'y Gen. No. 17 at 66 (1983). There must nonetheless be some constitutional or statutory basis for their existence. Id.

Here, the city is expressly mandated to levy a special tax whenever the fund falls below the 4 percent mark. However, the amount that may be levied is limited to four mills on each dollar of taxable valuation. To increase the levy through an additional special tax, even with voter approval, would contravene the explicit statutory limitation of four mills. The city cannot validate its action by putting the issue to the voters. A referendum and subsequent vote cannot ratify an action that the city does not have the authority to take in the first instance. The general rule is that the power of referendum is restricted to legislation that is within the power of the municipality to enact or adopt. 46 Op. Att'y Gen. No. 15 at 139 (1996), citing McQuillin, Municipal Corporations § 16.54. The electorate has no greater power to legislate than the municipality itself. Id.

In short, where the legislature has expressly limited the special tax levy to four mills on each dollar of taxable valuation, there is no authority, express or implied, to increase that levy beyond the four-mill limit.

THEREFORE, IT IS MY OPINION:

If the city council has already imposed the maximum mill levy authorized by statute in order to fund the firefighters' disability and pension fund, it may not levy an additional special tax or seek voter approval for an additional special tax, even if the fund's value is less than 4 percent of the taxable valuation of all taxable property within the city.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/ja/dm