

COUNTIES - A county with general government powers only has legislative powers as provided or implied by law;

INITIATIVE AND REFERENDUM - The closing of a county-owned incinerator is an administrative act not subject to initiative and referendum;

LOCAL GOVERNMENT - A county with general government powers only has legislative powers as provided or implied by law;

REFUSE DISPOSAL - The closing of a county-owned incinerator is an administrative act not subject to initiative and referendum;

SOLID WASTE - The closing of a county-owned incinerator is an administrative act not subject to initiative and referendum;

MONTANA CODE ANNOTATED - Title 69, chapter 7; sections 7-1-201, -2101(2), -2103, -2104, -4122(1), -4123, 7-3-703, -704, -1104, -1203, 7-5-131, (1), -134(3), 7-13-203, 61 12-101(14);

MONTANA CONSTITUTION - Article XI, sections 4(1)(b), 6, 8;

OPINIONS OF THE ATTORNEY GENERAL - 48 Op. Att’y Gen. No. 14 (2000); 47 Op. Att’y Gen. No. 18 (1998); 45 Op. Att’y Gen. No. 5 (1993); 40 Op. Att’y Gen. No. 51 (1984); 40 Op. Att’y Gen. No. 17 (1983); 37 Op. Att’y Gen. No. 105 (1978).

HELD: The closing of a county-owned incinerator by the Park County Commission is an administrative act not subject to initiative and referendum.

July 20, 2004

Ms. Tara DePuy
Park County Attorney
414 East Callender Street
Livingston, MT 59047

Dear Ms. DePuy:

Your letter requests an opinion on the following two questions:

1. Is the closing of the incinerator in Park County an administrative decision or a legislative act by the Park County Commission?

2. If the closing of the incinerator in Park County is a legislative act subject to the right of initiative and referendum by the electors, do the electors in the county (including within the City of Livingston) have the right to vote on a ballot issue?

Because I hold that the closing of the incinerator is an administrative decision, I will not address the second question.

Before a petition proposing a local government resolution may be circulated for signatures, the county attorney “shall review the sample petition for form and compliance with 7-5-131.” Mont. Code Ann. § 7-5-134(3). If the county attorney determines that the sample petition proposes an ordinance outside the powers of initiative or referendum specified in Mont. Code Ann. § 7-5-131, she may advise that the election administrator reject the petition. See 45 Op. Att’y Gen. No. 5 (1993).

The Montana Constitution provides that “[t]he legislature shall extend the initiative and referendum powers reserved to the people by the constitution to the qualified electors of each local government unit.” Art. XI, § 8. In implementing this provision the legislature has granted to local electors the power to propose “resolutions and ordinances within the legislative jurisdiction and power of the governing body of the local government”. Mont. Code Ann. § 7-5-131(1). The closing of the incinerator is subject to jurisdiction only if it is within Park County’s “legislative jurisdiction and power”.

In your request, you urge consideration of a line of cases concerning the meaning of “legislative jurisdiction and power” in the local initiative context beginning with City of Billings v. Nore, 148 Mont. 96, 104, 417 P.2d 458 (1966), which set forth a test of “whether the act was one creating a new law (legislative) or executing an already existing law (administrative).” You place particular reliance on the four-part standard for legislative acts that the Supreme Court elaborated in Town of Whitehall v. Preece, 1998 MT 53, 956 P.2d 743. These cases deal with the legislative jurisdiction and power of municipalities, however, and not with the distinct authority of counties at issue here. Where the Supreme Court has addressed county initiatives and referenda, it has not directly addressed the fundamental question of county legislative power. See Ravalli County v. Erickson, 2004 MT 35, ¶ 19, 320 Mont. 31, 85 P.3d 772 (holding that a district court must determine whether a proposed county obscenity ordinance by initiative would be valid and constitutional if passed); DeLong v. Downes, 175 Mont. 152, 157, 573 P.2d 160 (1977) (holding that proposed county initiative to limit gambling was beyond the confined powers of the county), overruled by Tipco Corp. v. City of Billings, 197 Mont. 339, 642 P.2d 1074 (1982); Chouteau County v. Grossman, 172 Mont. 373, 379, 563 P.2d 1125 (1977) (holding that proposed county resolution to withhold funds from paving

project was administrative and not subject to referendum), overruled in part by Preece, ¶ 27.

To resolve this question, a determination of the extent of a county's "legislative jurisdiction and power" must be addressed, beginning with the description of county powers in the Montana Constitution. "A county has legislative, administrative, and other powers provided or implied by law." Mont. Const. art. XI, § 4(1)(b). While the subsection (2) of this provision instructs that "[t]he powers of . . . counties shall be liberally construed," those powers must spring from a source "provided or implied by law." This general government rule may be inverted by a local government's adoption of a self-government charter granting "any power not prohibited by th[e] constitution, law, or charter," Mont. Const. art. XI, § 6, but absent such a charter a county's power is limited to that expressed or implied by the legislature. "Every county is a body politic and corporate and as such has the power specified in this code or in special statutes and such powers as are necessarily implied from those expressed." Mont. Code Ann. 7 1-2101(2).

The Local Government Committee report to the Constitutional Convention explained the reasoning behind the provisions eventually incorporated into article XI, section 4(1)(b):

Through stringent court interpretations . . . Montana counties have been denied the local legislative, or ordinance-making powers possessed by cities and towns.

. . . .

The Local Government Committee is well aware of contentions that counties should not exercise any legislative power because the traditional county structure does not allow for clear separation of the legislative and executive functions and thus does not provide for clear separation of powers. However, the committee believes the legislature can build safeguards into any grant of legislative powers to counties to guard against such alleged abuse of the separation of powers concept. The language of section 4, subsection 2 clearly hinges the grant of legislative powers to counties on grants from the legislature; no broad grant of power is given directly to counties by this section.

II 1972 Mont. Const. Conv. 793-94.

While the Montana Constitution gives the legislature power to grant the exercise of legislative power to general government counties, the Montana Code does not provide for it in this instance. Instead, the legislature clearly has distinguished the narrower powers of counties from the broader powers of municipalities. The enumeration of county powers in Mont. Code Ann. § 7-1-2103 does not include legislative powers. In contrast, “a municipality has legislative . . . powers,” Mont. Code Ann. § 7-1-4122(1), including broadly enumerated public order and welfare powers. See Mont. Code Ann. § 7-1-4123.

Similarly, counties organized as charter governments must provide for a legislative body, see Mont. Code Ann. § 7-3-704, and may enumerate their own legislative powers in the charter, see Mont. Code Ann. § 7-3-703. A county may also gain the legislative powers of a municipality by forming a consolidated city-county government. See Mont. Code Ann. §§ 7-3-1104, -1203; see also 48 Op. Att’y Gen. No. 14 at [] (2000) (holding that the consolidated and chartered City and County of Butte-Silver Bow has the powers of a municipality under Mont. Code Ann. title 69, chapter 7.)

This office has reiterated that, absent a charter granting self-government powers, “those counties which exercise only general powers are limited to whatever powers the legislature expressly or implicitly grants.” 37 Op. Att’y Gen. No. 105 at 447 (1978); 47 Op. Att’y Gen. No. 18 at [] (1998). [One such explicit grant of legislative powers, Mont. Code Ann. § 61-12-101(14) empowers local authorities to enact traffic ordinances. See 40 Op. Att’y Gen. No. 51 (1984).]

Even though the Montana Constitution extends initiative and referendum authority to voters of local government entities, that power is limited to the local government's legislative authorization. “Even under the policy of broadly construing the powers of initiative and referendum,” those powers “have been reserved under the Constitution as to legislative acts only.” Preece at ¶ 24. “Recognition of ‘inherent’ powers of general power county governments would effectively obliterate the distinction between general powers and self-government powers, a result which is obviously inconsistent with article XI of the Montana Constitution”. 40 Op. Att’y Gen. No. 17 at 66 (1983). In an early examination of county self-government powers under the 1972 Constitution, the Supreme Court observed that “had Madison County been acting as a general power jurisdiction, we should perforce be required to hold that Madison County had only such powers as were expressly or impliedly delegated to it,” but “[a]s a self-governing unit, Madison County has shared powers of legislative . . . authority.” State ex rel. Swart v. Molitor, 190 Mont. 515, 521, 621 P.2d 1100 (1981).

Beyond the basic corporate powers enumerated by Mont. Code Ann. § 7-1-2103 and exercised by the board of county commissioners (or its agents) under Mont. Code Ann.

Ms. Tara DePuy

July 20, 2004

Page 5

§ 7-1-2104, a general government county may function through administrative boards, districts, and commissions it may create under specific statutory authority. See Mont. Code Ann. § 7-1-201. The Park County Refuse District is such an administrative district, created under the statutory authority of the predecessor to Mont. Code Ann. § 7-13-203. By definition, and in the absence of any grant of legislative powers to the county and its board of commissioners by law or charter, the actions of the administrative district are administrative and therefore outside of the legislative jurisdiction and power subject to initiative.

THEREFORE, IT IS MY OPINION:

The closing of a county-owned incinerator by the Park County Commission is an administrative act not subject to initiative and referendum.

Very truly yours,

MIKE McGRATH
Attorney General

mm/aj/jym