

CITIES AND TOWNS - Establishment of preferential water and sewer rate for senior citizens by self-governing municipality;

HUMAN RIGHTS - Application of Human Rights Act to self-governing local governments;

LOCAL GOVERNMENT - Application of Human Rights Act to self-governing local governments;

LOCAL GOVERNMENT - Establishment of preferential water and sewer rate for senior citizens by self-governing municipality;

MUNICIPAL GOVERNMENT - Application of Human Rights Act to self-governing local governments;

MUNICIPAL GOVERNMENT - Establishment of preferential water and sewer rate for senior citizens by self-governing municipality;

STATUTORY CONSTRUCTION - Application of specific provision of Human Rights Act over general provision of Governmental Code of Fair Practices;

MONTANA CODE ANNOTATED - Sections 1-2-102, 7-1-103, -113(3), -114(1)(g), 7-13-4301, -4304, -4304(2), -4304(4), 49-1-102, -205, 49-2-205, -308, -402, 49-3-205, 69-7-101 to -113, -201.

- HELD:
1. A local government with self-government powers may set rates for water and sewer service without regard to the requirements of Mont. Code Ann. § 7-13-4304.
 2. Protection against unlawful governmental discrimination is an area affirmatively subject to state control. Consequently, the provisions of Mont. Code Ann. § 49-2-308 of the Montana Human Rights Act apply to a self-governing municipality in the setting of water and sewer service rates.

October 12, 2004

Mr. Paul J. Luwe
Bozeman City Attorney
P.O. Box 1230
Bozeman, MT 59771-1230

Dear Mr. Luwe:

You have requested my opinion on the following questions:

1. Does providing discounts or preferential rates to senior citizens violate the uniformity for like services requirement of Mont. Code Ann. § 7-13-4304(2)?
2. Does providing discounts or preferential rates to senior citizens violate Mont. Code Ann. § 7-13-4304(4)?
3. Does providing discounts or preferential rates to senior citizens violate Mont. Code Ann. §§ 49-1-102 and 49-1-205?

Your letter informs me that the City Commission of the City of Bozeman, a city with self-government powers, is interested in providing discounts or preferential rates to senior citizens on their wastewater or water charges. The cost of the discounts or preferential rate would be spread among the remaining wastewater and water rate payers. Thus, the non-senior citizen ratepayers would subsidize senior citizen ratepayers. The Bozeman City Commission is interested in providing preferential rates on the basis that seniors are often on fixed incomes and have a lesser ability to pay.

I.

Mont. Code Ann. § 7-13-4301 authorizes a municipality to create and operate a water and sewer system. Mont. Code Ann. § 7-13-4304 provides:

Authority to charge for services. (1) The governing body of a municipality operating a municipal water or sewer system shall fix and establish, by ordinance or resolution, and collect rates, rentals, and charges for the services, facilities, and benefits directly or indirectly afforded by the system, taking into account services provided and benefits received.

(2) Sewer charges may take into consideration the quantity of sewage produced and its concentration and water pollution qualities in general and the cost of disposal of sewage and storm waters. The charges may be fixed on the basis of water consumption or any other equitable basis the governing body considers appropriate. *The rates for charges may be fixed in advance or otherwise and shall be uniform for like services in all parts of the municipality.* If the governing body determines that the sewage treatment or storm water disposal prevents pollution of sources of water

supply, the sewer charges may be established as a surcharge on the water bills of water consumers or on any other equitable basis of measuring the use and benefits of the facilities and services.

(3) An original charge for the connecting sewerline between the lot line and the sewer main may be assessed when the connecting sewerline is installed.

(4) ***The water and sewer rates, charges, or rentals shall be as nearly as possible equitable in proportion to the services and benefits rendered.***

(Emphasis added.) While the Montana Supreme Court has not ruled on this issue under this statute, courts in other jurisdictions have held that under similar legal provisions requiring “uniform” or “equitable” rates, preferences for groups thought to be of limited means are sometimes illegal. See, e.g., Mountain States Legal Found.v. New Mexico State Corp. Comm’n, 687 P.2d 92 (1984) (preferential telephone rate for senior citizens violates constitutional requirement that utility rates be “just and reasonable.”) Before addressing the difficult issue that might otherwise be presented under these statutes, it is prudent first to decide whether these provisions apply to a self-governing city such as Bozeman.

In Lechner v. City of Billings, 244 Mont. 195, 797 P.2d 191 (1990), the Montana Supreme Court considered a challenge to provisions enacted by the City of Billings, a self-governing city, providing charges for new water and sewer connections that would be paid by the owners of newly developed properties but not by those owning property with existing hook-ups. Developers challenged the charges on the ground, among others, that municipal water and sewer charges were affirmatively subject to state control and that the statutes governing such charges were binding on self-governing cities. The Montana Supreme Court rejected this argument, holding that the legislature had removed the Public Service Commission’s authority over municipal utility rates and that under Mont. Code Ann. § 7-1-113(3) the matter is not subject to rulemaking by any state agency and no state agency has enforcement authority. 244 Mont. at 200-03.

If the Court had stopped there, the answer to your question regarding the application of the rate equity provisions of Mont. Code Ann. § 7-13-4304 would be clear--since water and sewer ratemaking is not an area affirmatively subject to state control, and no provision of law makes the rate equity provisions specifically applicable, they should not apply at all. However, the next section of the Court’s opinion creates some confusion by discussing the extent to which statutes governing municipal water and sewer ratemaking affected the validity of the Billings ordinance. The Court analyzed the ordinance and held that it did not violate the requirements of Mont. Code Ann. § 7-13-4304 requiring

that charges be commensurate with “services provided and benefits received” and that the charges be “as nearly as possible equitable in proportion to the services and benefits rendered.” 244 Mont. at 203-08 (concluding after statutory analysis that “the system development fee is a reasonable exercise of the City’s self-governing powers.”).

Accepting the Court’s first holding that setting of rates is not an area “affirmatively subject to state control” under Mont. Code Ann. § 7-1-113(3), the second holding appears to be dicta in which the Court assumed, without necessarily deciding, that the rate-setting statutes applied. In my opinion, based on Lechner’s holding that setting of municipal water and sewer rates is not “affirmatively subject to state control,” the proposed Bozeman ordinance would not be subject to challenge under Mont. Code Ann. § 7-13-4304 as being in violation of the statutory requirement that rates be “commensurate with services provided and benefits received” or that they be “as nearly as possible equitable in proportion to the services and benefits rendered.” Rather, as a self-governing municipality, Bozeman would be free to design its own rate system without having to comply with the provisions of Mont. Code Ann. § 7-13-4304 under the broad authority of Mont. Code Ann. § 7-1-103 (“A local government unit which elects to provide a service or perform a function that may also be provided by a general power government unit is not subject to any limitation in the provision of that service or performance of that function except such limitations as are contained in its charter or in state law specifically applicable to self-government units.”). State ex rel. Swart v. Molitor, 190 Mont. 515, 521, 621 P.2d 1100, 1104 (1981).

Several additional matters are beyond the scope of this opinion. First, your letter provides no information and seeks no opinion as to whether the proposed ordinance might bring the city into conflict with its obligations to comply with laws “regulating budget, finance, or borrowing procedures.” Mont. Code Ann. § 7-1-114(1)(g). The holding above should therefore not be read to determine that the rate system will be adequate to meet requirements for retirement of bonded indebtedness and any other applicable financial requirements. Second, you also have not submitted a copy of the city charter or asked my opinion as to whether the proposed ordinance is consistent with the City’s authority under that instrument. Third, you have not sought my opinion as to the extent to which the City must, in its ratemaking decisions, comply with the provisions of Mont. Code Ann. § 69-7-101 to 69-7-113 and 69-7-201. Fourth, since Bozeman is a self-governing municipality, I have no occasion here to opine as to the application of these statutes to general government municipalities. Accordingly, I express no opinion on any of these questions.

II.

Your remaining question inquires as to whether the proposed ordinance would constitute age discrimination in violation of the Montana Human Rights Act and the Montana Governmental Code of Fair Practices. The Human Rights Act provides, in pertinent part:

Discrimination by the state. (1) It is an unlawful discriminatory practice for the state or any of its political subdivisions:

(a) to refuse, withhold from, or deny to a person any local . . . services, . . . advantages, or privileges because of . . . age, . . . unless based on reasonable grounds

Mont. Code Ann. § 49-2-308. Under Mont. Code Ann. § 49-2-402, “[a]ny grounds urged as a ‘reasonable’ basis for an exemption . . . shall be strictly construed.” In addition, the Montana Governmental Code of Fair Practices contains a general prohibition against the performance of governmental services in a manner that discriminates based on age, without any recognition of a defense based on “reasonable grounds.” Mont. Code Ann. § 49-3-205. In applying these two statutes to your questions, in my opinion the provision of the Human Rights Act is the more specific, since it recognizes a defense not provided in the Governmental Code of Fair Practices, that of “reasonable grounds.” Accordingly, my analysis concentrates on the Human Rights Act. Mont. Code Ann. § 1-2-102.

The City is subject to the Act despite its status as a self-governing municipality. Discrimination in government services is affirmatively subject to state control. The Human Rights Commission has both substantive rulemaking authority and enforcement jurisdiction, satisfying the requirements of Mont. Code Ann. § 7-1-113(3). It is therefore my opinion that the Human Rights Act may be applied in determining the validity of the proposed ordinance.

No Montana cases are helpful in determining whether the City’s proffered justification provides “reasonable grounds” for its ordinance. However, in at least one case, a court has held that the presumption that senior citizens are of limited financial means does not provide a rational justification for preferential rates for senior citizens. Mountain States Legal Found. v. Utah Pub. Serv. Comm’n, 636 P.2d 1047, 1057-58 (Utah 1981).

I find it would be inappropriate for me to give an opinion as to whether the proposed ordinance would meet the strictly construed standard of “reasonable grounds” for discrimination based on age. The reasonableness of the distinction would require fact-finding as to the economic circumstances of seniors and the effect of the proposed rates that I cannot perform in the context of my power to render opinions. See, e.g., Utah

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Pub. Serv. Comm'n, 636 P.2d at 1057-58 (considering rationality of senior citizen power rates based on the existence of “substantial record evidence”). Moreover, the Human Rights Act gives primary jurisdiction to the Human Rights Commission in making such factual determinations. Mont. Code Ann. § 49-2-205.

THEREFORE, IT IS MY OPINION:

1. A local government with self-government powers may set rates for water and sewer service without regard to the requirements of Mont. Code Ann. § 7-13-4304.
2. Protection against unlawful governmental discrimination is an area affirmatively subject to state control. Consequently, the provisions of Mont. Code Ann. § 49-2-308 of the Montana Human Rights Act, apply to a self-governing municipality in the setting of water and sewer service rates.

Very truly yours,

MIKE McGRATH
Attorney General

mm/cdt/jym