March 25, 2010

Mr. Charles A. Harball
Kalispell City Attorney
201 First Avenue East
Kalispell, MT 59903-1997

Dear Mr. Harball:

You have requested an opinion from the Attorney General on a question I have phrased as follows:

> May a city create a business improvement district consisting of properties providing overnight stays at lodging facilities in which the properties are assessed on the basis of a percentage of business revenues?

Since the answer to your question is controlled by clear statutory and case law, a letter of advice rather than a formal opinion has been determined to be appropriate in this case.

Your letter informs me that a group of hoteliers within the City of Kalispell are organizing to propose a business improvement district ("BID"). The hoteliers propose to take advantage of Mont. Code Ann. § 7-12-1111(4)(a), which allows creation of a district consisting of non-contiguous properties all of which provide overnight stays at lodging facilities. With respect to assessment, the hoteliers believe it would be preferable to assess the properties within the district based on a percentage of revenues.

Montana Code Annotated § 7-12-1133 governs the permissible assessment methods for a BID. It provides in pertinent part:

> (2) The governing body shall annually assess the entire cost of the district against the entire district using a method that best ensures that the assessment on each lot or parcel is equitable in proportion to the benefits to be received. *** The governing board shall levy the assessment using one of the following methods:

> (a) each lot or parcel of land within the district may be assessed for that part of the whole cost that its area bears to the area of the entire district, exclusive of streets, avenues, alleys, and public places;
>
> (b) if the governing body determines that the benefits derived by each lot or parcel are substantially equivalent, the cost may be assessed equally to each lot or parcel located within the district without regard to the area of the lot or parcel;
>
> (c) if the governing body determines that benefits derived by each lot or parcel are proportional, the governing body may use a standard criteria [sic], such as individual occupancy or daily use, and make the assessment on a flat-fee basis based on the criteria;
>
> (d) each lot or parcel of land, including the improvements on the lot or parcel, may be assessed for that part of the whole cost of the district that its taxable valuation bears to the total taxable valuation of the property of the district;
>
> (e) each building may be assessed for that part of the whole cost of the district that the occupied or income-producing area of the building above the first floor bears to the area of the entire district;
>
> (f) if the governing body determines that benefits derived by each lot or parcel are disproportional, the governing body may use classification criteria, such as location within the district, economic impact, or any other measurable criteria, in conjunction with methods of assessing fees outlined in this subsection (2). Each classification must have its own rate. There may not be more than six classifications upon which a charge is imposed.
>
> (g) by using any combination of the assessment options provided in subsections (2)(a) through (2)(f).

Section 7-12-1133 gives discretion to the city governing body to adopt the method that "best ensures that the assessment on each lot or parcel is equitable in proportion to the benefits to be received," but limits that discretion by requiring the governing body to choose one or a combination of methods from an exclusive list set forth in subsections 2(a)-(f).

Subsections (a), (b), (d), and (e) can immediately be discarded from this analysis, since they rely either on area, valuation, or an equal charge for each parcel within the district. The issue thus resolves to whether subsections (c), (f), or some combination of them, can be read to authorize an assessment based on revenue. In my opinion they cannot.

Under subsection (c), if the governing body finds that the benefits to each property are "proportional . . . the governing body may use a standard criteria [sic], such as individual

occupancy or daily use, and make the assessment on a flat-fee basis based on the criteria." Assuming that the governing body can make the required proportionality finding, this provision allows the body to adopt a "flat fee" based on "standard criteria, such as occupancy or daily use." It would seem obvious that a "flat fee" cannot be based on the revenues generated by each individual property in the district. Rather, this section appears to contemplate something like a single level of charge, such as one dollar, for each day of occupancy. The term "standard criteria" cannot fairly be read to contemplate a percentage of revenues, since a percentage cannot be a "flat fee."

Subsection (f) is likewise unhelpful to the proponents of the district. It allows the governing body, if it finds that the benefits are "disproportional," to adopt classes of similarly situated properties and then apply the various other methods permitted in subsection (2) to each class. The proponents do not appear to contemplate creation of classes assessed by different methods. Rather, they contemplate a single method of assessment based on revenues. Subsection (f) does not apply where a single method of assessment is to be applied to all properties.

A reading of these provisions allowing a revenue-based assessment would also be foreclosed by general principles of local government law. A general power local government may only impose improvement district assessments specifically allowed or implied by law. In the context of an effort by a municipality to impose an assessment not authorized by statute, the Montana Supreme Court has explained:

> To make this construction we would have to act in derogation of the general principle that a City's power to levy is strictly construed. What would be particularly offensive to our common law would be the enlargement of a City's assessment power without a statutory basis. A municipality's power to tax and levy assessments warrants special consideration apart from our Constitution's general mandate that powers of incorporated cities be liberally construed. Art. XI, Section 4(2), 1972 Mont. Const.

Tocci v. City of Three Forks, 216 Mont. 159, 162-63, 700 P.2d 171, 173 (1985).

A self-governing local government stands in the same shoes as a general power government with respect to a tax on the value of goods and services sold. Mont. Code Ann. § 7-1-112(1) (denying the power to levy a tax on the sale of goods or services unless specifically delegated by law). The legislature has authorized local governments to levy sales taxes in other contexts, most notably when the local government has been established as a resort taxing entity. Mont. Code Ann. § 7-6-1502 (specifically

delegating pursuant to Mont. Code Ann. § 7-1-112(1) the authority to levy a "a tax on the retail value of all goods and services sold" by certain businesses, including hotels and motels, within resort taxing jurisdiction). If it had intended a similar delegation for BIDs, it presumably would have used similarly specific language.

The proponents of the BID argue that a revenue-based assessment is best suited to a BID created to promote tourism. The statutes as currently written do not permit such a method of assessment. The question of whether they should must be addressed to the legislature.

I hope you find these views helpful. This letter of advice may not be considered an official opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym