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Montana Legislative Services Division
Legal Services Office

SECRET #1

DATE Jan 21, 2015

HB # 222

TO: Revenue and Transportation Interim Committee

FROM: Jaret Coles, Staff Attorney

RE: Legal Opinion: City of Missoula Ordinance on Oversize Loads

DATE: April 23, 2014

On February 18, 2014, the Committee requested a legal opinion from the Legislative Legal Services Office regarding whether the City of Missoula ("Missoula" or "City") is legally prohibited from enacting a local ordinance that requires certain oversize loads on U.S. Highway 93 to pay a fee and obtain a permit. It is my understanding that the question relates to the movement of oversize loads that are involved in interstate commerce on a federal highway, as opposed to city streets.

Before I provide you with my opinion and analysis, a few caveats are necessary. Due to the constitutional constraints inherent in the separate powers of each branch of state government, a legal opinion provided to you by a Legislative Branch attorney is not binding on the Montana Department of Transportation (MDT) as an Executive Branch agency or Missoula as a selfgoverning power. Additionally, this opinion does not directly analyze Missoula's ordinance regarding oversize loads. Instead, it analyzes the specific question presented. It should be noted that Missoula has an exception under Missoula Ordinance section 15.44.030(B)(3), regarding certain oversize loads that move solely on U.S. Highway 93. Arguably, this provision may provide an exception for certain oversize loads that are involved in interstate commerce. However, for the purpose of this memorandum it is assumed that some oversize loads involved in interstate commerce do not qualify for this exception. The full text of Chapter 15.44, regarding Missoula's ordinances pertaining to oversize loads and house moving, is contained in appendix A.

QUESTION PRESENTED

Is Missoula legally prohibited from enacting a local ordinance that requires certain oversize loads on U.S. Highway 93 to pay a fee and obtain a permit?

SHORT ANSWER

Likely yes. As a city with self-governing powers, section 7-1-106, MCA, requires Missoula's power and authority to be liberally construed, and every reasonable doubt must be resolved in favor of the existence of the power or authority. However, the city's power is not unlimited.

Section 7-1-111, MCA, specifies the powers that are denied to a local government with self-government powers. One of the denied powers includes a prohibition on establishing "a rate or

price otherwise determined by a state agency". As applied here, MDT has statutory jurisdiction over federal highways, and it imposes fees on certain oversize loads. *See* section 61-10-128(1), MCA. Moreover, section 61-10-121(1)(a), MCA, provides a limitation on permit issuance, as only MDT "may issue permits for movement of a vehicle or combination of vehicles carrying built-up or reducible loads in excess of 9 feet in width or exceeding" a specified length, height, or weight. As such, a liberal construction of the law could result in a local government being prohibited from imposing an oversize load fee on a federal highway.

Section 7-1-112, MCA, specifies the powers that a local government with self-government powers is prohibited from exercising unless the power is specifically delegated by law. One of the denied powers (without delegation) includes "the power to authorize a tax on income or the sale of goods or services, except that, subject to 15-10-420, this section may not be construed to limit the authority of a local government to levy any other tax or establish the rate of any other tax". Section 7-1-112(1), MCA. As applied here, it could be hard for a person or entity to challenge the permit fee using section 7-1-112(1), MCA, as the permit fee is arguably not a tax on the sale of a service. Additionally, the city could argue that the relatively small fee is used for ancillary services, such as police protection and direct administrative costs. A liberal construction of the law could result in a conclusion that Missoula is not prohibited by section 7-1-112(1), MCA, from imposing a fee and regulating overweight or oversize vehicles on a federal highway.

Section 7-1-113, MCA, requires a local government with self-government powers to exercise those powers consistent with state law and regulation. As applied here, any local ordinance regarding a federal highway would appear to be inconsistent with state law, as section 61-10-128, MCA, specifically prohibits a local authority from altering width, height, and length restrictions on a federal highway, in addition to prohibiting the substitution of other limitations or requirements. There is also a provision in section 61-10-121(1)(a), MCA, that prohibits any entity other than MDT from issuing certain built-up load permits. Even under a liberal construction of the law standard, there is a viable argument that Missoula does not have the power or authority to impose a fee and regulate overweight or oversize vehicles on a federal highway based on section 7-1-113, MCA

In summary, Missoula is most likely prohibited from enacting a local ordinance and imposing a fee on certain oversize loads operating on U.S. Highway 93 pursuant to sections 7-1-111(5), and 7-1-113, MCA. If the Legislature desires to simplify the analysis in this opinion, then it could amend section 7-1-111, MCA, and add an explicit prohibition regarding local permits on a federal (or state) highway to the list of powers that a local government unit with self-government powers is prohibited from exercising. If the Legislature desires to allow a local government to issue permits for oversize loads engaged in interest commerce on a federal highway, then several statutes should be modified in Titles 60 and 61, MCA. Additionally, further analysis would be required in regard to whether the Commerce Clause of the U.S. Constitution and federal law prohibit local size and weight restrictions on a federal highway.

LEGAL ANALYSIS

I. Overview of Self-Governing Powers

The authority of local governments to regulate is derived from state law. Traditionally, local governments could exercise only those powers expressed or implied by law. Article XI, section

4, of the Montana Constitution provides that local governments without self-governing powers have the powers provided or implied by law. Generally this means that governments with general powers must receive a legislative grant of authority before they can take a particular action. Under section 7-1-4124, MCA, municipalities with general powers are vested with a number of specific powers, including the power to enact ordinances and resolutions and to "exercise powers not inconsistent with law necessary for effective administration of authorized services and functions." The majority of Montana's local governments are organized as general powers governments.

With the adoption of a new constitution in 1972, local governments gained the ability to organize as self-governing units. Article XI, section 6, of the Montana Constitution states that local governments with a self-governing charter "may exercise any power not prohibited by [the] constitution, law, or charter." The powers of a local government with self-government powers include all powers granted to general-power governments. Section 7-1-106, MCA, implements Article XI, section 6, of the Montana Constitution by specifying that the powers and authority of a local government unit with self-government powers must be liberally construed and every reasonable doubt must be resolved in favor of the existence of the power or authority. Missoula has self-governing powers. However, the city's self-governing power is not unlimited.

Section 7-1-111, MCA, specifies the powers that are denied to a local government with self-government powers. Governments with self-governing powers may not exercise certain powers, including "any power that establishes a *rate or price* otherwise determined by a state agency". See section 7-1-111(5), MCA (emphasis added). This lengthy section provides as follows:

7-1-111. Powers denied. A local government unit with self-government powers is prohibited from exercising the following:

- (1) any power that applies to or affects any private or civil relationship, except as an incident to the exercise of an independent self-government power;
- (2) any power that applies to or affects the provisions of 7-33-4128 or Title 39 (labor, collective bargaining for public employees, unemployment compensation, or workers' compensation), except that subject to those provisions, it may exercise any power of a public employer with regard to its employees;
- (3) any power that applies to or affects the public school system, except that a local unit may impose an assessment reasonably related to the cost of any service or special benefit provided by the unit and shall exercise any power that it is required by law to exercise regarding the public school system;
- (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;
- (6) any power that applies to or affects any determination of the department of environmental quality with regard to any mining plan, permit, or contract;
- (7) any power that applies to or affects any determination by the department of environmental quality with regard to a certificate of compliance;
- (8) any power that defines as an offense conduct made criminal by state statute, that defines an offense as a felony, or that fixes the penalty or sentence

for a misdemeanor in excess of a fine of \$500, 6 months' imprisonment, or both, except as specifically authorized by statute;

(9) any power that applies to or affects the right to keep or bear arms, except that a local government has the power to regulate the carrying of concealed weapons;

(10) any power that applies to or affects a public employee's pension or retirement rights as established by state law, except that a local government may establish additional pension or retirement systems;

(11) any power that applies to or affects the standards of professional or occupational competence established pursuant to Title 37 (professions and occupations) as prerequisites to the carrying on of a profession or occupation;

(12) except as provided in 7-3-1105, 7-3-1222, or 7-31-4110, any power that applies to or affects Title 75, chapter 7, part 1 (streambeds), or Title 87 (fish and wildlife);

(13) any power that applies to or affects landlords, as defined in 70-24-103, when that power is intended to license landlords or to regulate their activities with regard to tenants beyond what is provided in Title 70, chapters 24 and 25. This subsection is not intended to restrict a local government's ability to require landlords to comply with ordinances or provisions that are applicable to all other businesses or residences within the local government's jurisdiction.

(14) subject to 7-32-4304, any power to enact ordinances prohibiting or penalizing vagrancy;

(15) subject to 80-10-110, any power to regulate the registration, packaging, labeling, sale, storage, distribution, use, or application of commercial fertilizers or soil amendments, except that a local government may enter into a cooperative agreement with the department of agriculture concerning the use and application of commercial fertilizers or soil amendments. This subsection is not intended to prevent or restrict a local government from adopting or implementing zoning regulations or fire codes governing the physical location or siting of fertilizer manufacturing, storage, and sales facilities;

(16) any power that prohibits the operation of a mobile amateur radio station from a motor vehicle, including while the vehicle is in motion, that is operated by a person who holds an unrevoked and unexpired official amateur radio station license and operator's license, "technician" or higher class, issued by the federal communications commission of the United States;

(17) subject to 76-2-240 and 76-2-340, any power that prevents the erection of an amateur radio antenna at heights and dimensions sufficient to accommodate amateur radio service communications by a person who holds an unrevoked and unexpired official amateur radio station license and operator's license, "technician" or higher class, issued by the federal communications commission of the United States.

Section 7-1-112, MCA, specifies the powers that a local government with self-government powers is prohibited from exercising unless the power is specifically delegated by law. This section provides as follows:

7-1-112. Powers requiring delegation. A local government with self-government powers is prohibited the exercise of the following powers unless the power is specifically delegated by law:

- (1) the power to authorize a tax on income or the sale of goods or services, except that, subject to 15-10-420, this section may not be construed to limit the authority of a local government to levy any other tax or establish the rate of any other tax;
- (2) the power to regulate private activity beyond its geographic limits;
- (3) the power to impose a duty on another unit of local government, except that nothing in this limitation affects the right of a self-government unit to enter into and enforce an agreement on interlocal cooperation;
- (4) the power to exercise any judicial function, except as an incident to the exercise of an independent self-government administrative power;
- (5) the power to regulate any form of gambling, lotteries, or gift enterprises.

Section 7-1-113, MCA, provides that a local government with self-government powers is prohibited from exercising any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control. This section provides as follows:

7-1-113. Consistency with state regulation required. (1) A local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.

(2) 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.

(3) 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.

II. The Three-Step Process

In the past, various Attorney General Opinions have engaged in a three-part analysis in determining whether a particular self-government power is authorized:

- (1) consult the local government's charter and consider constitutional ramifications;
- (2) determine whether the exercise is prohibited under the various provisions Title 7, chapter 1, part 1, MCA 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, MCA. *See, e.g.*, 48 A.G. Op. 14 (2000).

This three-part analysis is applied in this opinion, as it provides a logical framework for the analysis. If one of the factors is not satisfied, it will result in an invalid ordinance.

1. Factor 1 -- Missoula's Charter and Constitutional Ramifications

With respect to the first factor, the City of Missoula Charter does not restrict the powers of the local government beyond recognizing those restrictions that exist in law. The charter provides in relevant part as follows:

Article I, Section 1. Self-government powers. The City of Missoula shall exercise all powers conferred upon Montana cities with self-government powers and shall have all powers not prohibited by the Constitution of the United States of America, the laws of the United States of America, the Montana Constitution, the laws of the State of Montana or this Charter.

Article I, Section 6. City fees. There shall be no changes made in any ordinance or resolution of the City of Missoula regarding license fees, user fees, service fees, or permit fees without a prior public hearing on the matter.

Article II, Section 1. Legislative authority. The legislative authority of the City of Missoula shall be vested in the City Council which shall have the authority to enact such ordinances and resolutions necessary for the protection and benefit of the people's health, welfare and security. The City Council shall be the policymaking body of the City of Missoula.

The charter does not contain any restrictions on enacting a fee, so long as there is a public hearing. There is a potential issue in regard to whether the fee at issue is an impermissible regulation of interstate commerce under the Commerce Clause of the United States Constitution.¹ There are volumes of Commerce Clause taxation cases that could be analyzed in this opinion.

These cases are not analyzed, as this opinion concludes that state law can answer the question. The commerce clause cases and federal law would need to be analyzed in depth if there is a legislative proposal to specifically permit a local government to impose fees and restrictions on a federal highway.

2. Factor 2 -- Prohibitions Under State Law

The second factor of the three-part analysis requires an examination of the relevant statutes to consider whether the permit fee ordinance is prohibited by state law. Sections 7-1-111 and 7-1-112, MCA, set forth specific powers that a local government with self-government powers is prohibited from exercising. Section 7-1-114, MCA, sets forth the laws that a local government with self-government powers must follow. An examination of these statutes reveals two provisions that could be raised in a challenge to the Missoula ordinance. The first statute relates to a prohibition in establishing a rate or price otherwise determined by a state agency, and the second statute relates to a prohibition on a revenue-raising tax on income or the sale of goods.

A. No Power to Establish a "Rate or Price" Established by a State Agency

¹ U.S. Const. Art I, § 8, cl. 3 (Congress shall have power . . . "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes").

A challenge could be asserted under section 7-1-111(5), MCA, which provides that a selfgoverning power is prohibited from exercising:

"any power that establishes a rate or price otherwise determined by a state agency".

The terms "rate or price" are not defined by statute, but the Montana Supreme Court has applied the language to water and sewer facilities fees. *See Lechner v. Billings*, 244 Mont. 195, 797 P.2d 191 (1990). Additionally, a rate is often used as a measure of a tax or fee. *See, e.g.*, sections 156-133(2), MCA (property tax rate); 15-23-703(1)(b), MCA (tax levied at a rate that takes a formula into consideration); 15-30-2103, MCA (rates for the income tax). Consequently, this opinion assumes that a court would label an oversize permit fee as a "rate or price". The rate in this case would be flat, and the price would be the amount required to be paid to travel on the federal highway.

In *Lechner*, the Montana Supreme Court analyzed the "rate or price" prohibition to determine if the City of Billings was permitted to assess system development fees for funding the expansion of water and sewer facilities. *Lechner*, 244 Mont. at 198. The Court noted that the enforcement of standards or requirements in the area of municipal utility ratemaking was not vested in any state officer or agency. *Id.* at 203. There were no statutes that directed any state agency or officer to establish rules governing municipal utilities. *Id.* Moreover, the exclusive authority to regulate, establish, and change municipal utility rates generally² rested with the city. *Id.* at 202. Therefore, section 7-1-111(5), MCA, did not prevent the City of Billings from establishing municipal water and sewer development fees. *Id.*

Ten years after *Lechner*, Attorney General Mazurek was asked to determine whether Butte-Silver Bow, as a consolidated government with self-government powers, had the authority to acquire and operate electric and natural gas utilities both within and outside the boundaries of the local government unit. *See* 48 A.G. Op. 14 (2000). The Attorney General considered the potential argument that the activity would result in the establishment of a "rate or price" but ultimately concluded that the power of the Public Service Commission (PSC) to regulate utility rates was reduced by the Legislature in 1981. Additionally, prior to 1981, the power of the PSC to regulate utility rates was not inconsistent with ownership and operation of utilities by local governments. Consequently, the Attorney General concluded that section 7-1-111(5), MCA, did not prevent Butte-Silver Bow from acquiring and operating electric and gas utilities.

Unlike *Lechner*, where there was limited state enforcement authority over the fees, the enforcement of standards or requirements on federal highways is vested with the MDT. An example of MDT's authority over a federal highway was addressed by Attorney General Greely regarding the City of Hamilton's inability to enact a crosswalk ordinance over a portion of Highway 93. *See* 41 A.G. Op. 10 (1985). Hamilton did not have self-government powers, but the opinion is highly instructive since it addresses MDT's jurisdictional authority over federal-aid highways. In the opinion, the Attorney General was asked whether Hamilton could require all traffic to stop for a pedestrian crossing U.S. Highway 93 whenever the pedestrian stepped off the curb and into any portion of the crosswalk. The proposed ordinance was in conflict with state law, as it would have required a driver of a motor vehicle on a federal-aid highway to stop for a pedestrian within a crosswalk when the pedestrian was not on the half of the roadway on which

² The Public Service Commission had the authority to review rate increases that would yield an increase in total revenues in excess of 12% in any 1 year. *Lechner*, 244 Mont. at 202.

the vehicle was traveling and the pedestrian was not close enough to be in danger. In the analysis, the Attorney General concluded that the ordinance would not promote statewide uniformity intended by the Legislature. Additionally, the Attorney General concluded that U.S. Highway 93 did not come under the jurisdiction of the city council as it entered the city limits. The analysis provided as follows:

Section 60-1-201, MCA, classifies public highways and distinguishes between federal-aid or state highways and city streets, the latter being defined as those public highways under the jurisdiction of municipal officials. Section 60-1-102, MCA, indicates the legislative intent to make the department of highways the custodian of the federal-aid and state highways. Section 60-2-201(4), MCA, gives the department the authority to adopt necessary rules for the marking of state highways. Sections 60-2-203 and 60-2-210, MCA, require the department to maintain state highways within incorporated municipalities. On the other hand, local authorities are expressly precluded by section 61-8-203, MCA, from placing or maintaining a traffic control device upon a highway under the jurisdiction of the department. 41 A.G. Op. 10 (1985) (citations omitted).

The statutes cited by the Attorney General have not been modified to the extent of changing the analysis, and MDT still maintains jurisdiction over federal-aid highways.

As applied here, there is a compelling argument that Missoula does not have the authority to establish an oversize load or overweight fee on a federal highway.³ MDT clearly has jurisdiction over federal highways. The imposition of a fee in any amount or changing the width, height, and length standards would not promote statewide consistency and could go into territory that is reserved by MDT. Specifically, section 61-10-128(1), MCA, provides that a "local authority may not alter the limitations provided in 61-10-101 through 61-10-104 [regarding width, height, and length] and 61-10-106 through 61-10-110 [weight and compliance with federal law] or substitute other limitations or requirements, except⁴ as provided in this section." Likewise, section 61-10-121(1)(a), MCA, appears to provide a limitation on permit issuance, as "only the department may issue permits for movement of a vehicle or combination of vehicles carrying built-up or reducible loads in excess of 9 feet in width or exceeding the length, height, or weight specified in 61-10-101 through 61-10-104 and 61-10-106 through 61-10-110." Additionally, unlike *Lechner*, MDT has ample authority to establish rules.

- Section 61-10-107(1)(a), MCA, provides that MDT "shall adopt rules for weight limits based upon the most recent version of 23 CFR, part 658, appendix c, for vehicles operating in Montana."

³ Pursuant to City of Missoula Ordinance Section 15.44.030(B)(3), there is an exception that may apply to certain oversize loads that are involved in interstate commerce. ⁴

The exception applies to jurisdictions that are "responsible for maintenance". However, a local government is not responsible for a federal highway. Section 60-2-201, MCA, gives MDT the power to maintain highways on the federal-aid systems and state highways according to priorities established by and on projects selected and designated by the Transportation Commission. *See also* section 60-2-111, MCA (regarding letting of contracts on state and federal-aid highways).

- Section 61-10-129, MCA, provides that MDT "may adopt rules to implement 61-10-124 [regarding special permits and fees for vehicles in excess of limits] and may by rule prescribe standards for the qualifications of drivers operating special vehicle combinations under 61-10-124 and for the equipping and operation of such combinations to enhance highway traffic safety."
- Section 61-10-154(2)(b), MCA, gives MDT rulemaking authority regarding safety of operations for "any motor vehicle or vehicle combination used in interstate commerce that has a gross vehicle weight rating, gross combination weight rating, gross vehicle weight, or gross combination weight, whichever is greater, of 10,001 pounds or more".
- Section 61-10-155, MCA, gives MDT broad rulemaking authority to "adopt and enforce rules to implement" Title 61, chapter 10, MCA, regarding motor vehicle size, weight, and loads.

As stated above, Missoula's powers must be liberally construed and every reasonable doubt must be resolved in favor of the existence of the power or authority. Nevertheless, even a liberal construction of the law would likely result in a conclusion that Missoula does not have the authority to impose a fee on overweight or oversize vehicles operating on a federal highway based on the "rate or price" prohibition in section 7-1-111(5), MCA.

B. No Power to Authorize a Tax on Income or the Sale of Goods

A second potential challenge could be asserted under section 7-1-112(1), MCA, which provides that a self-governing power is prohibited (without statutory permission) from exercising:

"the power to authorize a tax on income or the sale of goods or services, except that, subject to 15-10-420, this section may not be construed to limit the authority of a local government to levy any other tax or establish the rate of any other tax".

Arguably, a fee that is based on the weight or size of a vehicle is not imposed on income or the sale of a service. Nevertheless, it could be argued that such a fee is an impermissible tax on a service. A major weakness of this argument would be that the fee at issue is not calculated based on transportation costs or the sale of transportation services. Indeed, challenges under section 71-112(1), MCA, typically deal with fees that are traceable to the amount of revenue generated from an activity. *See, e.g., Mont.-Dak. Util. Co. v. Billings*, 2003 MT 332, 318 Mont. 407, 80 P.3d 1247 (see next paragraph); *Brueggemann v. Billings*, 221 Mont. 375, 719 P.2d 768 (1986) (ordinance imposing an annual tax on every lawyer or law firm calculated on the basis of gross revenue generated from attorney-client relationships was an impermissible sales tax); *Mont. Innkeepers Ass'n v. Billings*, 206 Mont. 425, 671 P.2d 21 (1983) (fee directly connected to the renting of a hotel or motel room was invalid). If this argument is overcome, then there is a case for arguing that the fee at issue is an impermissible revenue-generating tax that is unrelated to vehicles that exceed certain weight or size requirements.

As a general rule, a revenue-generating gross revenue "fee" that is unrelated to the regulatory cost of an activity is an impermissible tax. In *Montana-Dakota Utilities Co.*, the Montana Supreme Court reviewed a challenge to a City of Billings franchise fee on public utilities and telecommunications corporations with facilities located in the public right-of-way. *Mont.-Dak. Util. Co.*, ¶ 2. The fee was characterized as a franchise fee based on 4% of gross annual revenue

generated by each utility that occupied the public right-of-way within the city. *Id.* However, money collected was not earmarked for right-of-way maintenance or regulation. *Id.*, ¶ 22. As such, the Supreme Court held that the fee was a revenue-generating gross revenue fee, unrelated to use or occupancy of the right-of-way, and a tax on goods or services in violation of section 7-1-112(1), MCA. *Id.* ¶ 35.

As part of the analysis in *Montana-Dakota Utilities Co.*, the Court applied a three-part test from *City of Lakewood v. Pierce County*, 23 P.3d 1 (Wash App. 2001), in order to distinguish between an impermissible tax and a permissible fee. The distinguishing factors are: (1) whether the primary purpose is to raise revenue or to regulate; (2) whether the money collected is allocated only to the authorized regulatory purpose; and (3) whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. *Id.* at 7.

If a fee is charged by Missoula for oversize loads on U.S. Highway 93⁴, then a similar three-part test could be applied here. In regard to the first part of the test, the permit fees are somewhat low in comparison to the fees in *Montana-Dakota Utilities Co.*, which could make it harder to argue that a primary purpose is to generate revenue. In regard to the second part of the test, the money from the fee is deposited in the general fund⁶ and not allocated to the regulatory purpose. Consequently, the failure to earmark is a negative factor for Missoula. In regard to the third part of the test, it may be hard for Missoula to argue that a direct relationship exists between the fee charged and the services received, as the state is responsible for maintenance on federal highways, not the city. However, Missoula could argue that regardless of where the money is deposited, there are ancillary services provided, such as police protection and the regulatory costs of reviewing the permit.

There are definite hurdles in arguing that section 7-1-112(1), MCA, regarding the prohibition on the power to tax income or the sale of goods or services, applies to the Missoula ordinance. As such, a liberal construction of the law could result in a conclusion that Missoula is not prohibited by section 7-1-112(1), MCA, from imposing a fee and regulating overweight or oversize vehicles on a federal highway. However, a court may not get to this argument, as the case could potentially be decided under sections 7-1-111(5), and 7-1-113, MCA, as discussed in this opinion.

3. Factor 3 -- Consistency with State Law and Regulations

The final factor of the three-part analysis is derived from section 7-1-113, MCA, which requires that a local government with self-government powers must exercise those powers consistent with state law and regulation. As explained in prior attorney general opinions, section 7-1-113, MCA, "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." *See* 48 A.G. Op. 14 (2000) (citing 46 A.G. Op. 13 (1996); 44 A.G. Op. 34(1992)).

⁴ See footnote 3 regarding a potential exemption for oversize loads on U.S. Highway 93. ⁶

This is the case, as City of Missoula Ordinance Section 15.44.050 requires oversize load fees to be deposited in the "City General Fund", as opposed to being earmarked for oversize load regulation.

The Montana Supreme Court addressed the prohibition on self-governing units regulating in a manner that is inconsistent with state law in a 1998 decision regarding the local regulation of alcoholic beverages. *See Town Pump, Inc. v. Bd. of Adjustment of Red Lodge*, 1998 MT 294, 292 Mont. 6, 971 P.2d 349. At issue in this case was a local regulation that required a conditional use permit for the on-premise consumption of alcohol instead of a special exception. *Id.*, ¶ 11. The regulation was challenged on various grounds, including preemption by state law. The Court held that the state's regulation of alcoholic beverages did not preempt the city's regulation of the sale of alcohol because the regulation was "consistent with but more stringent than Montana's regulation of alcohol." *Id.*, ¶ 40. The Court relied on a statute stating that Montana could consider whether a proposed retail location for alcohol was consistent with local zoning. According to the Court, Montana law clearly contemplated that cities would impose local zoning to regulate the sale of alcohol.

As applied here, any local ordinance regarding a federal highway would appear to be inconsistent with state law, as section 61-10-128, MCA, specifically prohibits a local authority from altering width, height, and length restrictions on a federal highway, in addition to prohibiting the substitution of other limitations or requirements. The ordinance would need to be identical to state law in every respect. There is also a provision in section 61-10-121(1)(a), MCA, that prohibits any entity other than MDT from issuing certain built-up load permits. Unlike *Town Pump*, this is not an area of law where local regulation appears to be contemplated. There is a theme of statewide uniformity that emerges as the statutes, case law, and attorney general opinions are analyzed. *See* Section 60-1-102, MCA; *State ex rel. Dick Irvin, Inc. v. Anderson*, 164 Mont. 513, 525 P.2d 564 (1974) (reasoning that the Highway Commission (now MDT) had the power to issue permits without jeopardizing Montana's right to receive federal highway funds); 41 A.G. Op. 10 (1985) (MDT is the custodian of the federal-aid and state highways).

There is also little doubt that the area of law is affirmatively subject to state control. MDT, as an entity of the state, is vested with jurisdiction over federal highways. *See* 41 A.G. Op. 10 (1985). There are a variety of statutes that grant MDT rulemaking authority over weight limits, driver qualifications for vehicle combinations, safety for overweight vehicles, and broad rulemaking authority. *See, e.g.*, sections 61-10-107(1)(a), 61-10-129, 61-10-154, and 61-10-155, MCA.

Even under a liberal construction of the law standard, there is a viable argument that Missoula does not have the power or authority to impose a fee and regulate overweight or oversize vehicles on a federal highway based on section 7-1-113, MCA, and the inconsistent effect that any ordinance that requires a permit to operate on a federal highway would have on state law.

CONCLUSION

As a city with self-governing powers, Missoula's power and authority must be liberally construed and every reasonable doubt must be resolved in favor of the existence of the power or authority. Section 7-1-106, MCA. However, the city's self-governing power is not unlimited. If Missoula requires oversize loads engaged in interstate commerce on a federal highway to obtain a local permit, then a person or entity challenging the ordinance could raise viable challenges under sections 7-1-111(5), and 7-1-113, MCA. In order to present an argument and satisfy the reasonable doubt standard under one of these sections, a challenger would need to analyze both statutes and case law. The fact that MDT already charges a fee for oversize loads on federal

highways and the statutory prohibitions on a local government entity altering the limitations or requiring a permit are factors that could be hard for Missoula to overcome.

If you have any additional questions, please do not hesitate to contact me.

CI0425 4113jega.

APPENDIX A

Missoula Municipal Code

Chapter 15.44

OVERSIZE LOADS AND HOUSE MOVING *

Sections:

15.44.010 Purpose.

15.44.020 Scope.

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*Prior history: Prior Code §§5-9--5-15 and Ord. 2162.

15.44.010 Purpose. The purpose of this chapter is to provide safeguards to life, limb, health, property and public welfare by regulating and controlling the moving of any oversize load, house, building or part thereof into, out of, within or through the City. (Ord. 3448, 2010; Ord. 2357 §4, 1983)

15.44.020 Scope. . The provisions of this chapter shall include, when appropriate: the restoration of the original structure site, the intended site, the movement between sites, and any temporary storage sites. "Oversize load", "House" or "building" includes all oversize loads, houses and buildings or any part thereof that comes within the scope of this chapter, and as defined in the provisions of Title 61 of the Montana Code Annotated (MCA).

The provisions of this chapter shall apply to any oversize load, house, building, or part thereof which is:

- (1) outside the City intended to be relocated within the City;
- (2) within the City being relocated outside the City limits;
- (3) within the City and being relocated with-in the City; and being moved through the City on City streets.

(Ord. 3448, 2010; Ord. 2485 §1, 1986; Ord. 2357 §5, 1983).

15.44.030 Permit.

A. Permit Required. Except as provided in subsection B of this section, no person, partnership, corporation, firm or association shall move an oversize load, house or building or part thereof into, out of, within, or through the City without first obtaining an oversize load/housemover's license pursuant to Chapter 5.70 of this code and a moving permit as provided for in this chapter. A moving permit is required for each separate oversize load, house or building or any part thereof that is moved separately and whose size comes with-in the provisions of this chapter. The building official shall assure that the oversize load, house or building that originates within the City

limits is inspected prior to the move in order to ensure that it can be safely moved through the city streets pursuant to the provisions of this chapter.

B. Exceptions to Required Permit or Oversize Load/Housemover's License.

1. Neither a moving permit nor an oversize load/housemover's license is required pursuant to this chapter for the moving of a mobile home and similarly sized factory-built buildings.

2. The operation or movement of a vehicle, combination of vehicles, load, object or other things of a size or weight not exceeding the maximum specified in Sections 61-10-101 through 61-10-110, MCA, and which move can be legally accomplished without an oversize permit from the State (pertaining to the size, weight and load regulations for motor vehicles upon any highway within the state) shall not require an oversize load/housemover's license or permit when operated or moved upon a street or highway. Standard maximum dimensions pursuant to Montana state law are:

a. Total outside width loaded or unloaded of one hundred two inches (eight and one-half feet);

b. Overall length inclusive of front and rear bumpers, whether unladen or with load, forty feet;

c. A vehicle unladen or with load may not exceed a height of thirteen feet six inches. See Sections 61-10-102 through 61-10-104, MCA.

3. No city oversize load/housemover's license or permit shall be required where the movement of any oversize load, house, building, or part thereof that is being moved through the City from a location outside the City to a different location outside the City only when the moving route used within the City is solely Highway 93 if the move does not involve physical contact with or require the movement, adjustment or stoppage of a traffic-control signal, traffic flow is not adversely affected for more than ten (10) minutes, the oversize load does not exceed the overweight limit as defined by the Montana Department of Transportation, and as long as the move is made in compliance with Montana state law and administrative regulations applicable to motor vehicle traffic and house movers.

4. The movement of any of the excepted loads identified in this chapter must comply with all other City ordinances pertaining to motor vehicle traffic, including but not limited to, compliance with City truck route regulations to the extent feasible. Further, if the house or building being moved within the City is to be relocated within the City, the relocation of the house or building must be in compliance with all city ordinance provisions, including but not limited to, compliance with all City zoning, building and fire regulations.

C. Application. The application for a moving permit shall be filled out with the information required in this section:

1. All permit requests shall include:

a. Information with Respect to Mover. Name; address; state housemover's license number;

b. A description of the oversize load or building proposed to be moved, giving construction materials, dimensions, and conditions of exterior;

c. Proposed moving date(s) and time(s) and anticipated time length of move;

d. List complete moving route including a traffic control plan for approval by the following City departments: i.

Public works ii. Park Department iii. Police Department iv. Fire Department

v. Development Services

e. Further, the mover shall comply with all provisions of state laws and Administrative Rules of Montana pertaining to notifying and working with all utilities in order to accomplish the movement of any oversize load, house or building or part thereof in a safe manner. The mover shall consult with all utilities as to the most appropriate traffic route for a movement of any house or building or part thereof.

2. Permit requests for house or building moves must also include:

a. If original site is within the city the applicant shall provide the name of building owner; address of site; legal description; bond owner and bond number for restoration.

b. If destination site is within the city the applicant shall provide:

i. Name of owner; address of site; legal description; current zoning.

ii. Zoning Review. The City Zoning Officer must review the site plan and other materials submitted in this section and determine that the building, as relocated, will meet all requirements of Title 20 of this code pertaining to zoning.

iii. Building Permit Review and Permit. An approved City Building Permit will be required for any buildings relocated within the City limits

(Ord. 3492, 2013; Ord. 3448, 2010; Ord. 2485-§2, 1986; Ord. 2357 §6, 1983).

15.44.040 Permit--Completion requirement. Any oversize load, house or building or part thereof moved into, out of, within or through the City shall be accomplished in accordance with the building codes and following procedures:

A. If the permit is for a house or building and the original site is within the city; prior to the issuance of the moving permit, the real property owner, or representative thereof shall present a bond for twenty thousand dollars (\$20,000) to guarantee that the existing site shall be satisfactorily restored to protect public health and safety and the aesthetic quality of the site within forty-five days of the date of the issuance of the moving permit.

B. The time limits in subsections A may be extended by the Building official. The decision to extend or not extend a deadline may be appealed to the City Council.

C. If the City determines that any site restoration was not done to City standards, the City may draw upon either the bond of the moving contractor or the property owner of the existing site.

D. The physical move shall be completed on the date and time indicated on the permit or as extended by the Development Services Director taking into consideration the Administrative Rules of Montana and all state law pertaining to authorized time(s) allowed for moving oversize loads, houses or buildings

(Ord. 3492, 2013; Ord. 3448, 2010; Ord. 2629 §1, 1988; Ord. 2357 §7, 1983).

15.44.050 Permit--Fees. Fees for the issuance of a permit to move any oversize load, house or building shall be as set forth below. If any one measurement of the building exceeds the maximum given in any one fee schedule, the fee shall be determined by the next larger schedule. Permit fees shall be deposited in the City General Fund.

A. An oversize load, house or building or part thereof that when loaded onto its means of transportation is eight feet six inches wide but less than fifteen feet wide, and less than twenty-two feet in length and less than thirteen feet six inches in height, a permit fee of forty-one dollars (\$41.00) each.

B. An oversize load, house or building or part thereof that when loaded onto its means of transportation is fifteen feet or more wide, and twenty-two feet or more in length, and thirteen feet six inches or more in height, a fee of two hundred six dollars (\$206.00) each.

C. If the Building official or Public Works Director requires the services of a City employee(s) while the oversize load, house or building or part thereof is in transit, a fee of seventy-seven dollars (\$77.00) per hour per person shall be paid for all time spent on the inspection.

D. Overweight fee. In addition to the above listed City permit fees, whenever a load is overweight in accordance to the Montana Department of Transportation, an overweight impact fee of one hundred three dollars \$103.00 shall be paid to the City of Missoula before City oversize load permit issuance.

E. Multiple Moves. Whenever it is proposed that an oversize load, a house or building be moved in more than one part, a moving permit shall be obtained for each part moved that comes within the provisions of this chapter.

The primary permit fee shall be based upon the size of the largest part. Each additional permit for each part shall be based on the actual size of the remaining parts.

(Ord. 3501 §9, 2013; Ord. 3492, 2013; Ord. 3448, 2010; Ord. 2485 §3, 1986; Ord. 2357 §8, 1983) .

15.44.060 Grounds for issuance of permit. he Building official may issue a moving permit only once he or she verifies:

- A. That any application requirement of any fee, de-posi-t or bonding requirement has been complied with;
- B. That the process for granting any State or Federal oversize loads permits or permissions to proceed fullyaddresses and mitigates impacts identified by the City as determined by Development Services, Public Works Department and/or the Police Department.
- C. That the oversize load or building is not too large or heavy to move without en-dangering persons or private orpublic property, including trees, buried utilities and other public improvements as determined by the Building official in consultation with the Public Works Director;
- D. That the oversize load or building is not in such a state of deterio-ration, disrepair or otherwise so structurallyunsafe that it can be moved without endangering persons and property in the city as determined by the Building official;
- E. That the oversize load or building is structurally safe and fit for the purpose of its intended future use if there relocation site is in the City as determined by the Building official;
- F. That the applicant's equipment to be used for mov-ing the oversize load, house or building or part thereof is safeand that persons and property will not be endangered by its use as determined by the Building official;
- G. That City Zoning, Building, Fire or other codes or ordinances would not be violated by the building in its newlocation, if the relocation site is in the City;
- H. That for any other reason persons or property in the city would not be endangered by the moving of the oversizeload, house or building as determined by the Building official, Public works Department, Development Services and/or the Police Department;
- I. That the proposed route would not cause excessive traffic congestion as determined by the Public WorksDepartment, Development Services Department and/or the Police Department;
- J. That the time period in which the move would be taking place would not cause excessive traffic congestion asdetermined by the Public Works Department, Development Services Department and/or the Police Department.

(Ord. 3492, 2013; Ord. 3448, 2010; Ord. 2357 §9, 1983).

15.44.070 Permit duties of the mover. The duties of the permittee shall be as follows:

- A. To move the oversize load, house or building or any part thereof that comes within the scope of this chapter onlyover streets designated for such use in the written permit. If an emergency arises during the move, the mover may make slight changes in the route as long as the changes can be achieved without unduly endangering persons or property.
- B. To request in writing any change in the moving date or hours approved in the application. Such changes must beapproved in writing by the Building Official.
- C. To notify the Building Official in writing of any and all damage done to property within a public right-of-waywithin twenty-four hours after the damage or injury occurred, and further comply with all state law accident reporting procedures.
- D. To cause flashing yellow lights to be displayed on every side of the oversize load, house or building or partthereof if it is temporarily parked on a street or anywhere else within the public right-of-way. The flashing yellow lights shall be placed in such a manner as to warn the public of the obstruction.

E. At all times erect and maintain barricades across the street in such manner as to protect the public from damage or injury.

F. To remove the oversize load, house or building or part thereof from the public right-of-way after two days of such occupancy unless an extension is granted by the Building Official.

(Ord. 3492, 2013; Ord. 3448, 2010; Ord. 2357 §10, 1983).

15.44.080 Identification mark. All oversize loads, houses or buildings or parts thereof to be moved shall during the process of being moved have prominently displayed on the oversize load, house or building or part thereof both the name of the moving contractor and the moving permit number by which the oversize load, house or building or part thereof can be readily identified. Such identifying mark shall be placed on the house or building or part thereof prior to moving. (Ord. 3448, 2010; Ord. 2357 §11, 1983).

15.44.090 Storage of building. If a permanent relocation site for a house or building or part thereof that is to be moved pursuant to this chapter is unavailable at the time an initial move via or across any street or roadway is necessitated for whatever reason, and the relocation is for a period in excess of seventy-two hours, the building may be stored at a temporary storage location off public right-of-way. This will be handled as the receiving site on the permit application. The temporary storage shall be for a period of no more than forty-five days. Buildings may be stored indefinitely on an area zoned M2-4 so long as they comply to the extent possible with the zoning provisions applicable to an M2-4 zone. At any time during the storage period the building official may order the stored building moved to another location if he or she determines that the storage constitutes a danger to the public health, safety and welfare. (Ord. 3448, 2010; Ord. 2357 §12, 1983).

15.44.100 Supervision of move. The actual oversize load, house, or building movement shall be under the supervision of the Building Official, who shall determine any precautions deemed advisable for the protection of the streets, abutting structures, trees, foliage or any other property of the city. No oversize load, house or building or part thereof shall be moved without pilot vehicles or flag persons front and rear on any oversize load, house or building or part thereof twelve feet or more in width; or over thirty-six feet in length or more; or over twelve feet six inches in height. Such pilot cars or flat persons are to be provided by the mover at the mover's expense. No oversize load, house or building or part thereof shall be moved which shall cause an extensive deprivation of any public utility service to the citizens of the city. Whenever in the judgment of a city department the moving of an oversize load, a house or building or part thereof requires tree trimming, and/or removal and replacement of facilities by city forces, the costs of such work shall be borne by the permittee. Payments for those costs shall be made within five city business days of the date the costs are incurred and prior to the city's release of the mover's bond.

(Ord. 3492, 2013; Ord. 3448, 2010; Ord. 2357 §13, 1983).

15.44.110 Repealed. (Ord. 3448, 2010; Ord. 2357 §14, 1983).