

## GOVERNMENTAL FRANCHISE

### WHY IS THIS ISSUE BEFORE YOU?

In Fair Play Missoula, Inc. v. City of Missoula, 2002 MT 179 (2002), the Montana Supreme Court, in wrestling with the issue of whether the agreements between the City of Missoula and Play Ball Missoula, Inc. constituted leases or an exclusive franchise, opined:

Montana has failed to develop a comprehensive statutory scheme in this complex area [governmental franchise], with the result that the law of governmental franchise will likely develop on a case by case basis in a manner that is reactive, not proactive, and is of marginal guidance to governmental officials struggling with these issues. Accordingly, this area of the law is one which the Legislature may wish to examine in a future session. See also Montana-Dakota Utilities Co. (MDU) v. City of Billings, 2003 MT 332 (2003)(franchise law is relatively undeveloped in Montana).

### WHY IS THE COURT CONCERNED?

As stated in the Fair Play decision, without a statutory framework for "franchise" agreements, governmental officials "have no guidelines to balance the pressure on them to develop new ways to "raise revenue without raising taxes" with their responsibilities to protect public health and safety, protect the environment, guard against deteriorating services, and provide equitable public compensation."

### WHAT IS A "GOVERNMENTAL FRANCHISE"?

As just one form of "privatization", a "franchise" is a privilege conferred by the government on an individual or a corporation to do that which does not belong to the citizens of the country generally by common right. For example, the right to law rail or pipes, or to string wires or poles along a public street, it not an ordinary use which everyone may make of the streets, but is a special privilege, or franchise, granted for the accomplishment of public objects.

In Montana, the Legislature has defined a franchise in section 7-3-4201(3), MCA, as a "special privilege in the streets, highways, and public places of the city, whether granted by the state or the city, which does not belong to citizens generally by common right".

### WHAT CAN BE THE SUBJECTS OF A "GOVERNMENTAL FRANCHISE"?

Since the nineteenth century, the Montana Supreme Court has acknowledged the right of state and local governments in Montana to grant franchises to private or public corporations for the construction and maintenance of infrastructure within the public rights-of-way to provide essential services to the public. See Davenport v. Kleinschmidt, 6 Mont. 502, 13 P.249 (1887)(water franchise); Hershfield v. Rocky Mt. B.T. Co., 12 Mont. 102, 29 P. 883 (1892)(telephone franchise); State ex rel. Deeney v. Butte Elec. & Power Co., 43 Mont. 118, 15 P. 44 (franchise to provide electricity); City of Helena v. Helena Light & Ry. Co., 63 Mont. 108, 207 P. 337 (1922)(street railroad franchise).

What is a proper subject of a franchise depends largely upon the existing conditions and the extent to which the public welfare is affected by the conduct of the business or enterprise in question. Whenever an occupation or business is conducted in such a manner that the welfare of the people requires it to be regulated, modified, or restrained, the legislature may affix to its exercise any conditions and what was at one time a common right may be made the subject of a franchise.

### WHAT ARE THE CHARACTERISTICS OF A "GOVERNMENTAL FRANCHISE"?

The Montana Supreme Court has characterized a franchise as property that "is incorporeal and intangible in its nature. Glodt v. City of Missoula, 121 Mont. 178, 183, 190 P.2d 545, 547 (1948). A "franchise" is the special privilege awarded by government to a person or corporation and conveys a valuable property right.

Article XII, sections 16 and 17, of the 1889 Montana Constitution classified a franchise as property subject to taxation. Although incorporeal, franchises were historically subject to taxation under Article XII, section 17, of the 1889 Montana Constitution. In 2002, intangible property became fully exempt from taxation pursuant to 15-6-218, MCA.

The 1972 Constitution includes no provision comparable to Article XII, sections 16 and 17, but Article II, section 31, states that no law "making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature." See D & F Sanitation Serv. v. Billings, 219 Mont. 437, 713 P.2d 977 (1986)(upholding constitutionality of 7-2-4736, MCA, which preserves garbage haulers' franchise, but provides means for revocation).

### **CAN A LEGISLATURE PLACE TERMS AND CONDITIONS ON A "GOVERNMENTAL FRANCHISE"?**

Yes. Various terms and conditions may be annexed to a grant of a franchise. For example, a franchisee may be required to sell its waterworks plant to the municipality, or a franchisee can be required to post a bond conditioned upon its prompt erection of structures needed to exercise the grant.

In 1981, the Montana Legislature amended an earlier version of 7-5-4321, MCA, by inserting the word "exclusive" to modify "franchise" and to require that an election was required before a local government could grant an exclusive franchise.. Sec. 1, Ch. 283, L. 1981.

To release cities from the requirement of obtaining voter approval prior to granting a non-exclusive franchise to a utility or other entity, the Legislature limited the application of 7-5-4321, MCA, to those instances when a franchise agreement bars a city from granting the same special privilege to another within the same period. See Minutes of Local Govt. Comm., HB 425, Feb. 12, 1981.

### **CAN A GOVERNMENTAL ENTITY CHARGE A "GOVERNMENTAL FRANCHISE" FEE?**

Yes. But the fee must relate to an authorized regulatory purpose that has a direct relationship between the fee charged and the service received rather than an attempt to raise revenue. The Montana Supreme Court has adopted a three-part test in 2003 MDU case to distinguish a legal franchise fee from an illegal tax on goods and services that is currently prohibited under 7-1-112, MCA.

### **CAN THE LEGISLATURE CHOOSE TO RESTRICT A LOCAL GOVERNMENTAL ENTITY FROM COMPETING WITH THE PRIVATE SECTOR?**

Yes, by amending 7-1-112, MCA, to specifically prohibit local government competition in this area. In a United States Supreme Court case (Nixon v. Missouri Municipal League) decided March 24, 2004, the Court ruled that the federal Telecommunications Act does not prohibit a state from restricting its political subdivision from competing with the private sector in area of telecommunications services.

### **WHAT ARE THE SUBCOMMITTEES OPTIONS?**

1. Determine if members have interest and sufficient time to work on the issue and develop legislation to provide some criteria on governmental franchise for presentation to the Education and Local Government Committee?

2. Determine and direct staff as to what you want criteria the Subcommittee wants the legislation to include understanding that the issue could be broadened to larger "privatization" issues and that there are some new "unknowns" in the works (Mt. cities' interest in buying electrical generation facilities).

