



Montana Legislative Services Division

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TO: Revenue Interim Committee Members

FROM: Jaret Coles, Staff Attorney

RE: Legal Analysis of Subjecting Voted Levies to 15-10-420

DATE: May 8, 2024

This memorandum is in response to the Revenue Interim Committee's request for a legal opinion regarding whether the Legislature may subject voted mill levies to the floating mill levy limits of section 15-10-420, MCA.

Before I provide you with my opinion and analysis, a caveat is 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 obviously not binding.

QUESTION PRESENTED

May the Legislature subject voted levies to the floating mill levy limits of section 15-10-420, MCA?

SHORT ANSWER

Yes. The Legislature has the power to tax and is not allowed to contract away future taxing powers. As applied, it would be legally permissible for the Legislature to subject voted levies to section 15-10-420, MCA, so long as local government entities can satisfy existing contracts. In crafting any legislation, the Legislature should address whether it applies to local governments with self-government powers.

LEGAL ANALYSIS

The Montana Constitution establishes the limits on legislative authority for legislative action. The general rule is that the Constitution is a limit and not a grant of legislative authority. *State ex rel. Evans v. Stewart*, 53 Mont. 18, 161 P. 309 (1916). With this framework in mind, there are three constitutional provisions that need to be considered when determining the extent of the Legislature's power to revise local government mill levy limitations. The Montana constitutional provisions include the Contracts Clause under section 31 of Article II, the power of the state to tax under section 2 of Article VIII, and the power of local governments with self-government powers under section 6 of Article XI.

A. Contracts Clause

Section 31 of Article II of the Montana Constitution provides that a law may not impair contracts.

Article II, Section 31. Ex post facto, obligation of contracts, and irrevocable privileges. No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature.

The Contracts Clause has been used in the past to invalidate legislation that retroactively impaired contractual obligations of the state. *See Workers' Compensation Court. Carmichael v. Workers' Comp. Court*, 234 Mont. 410, 763 P.2d 1122 (1988).

B. State Taxing Power

Section 2 of Article VIII of the Montana Constitution essentially states that the power to tax is a fundamental governmental power.

Article VIII, Section 2. Tax power inalienable. The power to tax shall never be surrendered, suspended, or contracted away.

After the Legislature enacted Chapter 823, Laws of 1991, to tax retirement pension benefits that had previously been untaxed, the retirees sued, claiming that they had a contractual right to a continued exemption from taxation. The Supreme Court held that the former tax exemption was only a policy statement that could be changed by the Legislature and that the Legislature did not clearly manifest an intention in the law in question to create a private contractual right. Additionally, the Supreme Court held that the state was prohibited by this section from promising any group of taxpayers that it would never tax them. *Sheehy v. Public Employees Retirement Division*, 262 Mont. 129, 864 P.2d 762 (1993).

C. Local Governments With Self-Government Powers

In addition to providing that the state (and thereby the Legislature) may not contract away taxing powers, the Montana Constitution allows local government units to share powers with the state and to have all powers not specifically denied. Section 6 of Article XI of the Montana Constitution provides:

Article XI, Section 6. Self-government powers. A local government unit adopting a self-government charter may exercise any power not prohibited by this

constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in section 3.

Section 7-1-112, MCA, provides that a local government with self-government powers is prohibited from exercising a variety of powers unless the power is specifically delegated by law. In regard to taxation, this section provides that a legislative delegation is required in order for a local government to exercise "the power to authorize a tax on income or the sale of goods or services, except that, subject to 15-10-420, [the statutory limit] 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." This section essentially prohibits a local government from imposing a sales tax unless there is an express delegation in law. Additionally, the section provides that the mill levy limitations of section 15-10-420, MCA, are generally a limitation on self-government powers. However, the limitation does not extend to certain earmarked fees. In *Lechner v. Billings*, 244 Mont. 195, 797 P.2d 191 (1990), the Montana Supreme Court determined that water system development fees that were placed in a special fund earmarked for expanding a city's water and sewer facilities or for retiring bonds issued for that purpose, rather than being held in a general revenue fund to be used on projects unrelated to water and sewer systems, were not taxes but service charges, which the city was not prohibited from adopting.

D. Floating Mills vs. Fixed Mills

Section 15-10-420, MCA, provides for a general approach of deleting numeric limits on the number of mills that a government entity can levy for any specific purpose and places a revenue cap on the number of mills that a government entity is allowed to levy through property taxation. Pursuant to the revenue cap, local government property taxes are limited by the number of mills required to raise the same amount of tax revenue that was raised in the immediately previous year, increased by one-half of the average rate of inflation for the previous year, and by any mills carried over from the previous year, plus certain adjustments for new property.

The combined effect of section 15-10-420, MCA, is to free a local government so that it can dedicate as much of its annual mill levy as it chooses for any lawful governmental purpose, so long as the total millage does not exceed the revenue cap. In the event total taxable value in the jurisdiction goes down, a local government can remain whole by increasing the number of mills levied. Likewise, in the event total taxable value goes up, the local government is subject to the revenue cap, and it must reduce mills. This calculation is commonly referred to as the "floating mill" concept.

Section 15-10-425, MCA, allows a governing body to impose a new mill levy, increase a mill levy that is required to be submitted to the electors, or exceed the mill levy limit provided for in section 15-10-420, MCA, by conducting an election. Section 15-10-425(2) provides that a resolution, charter amendment, or petition must include either the *specific amount of money to be*

raised and the approximate number of mills to be imposed or *the specific number of mills to be imposed* and the approximate amount of money to be raised. In the event a local government levy is fixed to a certain number of mills, a decrease of total taxable value will result in decreased revenue, while an increase in total taxable value will generally result in increased revenue. However, a governing body that operates under a fixed mill concept may reduce a levy without losing the authority to impose it in the future. *See* section 15-10-425(5), MCA.

E. Analysis of Relevant Constitutional Provisions

The question of whether the Legislature may subject voted levies to section 15-10-420, MCA, can be analyzed by acknowledging that contracts should not be impaired, the Legislature has the power to tax and is not allowed to contract away future taxing powers, and that certain local governments have extended self-governing powers. In analyzing the state's power to tax and revise mill levy limitations, it is helpful to recognize that the state already has control over the amount of tax revenue collected when the voters in a local government with self-government powers approve a levy that is subject to a fixed mill rate. For example, whenever the Legislature decreases the tax rate for any given class of property, local governments with a fixed mill levy will have a lower tax base based on decreased taxable value.

As applied, it would be permissible legislative action for the Legislature to subject voted levies to section 15-10-420, MCA, so long as the Legislature were to make clear that it applies to all local government entities, including government entities with self-government powers. In crafting the legislation, the Legislature may desire to ensure that payments on government bonds are not impacted, in addition to ensuring that the government entities can satisfy existing contracts. One potential way to achieve this result would be to limit revenue collections to the amount of revenue that was collected in the prior tax year for the start of the section 15-10-420, MCA, limitation. This could be in the form of a "grandfather" transition clause, or in the statute itself. Of course, the Legislature could also formulate other mechanisms.

I hope that I addressed your question adequately. If you have any further questions, do not hesitate to contact me.