

VOLUME NO. 38

OPINION NO. 112

ATTORNEY GENERAL - Effect of unreported district court judgment on Attorney General Opinions;

JUDGMENTS - Binding effect of declaratory judgment on persons not parties to lawsuit;

MUNICIPAL GOVERNMENT - Functions which must be financed through all-purpose levy;

MUNICIPAL GOVERNMENT - Options where no funding mechanism provided for new municipal function;

MONTANA CODE ANNOTATED - Sections 1-2-112, 2-15-501, 7-1-114, 7-6-4431, 7-6-4452, 7-6-4453, 7-6-4455, 7-32-4117, 7-33-4111, 7-33-4130, 19-3-204, 19-9-704, 19-10-301, 19-11-503, 27-8-301;

1975 MONTANA LAWS - Chapter 324, section 2, chapter 359, section 2, chapter 438, section 3.

- HELD: 1. Municipalities which adopt the all-purpose mill levy authorized in section 7-6-4452, MCA, forfeit the power to impose levies for any particular purpose not clearly excepted by statute from exclusivity of the all-purpose levy.
2. The taxing authority granted in sections 19-10-301, MCA (local police retirement plans), 19-11-503, MCA (firemen's disability), and 7-33-4111, MCA (volunteer fire departments), is supplanted by the adoption of an all-purpose levy under section 7-6-4452, MCA.
3. The taxing authority granted in sections 7-32-4117, MCA (police group insurance), 7-33-4130, MCA (fireman's group insurance, first and second class cities), 19-9-704, MCA (statewide police retirement plan), 19-3-204 (PERS for city employees), 1975 Montana Laws, chapter 359, section 2 (not codified) (group insurance for city employees), 1975 Montana Laws, chapter 324, section 2 (not codified) (firemen's minimum wage, first and second class cities) and 1975 Montana Laws,

chapter 438, section 3 (not codified) (police minimum wage, first and second class cities) is not supplanted by adoption of an all-purpose levy under section 7-6-4452, MCA.

4. The Attorney General, in issuing advisory opinions, is not bound by a conclusion of law expressed in a district court declaratory judgment in an action to which the Attorney General is not a party.

29 October 1980

Harold A. Fryslie, Director  
Department of Community Affairs  
Capitol Station  
Helena, Montana 59601

Dear Mr. Fryslie:

You have requested my opinion on whether particular expenditures required of municipal governments by statute may be financed by property taxes levied in addition to the sixty-five mill all-purpose levy provided in section 7-6-4452, MCA. Section 7-6-4452, MCA, allows a municipal government to "make an all-purpose annual levy upon the taxable value of all property in the cities and towns subject to taxation for municipal purposes in lieu of the multiple levies now authorized by statute." I note that municipalities with self-government powers are exempt from this limit. § 7-1-114(g), MCA. Section 7-6-4453, MCA, permits special levies in addition to the all-purpose levy to fund bonded indebtedness, to pay judgments, and to fund SID revolving funds. You inquire whether certain other activities which municipalities are required by law to undertake may also be funded by additional levies.

The Montana Supreme Court has not had occasion to construe the all-purpose levy statute to determine whether municipalities which adopt the all-purpose levy alternative may make additional special levies for other purposes. However, opinions of three Attorneys General have consistently held that a municipality adopting the all-purpose levy may not levy additional special taxes without clear statutory approval. 31 Op. Att'y Gen. No. 18 (1966) held that a municipality adopting the all-purpose levy could not levy an additional tax to retire general obligation bonds. 36 Op.

Att'y Gen. No. 61 (1976), adopted a similar construction, stating:

It is apparent that this all-purpose levy is an optional system of financing a city's operations. It provides an alternative to financing through separate levies for each city function. Municipalities which choose this method of financing must include within the all-purpose levy those levies which would otherwise be imposed individually and which are not specifically exempt from the all-purpose levy.

This analysis was reiterated in 36 Op. Att'y Gen. No. 94 (1976).

As recently as last year I reviewed these opinions and reaffirmed their reasoning. 38 Op. Att'y Gen. No. 44 (1979). I continue to adhere to that viewpoint. The all-purpose levy is an alternative to the adoption of piecemeal special levies. The intent of the Legislature could not be clearer: The all-purpose levy is made "in lieu of the multiple levies now authorized by statute." When a municipality opts for this form of taxation, it forfeits the power to levy special additional taxes unless authorized by the Legislature.

It could be argued that the legislative history of the all-purpose levy does not support this conclusion. As originally enacted, section 7-6-4452, MCA, authorized "an all purpose exclusive annual mill levy in lieu of the multiple levies now authorized...." 1975 Montana Laws, chapter 82 (emphasis added). A 1969 amendment struck the word "exclusive" from the statute, 1969 Montana Laws, chapter 226, leading some to argue that the Legislature no longer intended the all purpose levy to supplant the piecemeal taxing authority which had been the rule prior to 1965. The argument is flawed in two respects. Initially, the 1969 amendment left intact the language providing that the all-purpose levy was an option to be exercised "in lieu of the multiple levies now authorized...." In my opinion this clause refers not to the specific multiple levies in existence in 1965, but rather to the system of multiple levies then in existence, to which the all-purpose levy was to provide an alternative. The retention of this phrase suggests a continuing legislative intent to exclude authority to levy taxes piecemeal in addition to the all-purpose levy. Further, the 1969 amendment authorized levies in addition to the all-purpose levy for two specific purposes--

"to service and pay bonded indebtedness of municipalities or to pay judgments against municipalities...." It is entirely plausible that in striking the word "exclusive" the Legislature was merely recognizing that exceptions to the all-purpose levy could be created by statute. The 1969 amendment does not alter my conclusion that the adoption of an all-purpose levy supplants the authority to levy taxes not specifically permitted in addition to the all-purpose levy.

It is my opinion that the expenditures you present must be financed through the all-purpose levy unless exempted by statute. It is therefore necessary to review the statutory language to determine whether the Legislature has expressed an intention that cities may levy special taxes in addition to the all-purpose levy.

The levy for firemen's disability insurance is authorized by section 19-11-503, MCA. The taxing authority is granted in subsection (2):

Whenever the fund contains less than 2% of the taxable valuation of all taxable property within the limits of the city or town, the governing body of the city or town shall, at the time of the levy of the annual tax, levy a special tax as provided in 19-11-504. The special tax shall be collected as other taxes are collected and, when so collected, shall be paid into the disability and pension fund.

This statute evidences no legislative intent to permit a special tax levy in addition to the all-purpose levy. It is significant that the taxing authority in section 19-11-503, MCA, has been in existence in some form since 1907, Laws of Montana (1907), chapter 71, section 3, and that the Legislature substantially rewrote these provisions as recently as 1977. 1977 Mont. Laws, ch. 157. Attorneys General have construed the all-purpose levy as exclusive virtually since its inception. See 31 Op. Att'y Gen. No. 18 (1966). The failure of the Legislature to include language excepting this levy from the all-purpose levy during the amendatory process suggests that the Legislature intended this levy to be supplanted by the all-purpose levy. See Bottomly v. Ford, 117 Mont. 160, 167-68, 157 P.2d 108 (1945). Section 7-33-4111, MCA, provides taxing authority to support volunteer fire departments:

For the purpose of supporting volunteer fire departments in any city or town which does not have a paid fire department and for the purpose of purchasing the necessary equipment for them, the council in any city or town may levy, in addition to other levies permitted by law, a special tax not exceeding 2 mills on each dollar of the taxable value of the property of the city or town subject to taxation.

Section 19-10-301, MCA, contains a similar grant of authority to impose "an additional levy of three mills" to support police retirement funds "if the demand against a city for deposits in its fund is such that it cannot be met within the general taxing authority of the city." While both of these statutes appear to provide "additional" taxing authority, a review of the legislative history discloses no legislative intent to exempt them from the exclusive all-purpose levy. The "additional" language in section 7-33-4111, MCA, was part of the statute as originally enacted, 1927 Mont. Laws, ch. 26, § 1. It is impossible to impute to that language an intent to except this levy from the all-purpose levy, which was not statutorily authorized until 1965. 1965 Mont. Laws, ch. 82. Likewise, the "additional levy" language in section 19-10-301, MCA, was added by amendment in chapter 78, section 1, 1949 Montana Laws. The 1949 amendment provided additional taxing authority if the then existing one mill levy proved insufficient. Both statutes have been amended since the adoption of the all-purpose levy, and in neither case did the Legislature add language specifically creating an exception to the exclusivity of the all-purpose levy. See 1974 Mont. Laws, ch. 335, § 6; 1977 Mont. Laws, ch. 224, § 1; 1977 Mont. Laws, ch. 456, § 35; 1977 Mont. Laws, ch. 489, § 3; 1977 Mont. Laws, ch. 566, § 26; 1979 Mont. Laws, ch. 114, § 20. I therefore conclude that the taxing authority granted in these two statutes is supplanted by the all-purpose levy.

Section 19-3-204, MCA, authorizes a tax levy by local governments to finance participation in the Public Employee's Retirement System. It provides:

If the required contributions to the retirement system exceed the funds available to a contracting employer (*i.e.*, a city or town) from general revenue sources, the contracting employer may budget, levy, and collect annually a special tax upon the assessable property of the contracting



employer in a number of cents per \$100 of assessable property as is sufficient to raise the amount estimated by the legislative body to be required to provide sufficient revenue to meet the obligation of the contracting employer to the retirement system. The rate of taxation may be in addition to the annual rate of taxation allowed by law to be levied by the contracting employer.

I conclude that this tax may be levied in addition to the all-purpose levy. This statute was enacted after the creation of the all-purpose levy as a financing alternative for city governments. It specifically provides for a situation where the general revenue raised by the city is inadequate to meet the obligations assumed, and allows the city to levy a tax "in addition to the annual rate of taxation allowed by law...." This language clearly states a legislative intent to grant taxing authority in addition to that found in the all-purpose levy.

I reach the same conclusion with respect to the taxing authority granted by 1975 Montana Laws, chapter 359, section 2, which, although not codified, gives cities the power to tax to fund group insurance plans for city employees. It provides:

In compliance with section 43-517 (now codified at 1-2-112, MCA) the administration of this act is declared a public purpose of a county, city or town which may be in addition to any other levy and may be paid out of the general fund of the governing body and financed by a levy on the taxable value of property within the county, city, or town. (Emphasis added.)

The Legislature's insertion of the underlined language evidences an intent to confer taxing authority beyond any statutory limitation such as is found in the all-purpose levy statute. I therefore conclude that this tax may be levied in addition to the 65-mill all-purpose levy.

You also inquire concerning section 19-9-704, MCA, which confers taxing authority to support municipal participation in the statewide police retirement plan. It provides in pertinent part:

(1) [W]hen the demand for deposits of such contributions cannot be met within the general taxation authority and other revenues available to the

city, the appropriate authority of the city may levy any additional tax authorized by law until the general taxing authority and other revenue available is sufficient to meet the demand.

(2) "General taxing authority," as used in this section, means that levy which the city may make under the all-purpose levy or under multiple-purpose levies, if the city is using multiple purpose levies.

(3) No provision of any statute relating to the all-purpose levy may be so construed as to limit the additional taxing authority created by this section. (Emphasis added.)

This statute creates a conditional authorization to exceed the 65-mill limit in those municipalities which have adopted the all-purpose levy. When the 65-mill levy is inadequate to fund the program, this statute allows the city to levy any additional tax "authorized by law," despite the 65-mill limitation.

The remaining statutes about which you inquire refer, more or less explicitly, to the provisions of section 1-2-112, MCA, although none creates an explicit exception to the all-purpose levy. Cf., 1975 Mont. Laws, ch. 359, § 2 (refers to 1-2-112, MCA, but creates explicit exception). Prior to July 1, 1979, section 1-2-112, MCA, provided:

(1) Any law enacted by the legislature after July 1, 1974, which requires a local government unit to perform an activity or provide a service or facility which will require the direct expenditure of additional funds must provide a means to finance the activity, service, or facility. The means of financing such activity may be through a general all-purpose, or special levy or through remission of funds by the state of Montana to said local government unit. However, any requirement in such law that financing be made from the local government unit's levy authority must also provide authority therein to increase said levy by an amount necessary to finance said program....

(2) The local government unit may refuse to administer or enforce any law which does not comply with the requirements of this section if that law requires an expenditure that would require a local government to exceed its statutory levy authority.

The 1979 Legislature substantially rewrote section 1-2-112, MCA. However, the 1979 amendments apply only to measures enacted after July 1, 1979.

The provisions relating to minimum wages for policemen and firemen, 1975 Montana Laws, chapter 324, section 2, and chapter 438, section 3, respectively, provide:

In compliance with section 43-517, R.C.M. 1947, (now codified as amended at 1-2-112, MCA), the administration of this act is declared to be a public purpose of a city or town which may be paid out of the general fund of the governing body and financed by a levy on the taxable value of property within the city or town.

Section 7-32-4117(3), MCA, pertaining to group insurance for policemen, states:

In compliance with 1-2-112, the administration of this section is declared a public purpose of a city, which may be paid out of the general fund of the governing body and financed by a levy not to exceed 2 mills on the taxable value of property within the city or town.

Section 7-33-4130(2), MCA, pertaining to group insurance for firefighters, does not refer to section 1-2-112, MCA, by number. However, it clearly embraces the intent of that section by providing:

Those incorporated cities and towns which require additional funds to finance the provisions of this section may levy on property, by the amount required to meet these provisions, a tax not to exceed 2 mills on the dollar....



While none of these statutes creates an explicit exception to the all-purpose levy, the reference to section 1-2-112, MCA, evidences a clear legislative intent to comply with the mandate of that section by providing a means to finance the new local government responsibility through a fund raising mechanism in addition to those presently available. While the Legislature could have made their intention more clear, as they did in 1975 Montana Laws, chapter 359, section 2, and in section 19-9-704, MCA, relating to group insurance for city employees and police retirement, the intent to comply with section 1-2-112, MCA, is unmistakable. Where the intent to provide additional taxing authority in compliance with section 1-2-112, MCA, is expressed, I conclude that the taxes authorized may be levied in addition to the all-purpose levy.

36 Op. Att'y Gen. No. 94 (1976) held that the taxing authority granted in sections 7-32-4117, MCA (police group insurance), 7-33-4130, MCA (firemen's group insurance), 1975 Montana Laws, chapter 438, section 3 (not codified) (police minimum wage) and 1975 Montana Laws, chapter 324, section 2 (not codified) (firemen's minimum wage), was supplanted by adoption of the all-purpose levy. I reach a contrary conclusion as to these statutes on the basis of my analysis of section 1-2-112, MCA, a factor not considered in the prior opinion. To the extent that it reaches a conclusion inconsistent with this opinion, 36 Op. Att'y Gen. No. 94 (1976) is overruled.

My conclusions as to the exclusivity of the all-purpose levy are based largely on the reasoning of the prior Attorney General opinions cited above, which I find persuasive. Your letter suggests that these prior opinions are overruled by implication by the decision of the District Court for the Fourth Judicial District in Golden v. City of Missoula, Cause No. 44614, August 19, 1976, in which the court held that section 1-2-112, MCA, authorized levies in addition to the 65 mill all-purpose levy, apparently for any new expenditure required by a statute enacted after the effective date of section 1-2-112, MCA. I disagree with the court's analysis. The statutory scheme expressed in section 1-2-112, MCA, may be summarized as follows: Every measure enacted after July 1, 1974, which imposed a new financial responsibility on a city must provide a mechanism to fund the newly created liability. If the mechanism involved a commitment of general fund money, the enabling measure must provide for an increase in levy authority sufficient to

---

offset the required increase in expenditures. In the event that no funding mechanism or levy authority increase is provided, subsection (2) empowered the city not to levy additional taxes, but rather to decline to enforce or administer any provision if enforcement or administration would force the city to exceed its statutory levy authority. The statute confers no additional taxing authority on the cities. It is rather a self-imposed limitation on the power of the Legislature to impose new financial obligations on local government units. The statute provides a remedy to local governmental units when legislative actions violate that limitation and force the local governments to exceed their spending authority. The statute is not a blanket abrogation of the exclusivity of the all-purpose levy. If anything, it strengthens that exclusivity by allowing cities to ignore legislative enactments which would require them to exceed their taxing authority. Further, if the mere enactment of section 1-2-112, MCA, allowed the levying of additional taxation, the provisions of sections 7-32-4117 and 7-33-4130, MCA, and chapters 324, 359 and 438, 1975 Montana Laws, which specifically refer to section 1-2-112, MCA, in granting additional taxing authority, would be unnecessary. I therefore conclude that a funding provision enacted to comply with the pre-1979 provisions of section 1-2-112, MCA, which does not clearly evidence a legislative intent to authorize a special additional levy, either by reference to section 1-2-112, MCA, or otherwise, must be funded through the all-purpose levy in those municipalities which elect to so finance their operations. If the amount generated by the all-purpose levy is inadequate, the municipality has the option of refusing to implement or enforce the program. It may not, however, levy additional taxes absent clear statutory authority.

By the terms of the Uniform Declaratory Judgments Act, section 27-8-301, MCA, the Attorney General is not bound by a declaratory judgment entered in a cause to which he was not a party. The court's judgment in the Golden case therefore does not foreclose the result I reach on the merits of your inquiry. Several considerations compel this conclusion. Initially, the district court did not explicitly overrule the prior opinions, despite the fact that the analysis is inconsistent with their content. Further, a district court judgment in an action to which the Attorney General is not a party is in no sense binding on the Attorney General in the performance of his statutory duty to render advisory opinions. I am aware of no authority in Montana defining the precedential value of district court

judgments. However, practicality dictates that a district court's judgment cannot be taken as declaratory of the law except as applied to the parties before the court. One of the foundations of the system of stare decisis is the collection of opinions on the law in reporters, so that interested persons may determine through research the approaches taken by prior courts facing the question presented. Trial court opinions and judgments are not reported in Montana, and it is therefore impossible to research the views of the district courts on any question of law.

The present question provides an excellent example of the problems inherent in the use of district court judgments as precedent. My latest opinion construing the all-purpose levy, 38 Op. Att'y Gen. No. 44 (1979), was issued on October 10, 1979, more than three years after the entry of judgment in Golden. I was unaware of the court's unreported order in that case, and no practical method exists to research such an order. To have value as precedent, a judicial decision must be readily available to persons doing research on the question decided. The absence of a reporter system for district court orders prevents them from serving as precedent in the way that reported Supreme Court decisions do.

Further, it is well to bear in mind the nature of Attorney General opinions. Although Attorney General opinions are declaratory of law, the Attorney General is an executive, and not a judicial officer. His opinions may occasionally serve to solve an ongoing dispute which might provide a court with a justiciable controversy. However, more frequently they serve as an executive construction of state law given for the benefit of executive branch agencies seeking guidance in situations where a justiciable controversy is absent. See 35 OP. ATT'Y GEN. NO. 68 (1974). Your request is a good example. The power to make such quasi-judicial pronouncements flows not from the judicial branch, but rather from the Attorney General's status as the chief legal officer and legal advisor of the executive branch. In the exercise of this executive power, the Attorney General need not be bound by district court judgments in actions to which he is not a party which do not explicitly overrule his opinions. Thus, although the district court's opinion is entitled to weight, it does not foreclose the Attorney General from reaching a contrary result.

My view of the impact of the district court's order is not inconsistent with the provisions of section 2-15-501(7), MCA, which states:

If an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney employed or retained by any state officer, board, commission, or department, the attorney general's opinion shall be controlling unless overruled by a state district court or the supreme court.

This provision means that parties requesting an Attorney General's opinion are bound to follow it until the opinion is expressly overruled. It does not serve to limit the Attorney General in his consideration and analysis of legal questions, nor does it foreclose his consideration of questions already decided at some point by a district court. It is therefore within my statutory opinion power to reach the conclusion on the merits expressed above.

I am well aware of the difficulties faced by local governments in trying to finance necessary services within the constraints of inflexible mill levy limitations set by the Legislature. However, my conclusions are supported by sound reasoning. Cities should bear in mind that the all-purpose levy is an option which they need not employ. If the sixty-five mill levy limitation poses an insoluble problem for a city in preparing its budget, section 7-5-4455, MCA, permits the city to abandon the all-purpose levy and return to piecemeal taxation. The additional effort of enacting piecemeal taxation resolutions may pay dividends if the aggregate amount raised is better able to finance necessary services. In addition, section 7-6-4431, MCA, provides a mechanism whereby a city may exceed the mill levy limitation with the approval of the voters. Finally, as I noted above, the adoption of a form of government exercising self-government powers exempts a municipality from mill levy limitations. § 7-1-114(g), MCA.

THEREFORE, IT IS MY OPINION:

1. Municipalities which adopt the all-purpose mill levy authorized in section 7-6-4452, MCA, forfeit the power to impose levies for any particular purpose not clearly excepted by statute from exclusivity of the all-purpose levy.
2. The taxing authority granted in sections 19-10-301, MCA (local police retirement plans), 19-11-503, MCA (firemen's disability), and 7-

33-4111, MCA (volunteer fire departments), is supplanted by the adoption of an all-purpose levy under section 7-6-4452, MCA.

3. The taxing authority granted in sections 7-32-4117, MCA (police group insurance), 7-33-4130, MCA (fireman's group insurance, first and second class cities), 19-9-704, MCA (statewide police retirement plan), 19-3-204 (PERS for city employees), 1975 Montana Laws, chapter 359, section 2 (not codified) (group insurance for city employees), 1975 Montana Laws, chapter 324, section 2 (not codified) (firemen's minimum wage, first and second class cities) and 1975 Montana Laws, chapter 438, section 3 (not codified) (police minimum wage, first and second class cities) is not supplanted by adoption of an all-purpose levy under section 7-6-4452, MCA.
4. The Attorney General, in issuing advisory opinions, is not bound by a conclusion of law expressed in a district court declaratory judgment in an action to which the Attorney General is not a party.

Very truly yours,

MIKE GREELY  
Attorney General