

VOLUME NO. 38

OPINION NO. 30

ADMINISTRATIVE PROCEDURE - Administrative Procedure Act meets existing due process standards;

CITIES AND TOWNS - A city has the power to regulate garbage and refuse collection;

CITIES AND TOWNS - Power to levy special tax for garbage collection services;

CITIES AND TOWNS - Local open burning policies are subordinate to Department of Health and Environmental Sciences Rules;

CONSTITUTIONAL LAW - Due Process and Equal Protection requirements met by open burning restrictions;

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES - Power to regulate open burning and pollution by adopting rules superior to local policies;

SANITATION - Garbage collection, open burning;

TAXATION - Garbage collection is a tax supported service;

TAXATION - Cities power to levy special tax for garbage collection.

MONTANA CODE ANNOTATED - Sections 7-6-4406, 7-14-7105(2), 7-14-4106(1), 75-2-111, 75-2-301.

- HELD: 1. The tax-supported garbage hauling service provided by the City of Kalispell comes within the jurisdictional scope of ARM 16-2.14(1)-S1490(1)(d).
2. The entire area covered by a private garbage hauler or the tax supported service is within the prohibited area for open burning.
3. ARM 16-2.14(1)-S1490(d) violates no constitutional standards of due process or equal protection.

19 July 1979

Norbert F. Donahue, Esq.
Kalispell City Attorney
P.O. Box 1035
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Dear Sir:

You have requested my opinion on the following questions:

1. Does a "special tax" levied pursuant to section 7-6-4406, MCA, to carry out the city's authority under section 7-14-4106(1), MCA, constitute Kalispell's garbage collection service as a "tax supported service" within the meaning of ARM 16-2.14(1)-S1490(1)(d).
2. If so, is the entire area covered by a private garbage hauler included within the prohibited area for open burning?
3. Does the prohibition of ARM 16-2.14(1)-S1490(1)(d) constitute a violation of constitutional due process and equal protection provisions because the denial of a reasonable

"open burning" period applies in some areas but not in others without sufficient reasonable connection or compelling public interest for their difference?

The authority in question is an administrative rule adopted by the Department of Health and Environmental Sciences in May of 1978. That rule provides in relevant part:

16-2.14(1)-S1490 OPEN BURNING RESTRICTIONS.

(1) Except as specified in subsection (2), no person shall cause, suffer or allow an open outdoor fire unless an air quality permit has been obtained, and further provided that the fire authority for the area of the burn shall be notified of intent to burn giving location, time and material to be burned and that proper fire safety directions given by the fire authority be complied with. A burning permit is required from the responsible fire control agency during the closed or extended fire season (May 1--September 30 or as extended pursuant to section 28-103 and 28-603, R.C.M. 1947). Reasonable precautions shall be taken to eliminate smoke when the purpose for which the fire was set has been accomplished. A permit shall be allowed only under the following conditions:

* * *

(d) Materials to be burned originate on an individual's premises, excluding commercial, industrial and institutional establishments, where no provision is available by private hauler providing a public service or a tax supported service for collection of the material to be burned and no public nuisance is created.

Section 7-14-4106(1), MCA, which you cite, specifically allows a special tax for purposes described in section 7-14-4105(3), MCA, which provides:

The city or town council has the power to:

* * *

(3) regulate the use of sidewalks and require owners of adjoining premises to keep the same free from snow or other obstruction.

It does not allow a special tax for city garbage collection services. The authority for that tax is section 7-6-4401, MCA:

The city or town council has the power to levy and collect taxes for general and special purposes on all property within town or city subject to taxation under laws of the state.

That purpose is specifically described in section 7-14-4105(2), MCA:

The city or town council has power to....

* * *

(2) regulate the disposition and removal of ashes, garbage, or other offensive matter in any street or alley, on public grounds, or on any premises.

The words of the statutes are to be interpreted by their plain meaning in their usual and accepted manner while attempting to accomplish the intent of the Legislature. § 1-2-106, MCA, Burritt v. City of Butte, 161 Mont. 530, 508 P.2d 563 (1973). It is clear that in its ordinary general usage Kalispell's tax supported garbage service comes within the context of ARM 16-2.14(1)-S1490(1)(d) and is therefore subject to its provisions.

The tax authorized by the preceding statutes is a tax supported service within the context of ARM 16-214(1)-S1490(1)(d).

Where two clauses or phrases of a statute are expressed in the disjunctive they are coordinate and either is applicable to the situation to which the terms relate. Shields v. Shields, 115 Mont. 146, 139 P.2d 528 (1943). The word "or" is a common disjunctive. The rule in question applies to the complete area covered within and outside of the city which is serviced by either a private or tax supported hauler. The statute has no expressed limitation and therefore should have general application in the state.

The power to control pollution and public health is given in section 75-2-111, MCA. Section 75-2-301, MCA, empowers the city or municipality to make more stringent rules and brings about the necessary implication that the city or municipality may not lessen the existing standards already set by the state. See State ex rel. Jones v. Giles, 168 Mont. 130, 541 P.2d 355 (1975).

When the object and tendency of legislation is to promote public health, there is no invasion of constitutional rights

based merely upon interference with liberty or property. Ruona v. City of Billings, 136 Mont. 554, 323 P.2d 129, 31 (1958). For example, the Board of Health and Environmental Sciences may constitutionally prohibit open burning without a permit. State ex rel. Department of Health v. Lincoln County, ___ Mont. ___, 583 P.2d 1293, 1295 (1978).

It is apparent from the rule in question that the Department of Health and Environmental Sciences felt that preservation of air quality required utilization of garbage collection service wherever available. In areas without a garbage collection service, it would be impractical to require hauling, while at the same time those areas without a collection service are usually sparsely populated and the detrimental impact of open burning on the air would be less severe.

Those distinctions are reasonable and justify applying the open burning rule in one area and not in others.

Compliance with the notice and hearing provisions of the Montana Administrative Procedure Act in adopting the rule would meet accepted standards of due process.

THEREFORE, IT IS MY OPINION:

1. The tax-supported garbage hauling service provided by the City of Kalispell comes within ARM 16-2.14(1)-S1490(1)(d).
2. The entire area covered by a private garbage hauler or the tax supported service is within the prohibited area for open burning.
3. ARM 16-2.14(1)-S1490(d) violates no constitutional standards of due process or equal protection.

Very truly yours,

MIKE GREELY
Attorney General