

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 60

LICENSES - Authority of local governments with self-government powers;
LICENSES, OCCUPATIONAL AND PROFESSIONAL - City licensing, self-government powers;
LOCAL GOVERNMENT - Self-government powers, authority to require license fees for certain professions;
MUNICIPAL CORPORATIONS - Self-government powers, authority to enact license fees;
MONTANA CODE ANNOTATED - Sections 7-1-101, 7-1-103, 7-1-106, 37-3-308(3), 37-31-323(3), 37-51-312, 37-65-203;
MONTANA CONSTITUTION - Article XI, section 6;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 68 (1977), 37 Op. Att'y Gen. No. 71 (1977).

HELD: State statutes, standing alone, that prohibit local governments from licensing certain professions or occupations do not apply to local governments with self-government powers unless the statutes are specifically made applicable to local governments with self-government powers.

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24 May 1982

Jeffrey M. Sherlock
City Attorney
316 North Park
Helena, Montana 59623

Dear Mr. Sherlock:

You have requested an opinion concerning whether state statutes that exempt certain professions from licensing fees imposed by local governments apply to municipalities with self-government powers.

The City of Helena has passed an ordinance that requires all persons engaged in business in the city to pay a license fee based upon the number of full-time employees engaged in the business. However, the Legislature has enacted a number of statutes that preclude a municipality from licensing certain occupations. For example, in the chapter regarding cosmetology, section 37-31-323(3), MCA, provides:

No other or additional license or registration fee may be imposed by a municipal corporation or other political subdivision of this state for the practice or teaching of cosmetology.

Similar provisions are contained throughout the code. See, for example, § 37-65-203 (architects); § 37-3-308(3) (physicians); and § 37-51-312 (real estate brokers or salesmen). Generally these statutes state that no municipality may impose a license fee on the indicated professions.

In 37 Op. Att'y Gen. No. 71 at 284 (1977), it was held that a city with general government powers may not require real estate firms to obtain business licenses. Your question is whether the same rule applies to municipalities with self-government powers. It is my opinion that the rule does not apply to these home rule jurisdictions.

The 1972 Montana Constitution, article XI, section 6, provides:

A local government unit adopting a self-government charter may exercise any power

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not prohibited by this constitution, law, or charter.

The convention notes to that section clearly indicate that home rule governments have all powers not specifically denied. The Legislature has echoed that philosophy in section 7-1-101, MCA. Additionally, the Legislature has mandated that self-government powers be liberally construed. Section 7-1-106, MCA, provides:

The powers and authority of a local government unit with self-government powers shall be liberally construed. Every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority.

Those provisions constitute a significant departure from the old law that required narrow construction of local government authority. See 37 Op. Att'y Gen. No. 68 at 272 (1977). Recently the Montana Supreme Court reviewed these provisions. In Tipco Corp., Inc. v. City of Billings, 39 St. Rptr. 600, 603 (1982), a case concerning an ordinance adopted by a home rule jurisdiction, the Court held:

We expressly overrule statements...that a county, city, or town can only exercise powers expressly conferred on it by the constitution and statutes or arising by necessary implication and that any reasonable doubt concerning such powers should be resolved against the municipality. This was the law under Montana's 1889 Constitution and cases decided thereunder. It is not the law under Montana's 1972 Constitution and statutes enacted thereunder.

It is within this framework that your question must be answered. Section 7-1-103, MCA, provides:

A local government unit with self-government powers which elects to provide a service or perform a function that may also be provided or performed by a general power government unit is not subject to any limitation in the provision of that service or performance of

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that function except such limitations as are contained in its charter or in state law specifically applicable to self-government units. [Emphasis added.]

Most of the statutes that prohibit local government licensing of professions were passed prior to the 1972 Constitution and prior to section 7-1-103, MCA. The Legislature has had opportunities to make the provisions specifically applicable to home rule governments, but has not done so. Thus, section 7-1-103, MCA, coupled with the principles regarding home rule governments discussed above, make it clear that state provisions which prohibit municipalities from imposing license fees on certain professions or occupations do not apply to local government units with self-government powers, unless the statutes specifically designate such forms of local government.

It must be emphasized that this opinion makes no determination as to the validity of the actual ordinance passed by the City of Helena nor does it impress an imprimatur upon the city council's action in passing the ordinance. Rather, it is simply my opinion that state statutes, standing alone, prohibiting local government licensing of certain professions or occupations do not apply to home rule governments within the State of Montana unless the statutes specifically express applicability to such local governments. This opinion does not address any constitutional questions that may arise by imposition of a fee on certain professions nor does it address any question that could arise under section 7-1-113, MCA, a statute that prohibits home rule local governments from exercising any power in a manner that is inconsistent with state law in an area affirmatively subjected by law to state regulation or control. Those questions would have to be answered individually with respect to each profession, and preferably by a court of law.

THEREFORE, IT IS MY OPINION:

State statutes, standing alone, that prohibit local governments from licensing certain professions or occupations do not apply to local governments with self-government powers unless the statutes are

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specifically made applicable to local governments
with self-government powers.

Very truly yours,

MIKE GREELY
Attorney General