

VOLUME NO. 40

OPINION NO. 7

LOCAL GOVERNMENT - Imposition of property lien in favor of municipality to secure unpaid water charges is not authorized under Montana law;

MUNICIPAL UTILITIES - Imposition of property lien in favor of municipality to secure unpaid water charges is not authorized under Montana law;

MONTANA CODE ANNOTATED - Sections 7-13-4306, 69-7-201.

HELD: Under existing Montana law, a city or town may not file a lien against a landowner's property due to the tenant's failure to pay for water service contracted for and used by the tenant. Discontinuance of service is the only remedy available for nonpayment of water charges. §§ 7-13-4306, 69-7-201, MCA.

18 March 1983

Kenneth R. Olson
Town Counsel
Dutton MT 59433

Dear Mr. Olson:

You have requested my opinion on the following question:

Can a city or town file a lien against a landowner's property due to the tenant's failure to pay for water service contracted for and used by the tenant?

Prior to the 1981 legislative session, the rates and operating procedures of municipal utilities were regulated by the Montana Public Service Commission. In 1981, the Legislature returned to the municipalities the power and authority to regulate rates and charges imposed for municipal utility service. This authority has certain restrictions set forth in section 69-7-101, MCA. In addition, municipal utilities were given broad authority to adopt rules governing their operation. Such rules must contain, at a minimum, those requirements of good practice which can be normally expected for the operation of a utility. § 69-7-201, MCA. In other words, the adopted rules, including those governing the collection of delinquent utility charges, must be reasonable. Section 69-7-201, MCA, also provides that the rules adopted by municipalities shall outline the utility's procedure for discontinuance of service.

A municipality is authorized to discontinue water supply to premises for nonpayment of either water or sewer charges. § 7-13-4306, MCA. The provisions of Title 7, MCA, apply to the actions of municipal utilities. See § 69-3-101(5), MCA. An additional remedy for delinquent sewer charges is provided by section 7-13-4309, MCA, which authorizes that unpaid sewer charges be inserted as a tax against the lot or parcel of real estate to which the service has been furnished. No similar provision exists for collection of delinquent water charges.

The Montana Supreme Court has not determined the legality of a property lien for nonpayment of water charges by a tenant. Therefore, it is appropriate to look to court decisions from other jurisdictions for guidance.

The United States Supreme Court has upheld, against constitutional objections, the imposition of liens against property of a landlord for unpaid water bills of a tenant. Dunbar v. New York, 251 U.S. 516, 40 S. Ct. 250 (1920). In that case the city charter, adopted by the New York General Assembly, provided that charges for

water become liens on the property. 1901 N.Y. Laws, ch. 466. The court indicated that the lien did not deprive the owner of property without due process since the property benefited from the water service. The fact that it is the tenant who defaults does not relieve the property from liability as it would be unfit for human habitation without water. Id. at 518.

In the absence of a statute expressly making arrearages for water rents a lien on property, or authorizing a lien procedure, the [municipality] has no right to compel an owner to pay charges incurred by another. Friedman v. Dist. of Columbia, 172 A.2d 562, 563 (D.C. 1961). Water rents do not constitute a lien on the property supplied unless it is so provided by statute in express terms or by necessary implication. Id. at 563.

Thus, in light of Dunbar and Friedman, the validity of statutorily authorized liens against property to secure delinquent utility charges incurred by a tenant is unquestioned. The only issue is whether the consequence of failing to pay water charges is limited in Montana to the statutory remedy provided by section 7-13-4306, MCA, or whether the 1981 enactment of section 69-7-201, MCA, expanded the authority of municipalities in the area of utility charge arrearages beyond the remedy of discontinuing service. Section 69-7-201, MCA, does not expressly provide a lien to secure payment of water charges. The specific reference in section 69-7-201, MCA, to the adoption of procedures for discontinuing service and the retention of section 7-13-4306, MCA, authorizing discontinuance for nonpayment of charges, support a conclusion that a lien upon property was not contemplated by the Legislature as an available remedy for nonpayment of water bills.

Municipal utilities are now only partially regulated under sections 69-7-101 to 201, MCA. However, the rules adopted for their operation must be in accord with existing law. No general grant of power to municipalities can authorize bylaws which conflict with state statutes. McGillic v. Corby, 37 Mont. 249, 253, 95 P. 1063, 1064 (1908). In this case, the pertinent state laws are sections 69-7-201 and 7-13-4306, MCA, authorizing discontinuance of service for nonpayment of water charges. It is a familiar rule of construction that, when a power is conferred upon a municipality, and the mode in which it is to exercise that power is

prescribed, such mode must be pursued. McGillic v. Corby, 37 Mont. at 255, 95 P. at 1065.

THEREFORE, IT IS MY OPINION:

Under existing Montana law, a city or town may not file a lien against a landowner's property due to the tenant's failure to pay for water service contracted for and used by the tenant. Discontinuance of service is the only remedy available for nonpayment of water charges. §§ 7-13-4306, 69-7-201, MCA.

Very truly yours,

MIKE GREELY
Attorney General