VOLUME NO. 43 OPINION NO. 41

CITIES AND TOWNS - Authority of city with self-government powers to enact ordinance superseding state law;
CITIES AND TOWNS - Sale of city lands;
LOCAL GOVERNMENT - Authority of city with self-government powers to enact ordinance superseding state law;
LOCAL GOVERNMENT - Sale of city lands;
MUNICIPAL GOVERNMENT - Authority of city with self-government powers to enact ordinance superseding state law;
MUNICIPAL GOVERNMENT - Sale of city lands;
PROPERTY, PUBLIC - Sale of city lands;
PROPERTY, REAL - Sale of city lands;
MONTANA CODE ANNOTATED - Sections 7-1-105, 7-1-111, 7-1-113, 7-1-114, 7-8-4201;
MONTANA CONSTITUTION - Article XI, sections 5, 6;

OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 42 (1986), 37 Op. Att'y Gen. No. 68 (1977).

HELD: Although section 7-8-4201(2)(a), MCA, requires a two-thirds vote of the city commission to sell city land, a city having self-government powers may enact a superseding ordinance allowing the sale of such land by simple majority vote.

November 1, 1989

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Dear Mr. Gliko:

You have requested my opinion on the following questions:

1. Does state law require a four-fifths vote of the city commission to sell city land?

2. If so, may the commission adopt an ordinance authorizing the sale of city property by simple majority vote?

Your request states that the Great Falls City Commission recently adopted a resolution vacating the park dedication of Park Island, a Missouri River island adjacent to the city of Great Falls. It has been proposed that the island, which never has been developed for use as a public park be sold to a private developer; the sale, however, failed for lack of a two-thirds majority vote, which translates into four votes of a five-member governing body.

The city of Great Falls has adopted a charter form of government with self-governing powers, effective July 1, 1986. Under its charter, the commission has proposed an ordinance allowing the sale of city property by a simple majority (3/5) vote of the city commission. The proposed ordinance would conflict with section 7-8-4201(2)(a), MCA, which requires a two-thirds vote of all members of a city council to sell city land.

As a general rule, local governments must possess specific statutory authority to dispose of their governmental properties. 2A C. Antieau, Municipal Corporation Law § 20.32 at 20-106 (1987). See also 41 Op. Att'y Gen. No. 42 at 167 (1986). Statutory conditions governing the sale of such properties are respected and strictly applied by the courts. 2A C. Antieau, Municipal Corporation Law § 20.35 at 20-114; Prezeau v. City of Whitefish, 198 Mont. 416, 646 P.2d 1186 (1982). Section 7-8-4201, MCA, contains the legislative grant of power enabling municipalities to sell their properties, and also

provides the procedures by which such sales may be had. By its unambiguous terms, section 7-8-4201(2)(a), MCA, requires four votes of a five-member city council in order to sell city land.

The answer to your second question thus turns on the power of the city commission to supersede section 7-8-4201(2)(a), MCA, by ordinance.

My analysis begins with the 1972 Montana Constitution. Prior to its enactment, cities were considered subordinate political subdivisions of the state, and had only those powers expressly given them by the Legislature. D & F Sanitation Service v. City of Billings, 219 Mont. 437, 444, 713 P.2d 977, 981 (1986). The new Constitution empowered local government units to adopt self-government charters with the approval of a voter majority. Mont. Const. Art. XI, § 5 (1972). Further, the Constitution grants to such entities the exercise of "any power not prohibited by this constitution, law, or charter." Mont. Const. Art. XI, § 6 (1972). Under the "shared powers" concept embodied in the Constitution, "'the assumption is that local government possesses the power, unless it has been specifically denied.'" D & F Sanitation, 219 Mont. at 445, 713 P.2d at 982 (quoting II Mont. Const. Conv. 796-97 (1972)) (emphasis in original). Every reasonable doubt as to the existence of a local government's authority is to be resolved in favor of the existence of that authority. § 7-1-106, MCA.

Keeping in mind that units of local government with self-government powers are constitutionally granted the exercise of any power not prohibited by the Constitution, law or charter, it is clear that the statutory scheme governing such units is designed as a limitation upon, rather than as a grant of, such powers. §§ 7-1-101 to 114, MCA. Section 7-1-111, MCA, enumerates those specific powers denied to units with self-government powers, and section 7-1-114, MCA, sets forth those provisions of state law with which such local government units are obligated to comply. Finally, section 7-1-113, MCA, prohibits such local governments from exercising any powers "in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control."

> Consequently, in determining whether a self-government power is authorized, it is necessary to: 1) consult the charter and consider constitutional ramifications; 2) determine whether the exercise is prohibited under the various provisions of [Title 7, chapter 1, part 1, MCA] or other statute specifically applicable to self-government units; and 3) decide whether it is inconsistent with state provisions in an area affirmatively subjected to state control as defined by section [7-1-113].

37 Op. Att'y Gen. No. 68 at 272, 274 (1977).

Considering the first factor, the city of Great Falls has by its charter reserved the full spectrum of self-government powers permitted by law, and has vested in its city commission the authority to enact such ordinances as are necessary for the proper execution of governmental functions and responsibilities. The charter contains no provision which would tend to limit the commission's authority to enact an ordinance such as the one in question. I see no constitutional ramifications of the proposed ordinance, other than the general limitation that a city may not exercise any power prohibited by law.

This leads to the second factor, which requires an examination of sections 7-1-111 and 7-1-114, MCA, to determine if enactment of the proposed ordinance is prohibited by law. The powers denied to a self-governing local government by section 7-1-111, MCA, consist largely of matters committed to a state agency or affecting statewide concerns. The sale of city properties is not included among those powers the city is prohibited from exercising.

Likewise, there is no provision of state law enumerated in section 7-1-114, MCA, which encompasses the sale of city land. Although that section requires the city to abide by all state laws which "require or regulate planning or zoning," § 7-1-114(1)(e), MCA, the planning and zoning laws do not concern disposition of city-owned property. See generally Tit. 76, ch. 2, pt. 3, MCA. Similarly, section 7-1-114(1)(c), MCA, by which the city is subject to laws establishing legislative procedures or requirements for units of local government, is not controlling. Section 7-8-4201, MCA, does not by its terms establish legislative procedures since it does not address the process of enacting laws or, in this instance, ordinances. A legislative act is one which prescribes what the law shall be in future cases arising under it. See Black's Law Dictionary 810 (5th ed. 1979). The process of enacting the proposed ordinance obviously is a legislative act which is required by section 7-1-114(1)(c), MCA, to be performed in conformity with state law. However, the sale of property pursuant to section 7-8-4201, MCA, is not a legislative act. The decision to sell a parcel of city property pertains to a specific set of circumstances and does not prescribe a permanent rule for future situations. Thus it is more akin to an executive or proprietary function and does not fit within the rubric of section 7-1-114(1)(c), MCA.

Accordingly, resolution of your inquiry turns on the third factor of the analysis. It is important to recognize that the proposed ordinance is not necessarily prohibited simply because it conflicts with a state statute. See § 7-1-105, MCA (state law applicable until superseded by ordinance). It is a fundamental principle of home rule that "state legislative acts are invalid when they deal with basically local concerns and are in conflict with laws of the municipality." O. Reynolds, Handbook of Local Government Law at 102 (1982). Thus, in most states, the gravamen of a home rule dispute is whether it concerns local matters or state matters. *Id.* at 96. In those states, while "[c]harter cities [with self-government powers] have certain rights and privileges in local matters to legislate free from interference by the

legislature[,] ... [w]hen the subject of legislation is a matter of statewide concern the [l]egislature has the power to bind all throughout the state including charter cities." City of Scottsdale v. Scottsdale Associated Merchants, 583 P.2d 891, 892 (Ariz. 1978). See also Envirosafe Services of Idaho v. County of Owyhee, 785 P.2d 998, 1000 (Idaho 1987); Village of Tully v. Harris, 504 N.Y.S.2d 591, 593 (App. Div. 1986); State Personnel Board of Review v. City of Bay Village, 503 N.E.2d 518, 520-21 (Ohio 1986); City and County of Denver v. Colorado River Water Conservation Dist., 696 P.2d 730, 740-41 (Colo. 1985).

Many of these states also acknowledge the ability of the state legislature to preempt local regulation implicitly by occupying the field of regulation or activity. See, e.g., Envirosafe Services, 735 P.2d at 1001; Handbook of Local Government Law at 119-20. Consistent with the shared powers presumption, Montana has expressly rejected the doctrine of implied preemption as applied to local governments with self-government powers. D & F Sanitation, 219 Mont. at 445, 713 P.2d at 982.

Indeed, by its enactment of section 7-1-113, MCA, the Montana Legislature apparently sought to avoid the nebulous distinction between matters of "statewide" and "local" concern. Essentially section 7-1-113(1), MCA, allows a local government with self-government powers to enact any ordinance unless the ordinance (1) is inconsistent with state law or regulation and (2) concerns an area affirmatively subjected by law to state control. See 37 Op. Att'y Gen. No. 68 at 274 (1977). The statute allows little room for interpretation; it provides further that:

> (2) The exercise of power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.
>
> (3) An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency.

The ordinance proposed by the city of Great Falls satisfies the first prong of the above test. Clearly, by allowing a sale of property upon a simple majority vote, the ordinance is inconsistent with state law in that it establishes requirements which are less stringent than the two-thirds majority required by section 7-8-4201, MCA.

As to the element of state control, the disposition of city lands does not appear to come within the statutory definition. Although section 7-8-4201, MCA, has been the subject of a number of cases and of an Attorney General's

Opinion, each involved subsection (2)(b) thereof and none considered the effect of self-governing powers on the procedural requirements. See Prezeau v. City of Whitefish, 198 Mont. 416, 646 P.2d 1186 (1982); 41 Op. Att'y Gen. No. 42 at 164 (1986). Further, my research has revealed no Montana case law interpreting section 7-1-113(3), MCA. Although the Montana Supreme Court has ruled in one case that a city with self-government powers could not supersede state statutory provisions pertaining to a service that is mandated by state law, that decision was based upon sections 7-1-113(2) and 7-1-114(1)(f), MCA. Billings Firefighters Local 521 v. City of Billings, 214 Mont. 481, 694 P.2d 1335 (1985). The Court did not consider subsection (3) of section 7-1-113, MCA, in its opinion. Given the subject matter there involved, and the fact that it was included within section 7-1-114's mandatory provisions, Billings Firefighters offers little guidance under the circumstances here presented.

Section 7-8-4201, MCA, is contained within the chapter of the local government title governing acquisition, transfer, and management of property and buildings. As noted above, it is not a mandatory provision under section 7-1-114, MCA, and is not committed by law to the jurisdiction of any state agency or officer. City lands are not included in any other provision of the code enforced by or under the control of a state officer or agency. As such, the disposition of city property cannot be said to be affirmatively subjected to state control.

I have assumed that the property in question was not held in trust for a specific purpose, and accordingly this opinion does not address section 7-8-4201(2)(b), MCA. See Prezeau, 646 P.2d 1186; 41 Op. Att'y Gen. No. 42 at 164 (1986).

THEREFORE, IT IS MY OPINION:

> Although section 7-8-4201(2)(a), MCA, requires a two-thirds vote of the city commission to sell city land, a city having self-government powers may enact a superseding ordinance allowing the sale of such land by simple majority vote.

Sincerely,

MARC RACICOT
Attorney General