

VOLUME NO. 43

OPINION NO. 53

CITIES AND TOWNS - Authority of city with self-government powers to enact ordinance allowing vehicles in funeral procession to disobey traffic-control devices by designating them as "authorized emergency vehicles";

FUNERALS - Authority of city with self-government powers to enact ordinance allowing vehicles in funeral procession to disobey traffic-control devices by designating them as "authorized emergency vehicles";

LOCAL GOVERNMENT - Authority of city with self-government powers to enact ordinance allowing vehicles in funeral procession to disobey traffic-control devices by designating them as "authorized emergency vehicles";

MOTOR VEHICLES - Authority of city with self-government powers to enact ordinance allowing vehicles in funeral procession to disobey traffic-control devices by designating them as "authorized emergency vehicles";

MUNICIPAL GOVERNMENT - Authority of city with self-government powers to enact ordinance allowing vehicles in funeral procession to disobey traffic-control devices by designating them as "authorized emergency vehicles";

MONTANA CODE ANNOTATED - Sections 7-1-111 to 7-1-114, 61-1-119, 61-8-107, 61-8-201(1), 61-9-402(2), (3), 61-9-501, 61-9-504;

MONTANA CONSTITUTION - Article XI, section 6;

OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 41 (1989), 37 Op. Att'y Gen. No. 68 (1977).

HELD: A city with self-government powers may not enact an ordinance exempting vehicles in a funeral procession from obeying traffic-control devices by designating such vehicles as "authorized emergency vehicles."

January 31, 1990

James L. Tillotson  
City Attorney  
P.O. Box 1178  
Billings MT 59103

Dear Mr. Tillotson:

You have requested my opinion concerning a question which I have rephrased as follows:

May a city with self-government powers enact an ordinance exempting vehicles in a funeral procession from obeying traffic-control devices by designating such vehicles as "authorized emergency vehicles"?

I understand from your letter that in response to a proposal by a local morticians' group the City of Billings, which has adopted a charter form of government with self-governing powers, is contemplating the enactment of an ordinance which would excuse vehicles in a funeral procession from obeying traffic-control devices. Such an ordinance would conflict with section 61-8-201(1), MCA, which provides:

The driver of any vehicle shall obey the instructions of any official traffic-control device applicable thereto in accordance with the provisions of this chapter unless otherwise directed by a highway patrol officer or police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this chapter.

However, the driver of an "authorized emergency vehicle" is granted the privilege of disregarding traffic-control devices under particularly defined conditions set forth in section 61-8-107, MCA. The proposed ordinance would purportedly avoid the requirement of section 61-8-201(1), MCA, by granting vehicles in a funeral procession the privilege granted "authorized emergency vehicles" in section 61-8-107, MCA.

The Montana Constitution permits local government units which have adopted a self-government charter to "exercise any power not prohibited by this constitution, law, or charter." Mont. Const. Art. XI, § 6; § 7-1-101, MCA. Under this constitutional provision, "the assumption is that local government possesses the power, unless it has been specifically denied." D & F Sanitation Service v. City of Billings, 219 Mont. 437, 445, 713 P.2d 977, 981-82 (1986) (emphasis in original). However, the Legislature has provided specific statutory limitations on the exercise of power by a unit of local government with self-government powers. §§ 7-1-101 to 114, MCA; 43 Op. Att'y Gen. No. 41 (1989). In addition to various particular limits on the exercise of power by a governmental unit with self-governing powers, this statutory scheme includes a general prohibition of "the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control." § 7-1-113(2), MCA.

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), 43 Op. Att'y Gen. No. 41 (1989).

Regarding the first step of this analysis, in adopting the Billings city charter the city has reserved all powers available to a self-government city under the Constitution and the laws of Montana. All reserved powers are vested in the city council, which, together with the mayor, constitutes the legislative branch. I can find no provision in the charter itself denying the city council's authority to enact the proposed ordinance. With regard to constitutional ramifications, although you have not provided me with a copy of the proposed ordinance I conclude that such an ordinance could be drafted without running afoul of any constitutional provisions.

The second step of the analysis requires consideration of sections 7-1-111 and 7-1-112, MCA, which limit the exercise of power by local governments with self-government powers, and section 7-1-114, MCA, which enumerates those provisions of state law with which a local government with self-government powers must comply. Enactment of the proposed ordinance is not prohibited by any of the provisions of section 7-1-111 or 7-1-112, MCA. Nor would such an enactment conflict with any of the provisions of section 7-1-114, MCA.

It is therefore necessary to proceed to the third step of the analysis, which is controlled by section 7-1-113, MCA, to resolve your question. That statute provides as follows:

- (1) A local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.
- (2) The exercise of a 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.

Stated conversely, section 7-1-113, 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." 43 Op. Att'y Gen. No. 41 (1989) (emphasis in original).

The proposed ordinance is clearly inconsistent with state law, since it would permit the driver of a vehicle in a funeral procession to disobey traffic-control devices, in contravention of section 61-8-201(1), MCA. Further, the proposed ordinance concerns an area affirmatively subjected by law to state control, because it would avoid the prohibition of section 61-8-201(1), MCA, by classifying vehicles in a funeral procession as "authorized emergency vehicles." As noted above, authorized emergency vehicles are permitted the privilege of disregarding traffic-control devices under carefully described circumstances set forth in section 61-8-107, MCA. However, the authority to designate or authorize a particular class of vehicles as "authorized emergency vehicles" is statutorily vested in the Department of Justice (the department), a state agency. §§ 61-1-119, 61-1-301, MCA. Before a vehicle qualifies as an authorized emergency vehicle privileged to disregard traffic-control devices under section 61-8-107, MCA, it must first meet the requirement established in section 61-1-119, MCA, that it be designated an authorized emergency vehicle by the department. Furthermore, authorized emergency vehicles must be equipped with certain audio and visual signals, § 61-9-402(2), (3), MCA, and enforcement of that requirement is again relegated to the department by statute. § 61-9-501, MCA. The department is also generally empowered to promulgate "additional rules governing the use of safety equipment on motor vehicles ... as it shall deem advisable for the protection of the public." § 61-9-504, MCA. These statutes clearly indicate that the department has exclusive statutory authority to designate "authorized emergency vehicles," to enforce mandatory equipment requirements for vehicles so designated, and to promulgate rules governing motor vehicle safety equipment.

The proposed ordinance is thus inconsistent with state law, and concerns an area affirmatively subjected by law to state control. The terms of section 7-1-113, MCA, therefore prohibit the city from enacting the proposed ordinance.

It has been suggested that sections 61-8-103 and 61-12-101, MCA, may be dispositive of the question presented. Those statutes provide in pertinent part:

**61-8-103.** ... The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any ordinance, rule, or regulation in conflict with the provisions of this chapter unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this chapter.

61-12-101. ... The provisions of chapter 8 and chapter 9 shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

....

(3) regulating or prohibiting processions or assemblages on the highways;

....

(14) enacting as ordinances any and all provisions of chapter 8 or chapter 9 and any and all other laws regulating traffic, pedestrians, vehicles, and operators thereof, not in conflict with state law or federal regulations and to enforce the same within their jurisdiction.

However, as a local government unit with self-government powers, the City of Billings inherently possesses all of the powers specifically authorized by sections 61-8-103 and 61-12-101, MCA. Furthermore, the limits on the power of local authorities described in sections 61-8-103 and 61-12-101, MCA, do not specifically apply to local government units with self-government powers. For that reason, those prohibitions do not limit the exercise of power by a city with self-government. § 7-1-103, MCA; D & F Sanitation, 219 Mont at 445, 713 P.2d at 982 (statutory preemption of self-government powers of a municipality requires express statutory prohibition forbidding local governments with self-government powers from acting in a certain area). Instead, my analysis is based upon section 7-1-113, MCA, and as noted above, under that statute the city is prohibited from enacting the proposed ordinance.

THEREFORE, IT IS MY OPINION:

A city with self-government powers may not enact an ordinance exempting vehicles in a funeral procession from obeying traffic-control devices by designating such vehicles as "authorized emergency vehicles."

Sincerely,

MARC RACICOT  
Attorney General