

VOLUME NO. 43

OPINION NO. 55

CITIES AND TOWNS - Authority of city with self-government powers to enact ordinance superseding state law;

CITIES AND TOWNS - Sale of city property held in trust;

LOCAL GOVERNMENT - Authority of city with self-government powers to enact ordinance superseding state law;
LOCAL GOVERNMENT - Sale of city property held in trust;
MUNICIPAL GOVERNMENT - Authority of city with self-government powers to enact ordinance superseding state law;
MUNICIPAL GOVERNMENT - Sale of city property held in trust;
PROPERTY, PUBLIC - Sale of city property held in trust;
PROPERTY, REAL - Sale of city property held in trust;
MONTANA CODE ANNOTATED - Sections 7-1-105, 7-1-111, 7-1-111(1), 7-1-113, 7-1-114, 7-8-4201(2)(b);
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 41 (1989), 41 Op. Att'y Gen. No. 42 (1986).

HELD: The governing body of a local government unit with self-government powers may enact an ordinance providing for the disposition by majority vote of the council of property held in trust for a specific purpose.

February 21, 1990

James L. Tillotson
Billings City Attorney
P.O. Box 1178
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Dear Mr. Tillotson:

You have requested an Attorney General's Opinion concerning the authority of the Billings City Council to adopt an ordinance allowing the sale of city property by majority vote of the council, where such property is held in trust for a specific purpose. Such an ordinance would conflict with state law requiring that sale or lease of city property held in trust for a specific purpose be approved by a majority vote of the electors of the municipality. § 7-8-4201(2)(b), MCA. Billings has adopted a charter form of government with self-government powers, reserving the full spectrum of such powers permitted by law. Your question is whether its self-government status allows the Billings City Council to supersede by ordinance section 7-8-4201(2)(b), MCA.

In 43 Op. Att'y Gen. No. 41 (1989), I concluded that a city with self-government powers could enact an ordinance permitting the sale of city property by a simple majority vote, despite the requirement of state law that such sale may only be had by a two-thirds majority vote of the governing body. The statute under consideration, § 7-8-4201(2)(a), MCA, was found not to be binding upon local government units with self-government powers. Specifically, I found that the sale of city properties is not among the powers denied to self-government units under section 7-1-111, MCA, and is not within any of the mandatory provisions of state law set forth in section 7-1-114,

MCA. Finally, my opinion concluded that the sale of city land is not in an area affirmatively subjected to state control within the meaning of section 7-1-113, MCA. The opinion did not address subsection (2)(b) of section 7-8-4201, MCA--the sale of property held in trust for a specific purpose--and that is the issue presented by your request.

Section 7-8-4201(2)(b), MCA, has been interpreted by both the Attorney General and the Montana Supreme Court. In Prezeau v. City of Whitefish, 198 Mont. 416, 646 P.2d 1186, 1188-89 (1982), the Court concluded that under section 7-8-4201(2)(b), MCA, an election must be held to approve the sale or lease of municipal property held in trust for specific purposes, irrespective of whether such sale or lease is in abrogation of or substantially interferes with the specific trust purpose. Following Prezeau, an Attorney General's Opinion concluded that park dedication language in a subdivision plot dedicating certain lands "to the use of the public forever" creates a trust for a specific purpose and requires an election to dispose of such property. 41 Op. Att'y Gen. No. 42 at 164 (1986). The opinion was requested by the city of Missoula, however, which has not adopted self-government powers.

Although the city of Whitefish does have self-government powers, its authority to supersede state law was not at issue in Prezeau, and the Court thus only considered state law. Absent a superseding ordinance, all state statutes are applicable to self-government local units. § 7-1-105, MCA. Neither Prezeau nor 41 Op. Att'y Gen. No. 42 considered the effect of self-government powers upon section 7-8-4201(2)(b), MCA, and neither provides controlling authority for the question presented here.

The only distinguishing factor between the ordinance proposed by the city of Billings and the proposed Great Falls ordinance considered in 43 Op. Att'y Gen. No. 41 is the nature of the property to which the ordinance would apply. As a general rule, "[p]roperty once acquired and devoted to public use is held in trust for the public and cannot be alienated without legislative authority, either express or implied." Nelson v. Pacific County, 36 Wash. App. 17, 671 P.2d 785, 789 (1983). As noted in the recent opinion, however, Montana has "changed the role and power of local governments" through its constitution. D & F Sanitation Service v. City of Billings, 219 Mont. 437, 444, 713 P.2d 977, 981 (1986). The doctrine of implied preemption no longer applies to local governments with self-government powers. *Id.* at 445, 713 P.2d at 982. Under Montana law, a city with self-government powers may supersede state law by ordinance, so long as it is not expressly prohibited from doing so by its charter or by state laws or constitution. See 43 Op. Att'y Gen. No. 41, slip. op. at 2-3.

A statutory provision not implicated in 43 Op. Att'y Gen. No. 41 which possibly could be applicable in this case is section 7-1-111(1), MCA. Under that section, a local government unit with self-government powers may not exercise "any power that applies to or affects any private or civil relationship,

except as an incident to the exercise of an independent self-government power." Arguably, the disposition of trust property affects a private relationship because it affects the trust *res* and may trigger a reversionary interest.

Whatever the statute means with respect to a private or civil relationship, however, it does not apply here because the sale of government property would simply be incidental to the exercise of an independent self-government power, and would not, of course, impact contractual obligations. The Legislature already has granted local governments the power to dispose of property held in trust, and the contemplated ordinance would apply only to the manner by which such disposition is to be accomplished. Accordingly, it is my opinion that section 7-1-111(1), MCA, creates no barrier to the enactment of the proposed ordinance.

Finding no other applicable provision in either section 7-1-111 or section 7-1-114, MCA, and consistent with the conclusion in 43 Op. Att'y Gen. No. 41 that this does not involve an area affirmatively subjected to state control, the analysis and conclusion of 43 Op. Att'y Gen. No. 41 are equally applicable to subsection (2)(b) of section 7-8-4201, MCA.

THEREFORE, IT IS MY OPINION:

The governing body of a local government unit with self-government powers may enact an ordinance providing for the disposition by majority vote of the council of property held in trust for a specific purpose.

Sincerely,

MARC RACICOT
Attorney General