

VOLUME NO. 44

OPINION NO. 34

CITIES AND TOWNS - Authority of self-governing local government to enact ordinance providing that delinquent solid waste charges become lien on property served;

COUNTIES - Authority of self-governing local government to enact ordinance providing that delinquent solid waste charges become lien on property served;

LIENS - Authority of self-governing local government to enact ordinance providing that delinquent solid waste charges become lien on property served;

SOLID WASTE - Authority of self-governing local government to enact ordinance providing that delinquent solid waste charges become lien on property served;

MONTANA CODE ANNOTATED - Sections 7-1-106, 7-1-111, 7-1-113, 7-1-114, 7-13-233(5);

MONTANA CONSTITUTION - Article XI, section 6;

OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 53 (1990), 43 Op. Att'y Gen. No. 41 (1989), 43 Op. Att'y Gen. No. 1 (1989), 40 Op. Att'y Gen. No. 45 (1984), 40 Op. Att'y Gen. No. 7 (1983), 37 Op. Att'y Gen. No. 68 (1977).

HELD: A local government with self-governing powers may enact an ordinance which provides that delinquent solid waste management service charges become a lien on the property served.

May 19, 1992

Robert M. McCarthy
Silver Bow County Attorney
155 West Granite Street
Butte MT 59701

Dear Mr. McCarthy:

You have requested my opinion on the following question:

May the city-county of Butte-Silver Bow, under its self-government charter, enact an ordinance which provides that delinquent solid waste management service charges become a lien on the property served?

Your letter of inquiry sets forth the factual background for your request. On November 2, 1976, the voters in the City of Butte and the County of Silver Bow approved consolidation of the city and county under a charter form of government with self-government powers. Prior to consolidation the County of Silver Bow had provided solid waste disposal services through garbage and ash collection districts, and the City of Butte had provided such services to the city residents, using the county landfills. The consolidated city-county has continued to provide solid waste disposal services and is currently undertaking the establishment of a new landfill facility that will meet state and federal requirements. The city-county has enacted an ordinance establishing standards and regulations for the use of the new facility and providing a system of fees and charges for the facility. In order to secure financing for the landfill facility, it is necessary for the city-county to have in place an enforceable system of collecting the fees and charges.

Butte-Silver Bow's charter provides that the city-county shall have self-government powers, which are "all powers not prohibited by the Constitution of the State, the laws of the State or this Charter." Consistent with section 7-1-106, MCA, the charter provides that "the powers and authority of this self-government unit shall be liberally construed" and that "[e]very reasonable doubt as to the existence of this government's power shall be resolved in favor of the existence of that power or authority."

Concerning solid waste management, the charter provides as follows:

All existing special improvement districts, lighting districts and garbage collection districts, shall continue to exist and levies for such special services shall continue to be the obligation of the owners of the property beneficially served in said districts, provided that the Council of Commissioners may change the boundaries or abolish garbage districts.

In determining whether a self-government power is authorized, previous opinions from this office have engaged in a three-part analysis:

- 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].

43 Op. Att'y Gen. No. 41 at 130, 132 (1989), citing 37 Op. Att'y Gen. No. 68 at 272, 274 (1977).

Consideration of the first factor does not suggest any reason why Butte-Silver Bow would not be authorized to enact the proposed ordinance. The city-county has reserved the full spectrum of self-governmental powers permitted by law, and I am aware of no provision in the charter which would limit the commissioners' authority to enact such an ordinance. The charter expressly authorizes the city-county to provide solid waste management services, to charge the owners of the properties beneficially served, and to change or abolish the districts which were carried over to the consolidated city-county government. There would be no apparent constitutional ramifications of the proposed ordinance unless its enactment amounts to the exercise of a power prohibited by law. Mont. Const. Art. XI, § 6.

The second factor 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. As noted in 43 Op. Att'y Gen. No. 41, 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 collection of solid waste management service charges has not been committed to a state agency and does not present such a statewide concern, even though the construction and management of a solid waste landfill may be subject to both federal and state regulation. Similarly, section 7-1-114, MCA, does not prohibit enactment of the proposed ordinance. I agree that subsection (f) of that statute does not apply inasmuch as state law does not direct or require a local government to provide solid waste management services. See Clopton v. Madison County Commission, 216 Mont. 335, 701 P.2d 347 (1985); 43 Op. Att'y Gen. No. 1 at 1 (1989).

The third factor of the analysis concerns section 7-1-113, MCA, which prohibits a self-governing local government from exercising any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control. Stated conversely, this statute "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. 53 at 184, 186-87 (1990), citing 43 Op. Att'y Gen. No. 41 (1989) (emphasis in original).

In this instance, the proposed ordinance is neither inconsistent with state law nor concerned with an area affirmatively subjected by law to state control. Subsection (2) of section 7-1-113, MCA, states that the exercise of a power is inconsistent with state law "if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation." Here the proposed ordinance would treat delinquent service charges in the same manner as such charges are presently treated where incurred by property owners in solid waste management districts. Section 7-13-233(5), MCA, provides that "[i]f not paid, the service charge [established pursuant to section 7-13-231, MCA, to defray the cost of maintenance and operation of a solid waste management district] becomes delinquent and becomes a lien on the property, subject to the same penalties and the same rate of interest as property taxes." See 40 Op. Att'y Gen. No. 45 at 180 (1984). The proposed ordinance would do no more than provide the city-county with the same remedy for collecting delinquent service charges as is now available to a solid waste management district.

Under section 7-1-113(3), MCA, 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." You correctly observe in your letter that state law does not vest any state officer or agency with enforcement or regulatory authority concerning the collection of delinquent service charges. Applying the statutory definition to the facts presented in your letter, I have concluded that the collection of such charges is not an area affirmatively subjected to state control.

I agree that 40 Op. Att'y Gen. No. 7 (1983) does not apply to a self-governing local government and would not prohibit the enactment of the proposed ordinance. The city-county of Butte-Silver Bow may properly rely upon the previously cited opinions from this office and the Montana Supreme Court's decisions in such cases as D & F Sanitation Service v. City of Billings, 219 Mont. 437, 713 P.2d 977 (1986), in concluding that it may enact an ordinance providing that delinquent solid waste management service charges become a lien on the property served.

THEREFORE, IT IS MY OPINION:

A local government with self-governing powers may enact an ordinance which provides that delinquent solid waste management service charges become a lien on the property served.

Sincerely,

MARC RACICOT
Attorney General