

Franchising

TO: John Lawton, City Manager
& City Commissioners
FROM: David V. Gliko, City Attorney
DATE: November 17, 1999
SUBJECT: Franchising Waste Haulers

You have requested legal authority for the imposition of a franchise on waste haulers in the City.

Municipalities may grant a franchise by ordinance. 7-1-4123, (8), MCA. An exclusive franchise may not be granted without a vote of the electorate. 7-5-4321, MCA.

In Montana, a franchise has been defined as a "special privilege conferred by the government on an individual which does not belong to the citizens generally." *D&F Sanitation v. Billings*, 219 Mont. 437, 441; *Glodt v. City of Missoula*, 121 Mont. 178. A franchise for waste haulers would grant a privilege of using city streets for business transportation purposes. Defining a class for "special privilege" would require very careful drafting - see 4 below.

Notwithstanding the bare statute authorizing municipalities to enact franchises, legal obstacles appear:

1. The law has always been and most recently repeated in *State Department of Highways v. Helena*, 193 Mont. 441 (1981):

The state has ownership and control of all city streets in Montana, and if the state chooses to delegate authority to the city to control its streets, the city becomes a trustee thereof.

2. "Garbage disposal service operators are required to get a certificate of public convenience and necessity issued by the PSC prior to doing business. Section 69-12-314, MCA. The certificate grants the carriers the right to operate their businesses upon the public streets." *Barney v. Board of Railroad Commissioners* (1932), 93 Mont. 115; *D&F Sanitation v. Billings* (1986), 219 Mont. 437, 446.
3. 7-1-111, MCA, provides: "A local government unit with self-government powers is prohibited from exercising the following: . . . (4) any power that prohibits the grant or denial of a certificate of public convenience and necessity." Obviously, the grant or denial of a franchise might be said to interfere with the state issuance of a certificate of public convenience.
4. Montana Constitution, Article II, Section IV, provides: "No person shall be denied the equal protection of the law." Question: Does requiring a franchise for "waste haulers" as opposed to other vehicular users of city streets violate the equal protection clause? Such an issue involves a determination of whether a classification is legally permissible and if the classification is reasonable. The test is whether the classification is rationally related to a legitimate governmental interest. *Tipco Corporation, Inc. v. Billings*, 197 Mont. 339, 345. In our case, facts would have to be identified setting apart the "waste haulers" as a class reasonably distinguished for special treatment as opposed to all other vehicular haulers of similar gross vehicle weight, size, etc.
5. Since the Montana Court has ruled that the holder of a certificate of public convenience grants the hauler a right to operate their business upon public streets, a municipal franchise requirement may raise an issue of a denial of a property right without due process of law guaranteed by Article II, Section 17 of the Montana Constitution.

I am not aware of a similar franchise having been enacted by any municipality in Montana and given the weight of legal authority cited above, I believe it is indicative of a doubtful expectation of surviving a legal test. Should the city enact such a franchising ordinance, I would expect a legal test, i.e. a declaratory judgment action, would be immediate and prudent for all parties before legal interests are abused and liability incurred.

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