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Revenue and Transportation Interim Committee

60th Montana Legislature

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TO: Revenue and Transportation Interim Committee

FROM: Lee Heiman, Staff Attorney

RE: Rulemaking Authority of Department of Revenue for Tax Increment Finance Districts

Question

Whether the Department of Revenue has rulemaking authority in regard to local districts using tax increment financing provisions.

Conclusion

The Department of Revenue has rulemaking authority in relation to the property tax operation of tax increment financing, but not in the creation or administration of the local government districts that utilize tax increment financing.

Background

Tax increment financing is a method of financing particular types of districts by freezing a base taxable value of property in the district at the time of creation. For the life of the district, property taxes levied on the base value are distributed as are all other property tax collections (to schools, state, cities, counties, districts, etc.), and all of the revenue from the value in excess of the base value is distributed to the district. Tax increment financing was originally used for urban renewal districts. The concept was that there was a specified blighted area that had a declining tax base. If you established a tax increment district to remove the blight and facilitate improvements, the taxable value would increase to cover the expenses that were incurred for the improvement. Although the traditional taxing entities would not immediately benefit from the increased taxable value, at least they didn't continue to lose revenue because the area stopped declining in value. Tax increments have a limited lifetime, and when they terminate, the collections from the entire property tax value is distributed like all other property taxes.

An urban renewal district is just one type of district that can use tax increment financing. Montana law also allows tax increment financing for industrial districts, technology districts, and aerospace transportation and technology districts. Only a municipality may establish an urban renewal district; the other districts may be established by municipalities and counties. The creation of urban renewal districts was authorized by law prior to the creation of tax increment

financing, and the municipality operating an urban renewal district had, and continues to have, broad powers for funding the district, including appropriating municipal funds and issuing revenue bonds. Industrial districts, technology districts, and aerospace transportation and technology districts were created by legislation fairly recently primarily to take advantage of tax increment financing to provide infrastructure for economic development.

Tax increment financing is a nontraditional method of using property taxes. Under Article VIII, section 3, property taxes are to be administered by the state. Section 15-1-201(1)(a), MCA, reads:

> The department has general supervision over the administration of the assessment and tax laws of the state, except Title 15, chapters 70 and 71, and over any officers of municipal corporations having any duties to perform under the laws of this state relating to taxation to the end that all assessments of property are made relatively just and equal, at true value, and in substantial compliance with law. The department may make rules to supervise the administration of all revenue laws of the state and assist in their enforcement.

Section 2-4-305, MCA, concerning the requisites for an administrative rule, provides that a rule must include a citation to the specific grant of rulemaking authority pursuant to which the rule or any part of a rule is adopted and a citation to the specific section or sections that the rule purports to implement.

Discussion

This opinion relates to rulemaking authority of the Department of Revenue related to tax increment financing. The opinion is not relevant to general duties of the Department relating to tax matters. Rules are defined as an "agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency". An agency often must act under its constitutional and statutory duties in a manner that does not involve rulemaking.

The Department of Revenue has the constitutional and statutory duty to administer the property tax system for the state. In the tax increment financing provisions, sections 7-15-4281 through 7-15-4294, MCA, the Department is specifically involved with tax increment financing in four MCA sections: 7-15-4284 (filing of plan), 7-15-4285 (relating to property values), 7-15-4293 (adjustment of base), and 7-15-4294 (assessment agreements).

The Department is not mentioned in relation to the creation or administration of urban renewal districts, industrial districts, technology districts, or aerospace transportation and technology districts. This makes sense because the districts are created by local governments and may take advantage of funding opportunities that have nothing to do with taxes, such as donations, revenue bonds, direct appropriations, or federal grants. There is no general or specific authority granted to the Department to regulate local government districts.

Section 15-1-201, MCA, grants the Department general rulemaking power under it's

constitutional duty to administer state property taxation to adopt rules, subject to the Montana Administrative Procedure Act, relating to the tax provisions of tax increment financing.

Appendix of Constitutional and selected MCA Sections.

Montana Constitution, Article VIII, Section 3. Property tax administration. The state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law.

2-4-305. Requisites for validity -- authority and statement of reasons. (1) The agency shall fully consider written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement the reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is printed in the register, the differences must be described in the statement of reasons for and against agency action. When written or oral submissions have not been received, an agency may omit the statement of reasons.

(2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference must clearly indicate the portion of the language that is statutory and the portion that is an amplification of the language.

(3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that the rule purports to implement. A substantive rule may not be proposed or adopted unless:

(a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules; or

(b) the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends.

(4) Each rule that is proposed and adopted by an agency and that implements a policy of a governing board or commission must include a citation to and description of the policy implemented. Each agency rule implementing a policy and the policy itself must be based on legal authority and otherwise comply with the requisites for validity of rules established by this chapter.

(5) To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

(6) Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption, amendment, or repeal of a rule is not valid or effective unless it is:

(a) consistent and not in conflict with the statute; and

(b) reasonably necessary to effectuate the purpose of the statute. A statute mandating that the agency adopt rules establishes the necessity for rules but does not, standing alone,

constitute reasonable necessity for a rule. The agency shall also address the reasonableness component of the reasonable necessity requirement by, as indicated in 2-4-302(1) and subsection (1) of this section, stating the principal reasons and the rationale for its intended action and for the particular approach that it takes in complying with the mandate to adopt rules. Subject to the provisions of subsection (8), reasonable necessity must be clearly and thoroughly demonstrated for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking and in the written and oral data, views, comments, or testimony submitted by the public or the agency and considered by the agency. A statement that merely explains what the rule provides is not a statement of the reasonable necessity for the rule.

(7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section and unless notice of adoption of the rule is published within 6 months of the publishing of notice of the proposed rule. If an amended or supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with reference to the latest notice in all cases.

(8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies in citations of authority for rules and in citations of sections implemented by rules. An agency may use an amended proposal notice but, except for clerical corrections, may not use the adoption notice to correct deficiencies in a statement of reasonable necessity.

(9) If a majority of the members of the appropriate administrative rule review committee notify the committee presiding officer that those members object to a notice of proposed rulemaking, the committee shall notify the agency in writing that the committee objects to the proposal notice and will address the objections at the next committee meeting. Following notice by the committee to the agency, the proposal notice may not be adopted until publication of the last issue of the register that is published before expiration of the 6-month period during which the adoption notice must be published, unless prior to that time, the committee meets and does not make the same objection. A copy of the committee's notification to the agency must be included in the committee's records.

7-15-4281. Financial authority in connection with urban renewal. (1) A municipality shall have power to:

(a) borrow money and apply for and accept advances, loans, grants, contributions, and any other form of financial assistance for the purposes of this part and enter into and carry out contracts in connection with the financial assistance from:

(i) the federal government;

(ii) the state, a county, or any other public body; or

(iii) any sources, public or private;

(b) (i) appropriate funds and make expenditures as may be necessary to carry out the purposes of this part; and

(ii) subject to 15-10-420 and in accordance with state law, levy taxes and assessments for the purposes of this part;

(c) invest any urban renewal project funds held in reserves or sinking funds or any funds that are not required for immediate disbursement in property or securities in which mutual savings banks may legally invest funds subject to their control;

(d) adopt, in accordance with state law, annual budgets for the operation of an urban renewal agency, department, or office vested with urban renewal project powers under 7-15-4231;

(e) enter, in accordance with state law, into agreements, which may extend over any period, with agencies or departments vested with urban renewal project powers under 7-15-4231 respecting action to be taken by the municipality pursuant to any of the powers granted by part 43 or this part;

(f) close, vacate, plan, or replan streets, roads, sidewalks, ways, or other places and plan or replan, zone or rezone any part of the municipality in accordance with state law.

(2) A municipality may include in any application or contract for financial assistance with the federal government for an urban renewal project the conditions imposed pursuant to federal laws that the municipality may consider reasonable and appropriate and that are not inconsistent with the purposes of part 43 and this part.

7-15-4282. Authorization for tax increment financing. Any urban renewal plan, as defined in 7-15-4206, industrial district ordinance, adopted pursuant to 7-15-4299, or technology district ordinance, adopted pursuant to 7-15-4295, may contain a provision or be amended to contain a provision for the segregation and application of tax increments, as provided in 7-15-4282 through 7-15-4292.

7-15-4284. Filing of tax increment provisions plan or district ordinance. (1) The clerk of the municipality shall file a certified copy of each urban renewal plan, industrial district ordinance, or technology district ordinance or an amendment to any of them containing a tax increment provision with the department of revenue.

(2) A certified copy of each plan, ordinance, or amendment must also be filed with the clerk or other appropriate officer of each of the affected taxing bodies.

7-15-4299. Industrial districts. (1) A local governing body, by ordinance and following a public hearing, may authorize the creation of an industrial district for industrial infrastructure development projects if the proposed industrial district:

(a) consists of a continuous area with an accurately described boundary;

(b) is zoned for light or heavy industrial use in accordance with the area growth policy document;

(c) does not include any property included within an existing urban renewal area district created pursuant to this part;

(d) is found to be deficient in infrastructure improvements for industrial development; and

(e) has as its purpose the development of infrastructure to encourage the growth and retention of secondary, value-adding industries.

(2) An industrial district may use tax increment financing pursuant to the provisions of 7-15-4282 through 7-15-4293.

15-1-201. Administration of revenue laws. (1) (a) The department has general supervision over the administration of the assessment and tax laws of the state, except Title 15,

chapters 70 and 71, and over any officers of municipal corporations having any duties to perform under the laws of this state relating to taxation to the end that all assessments of property are made relatively just and equal, at true value, and in substantial compliance with law. The department may make rules to supervise the administration of all revenue laws of the state and assist in their enforcement.

(b) In the administration of any tax over which it has general supervision, the department may require all individuals subject to the tax laws of the state to provide to the department the individual's social security number, federal employee identification number, or taxpayer identification number.

(c) The department may contract with the U.S. department of the interior or any other federal agency to perform federal royalty audits, collection services, and any other delegable functions related to mining operations on federal lands within the state pursuant to the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996.

(d) The department shall adopt rules specifying which types of property within the several classes are considered comparable property as defined in 15-1-101.

(e) The department shall also adopt rules for determining the value-weighted mean sales assessment ratio for all commercial and industrial real property and improvements.

(2) The department shall confer with, advise, and direct officers of municipal corporations concerning their duties, with respect to taxation, under the laws of the state.

(3) The department shall collect annually from the proper officers of the municipal corporations information, in a form prescribed by the department, about the assessment of property, collection of taxes, receipts from licenses and other sources, expenditure of public funds for all purposes, and other information as may be necessary and helpful in the work of the department. It is the duty of all public officers to fill out properly and return promptly to the department all forms and to aid the department in its work. The department shall examine the records of all municipal corporations for purposes considered necessary or helpful.