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Montana Legislative Services Divisi
Legal Services Office

TO: Education and Local Government Committee
FROM: Helen Thigpen, Staff Attorney
DATE: January 12, 2012
RE: Local Government Authority to Charge Accident Response Fees

Summary

This memo provides a general description of accident response fees and analyzes whether local governments or other local entities in Montana have the authority to charge accident response fees when state law does not specifically authorize such fees. Based on a review of current law provided below, local governments with self-governing powers likely have the authority to create, administer, and enforce accident response fees within their jurisdictions. Local governments with general powers, however, likely do not have the authority to charge accident response fees. Governments with general powers have only those powers that are provided or implied by law. Because state law has not authorized local governments with general powers or other local entities, such as fire districts, to charge accident response fees, it is unlikely that this authority exists.

Background

Accident response fees, also known as an emergency response fees or crash taxes, are fees imposed on drivers involved in an automobile accident and are designed to help defray the cost of providing fire, police, or other emergency services, including personnel, equipment, and supplies, to the scene of an accident. Accident response fees have become more common in recent years as local governments and other local entities, such as fire districts, seek to recover costs associated with providing emergency services.[1]

Accident response fees vary across communities and jurisdictions throughout the country.[2] For example, some communities impose a fee on nonresidents under the premise that nonresidents do not provide property tax revenue to fund local emergency services. Some fees are imposed only on the party deemed responsible for causing the accident while others apply uniformly to all individuals involved in the accident regardless of fault or residency. As these fees have become more common, scrutiny of the fees has intensified.[3] Some argue the fees take the wrong approach and undermine more stable forms of funding emergency services through property taxes. Others note that there are often third parties who collect accident response fees on behalf

[1] *See* "Cities and Counties Charging 'Accident Response' Fees to Drivers and Insurers," The Florida Senate, Committee on Insurance and Banking, Issue Brief 2009-303, October 2008; *see also* Mark Lafisher, "Crash taxes growing in popularity among cash-strapped California cities," LA Times, December 30, 2010.

[2] *See* The Florida Senate Issue Brief 2009-303, page 2.

[3] *See* "Say 'No' to double taxation and higher insurance premiums," Property Casualty Insurers Association of America, 2010; *see also,* California CrashTax.com for a summary of arguments against accident response fees in California.

of the local community – typically from the driver's insurance provider who may or may not cover the fee.

In the face of this scrutiny, several states have moved to ban accident response fees. Florida, for example, bans counties from imposing a fee or seeking reimbursement for costs incurred by first responders, although costs for transporting or treating patients by ambulance and for cleaning up hazardous materials are recoverable. Fla. Stat. § 125.01045 and 166.0446 (2011). Missouri's ban is broader and provides that "no person or entity shall impose an accident response service fee on or from an insurance company, the driver or owner of a motor vehicle, or any other person." Mo. Rev. Stat. § 374.055 (2011). Legal challenges have also been initiated against accident response fees. In general, those challenging the fees argue that they constitute a form of taxation that is not authorized by state law.

At the same time, other jurisdictions continue to utilize accident response fees to help defray the cost of providing emergency services. Several communities in California, including Riverside County, utilize accident response fees. The ordinance passed in Riverside County charges at-fault drivers a fee equal to 13 percent of the cost of having emergency personnel respond to the scene of an accident.[4]

Montana has not enacted legislation that specifically authorizes or bans accident response fees, though both options have been brought before the Legislature. In 2011, legislation was introduced by Representative Arntzen to ban accident fees in Montana. House Bill No. 400 (2011) would have prohibited a county, consolidated city-county, or municipality from imposing fees for certain emergency services provided in response to a motor vehicle accident. The bill made an exception for fees associated with the clean up of hazardous materials or for ambulance services. Proponents of the bill argued that accident response fees would circumvent local governments' responsibility to provide emergency response services and that the fees constituted a form of double taxation. Proponents of the bill also voiced concern that the fees would lead to overall increases in automobile insurance rates. Opponents of the bill, largely representing the emergency response community, noted that the fees provided compensation for emergency services that may not otherwise be provided. HB 400 was tabled in the House Local Government Committee.

Taking the opposite approach, legislation was introduced in 2007 to allow a board of county commissioners or the trustees of a rural fire district to charge fees for emergency services. Senate Bill No. 438 (2007) would have required the fees to be commensurate with the cost of the emergency services provided. SB 438 was tabled in the Senate Local Government Committee.

At the local level, some jurisdictions have considered and adopted accident response fees. In early 2011, for example, the Polson Rural Fire Board approved fees for responding to accidents

[4] *See* http://riversideca.gov/municode/pdf/09/9-60.pdf

and other emergency incidents.[5] The fees are charged to drivers who are deemed responsible for causing the accident and range from $500 for less than 1 hour at the scene to $1,750 for extrication and more than 1 hour at the scene, depending on the services and equipment that are provided. A lawsuit challenging the legality of the Board's action to charge accident response fees has been initiated by a resident of the Polson area and alleges that the resolution passed by the Polson Rural Fire Board is unconstitutional.

Analysis

The question of whether local governments and entities such as fire districts may utilize accident response fees is unclear and has not been definitively answered by the Legislature or courts in Montana. Because Montana law does not specifically authorize local entities to charge accident response fees, the answer hinges on whether the local community is vested with self-governing or general powers. Communities with self-governing powers may exercise any power not prohibited by the Montana Constitution, state law, or the community's own charter. Courts broadly construe self-governing powers and resolve any doubt in favor of self-governing authority. Section 7-1-106, MCA; Mont. Const. Art. XI, § 6.

While this authority is broad, there are limits on self-governing powers. State law denies self-governing communities certain powers and requires the other powers to be delegated to the community by the state. Section 7-1-112, MCA, for example, provides that a local government with self-governing powers is prohibited from authorizing a tax on income or the sale of goods or services (sales tax), regulating beyond its borders, or regulating any form of gambling. Self-governing communities are also prohibited 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." Section 7-1-113(1), MCA. A power is inconsistent with state law it if sets lower or less stringent standards than those imposed by the state. Section 7-1-113(2), MCA.

Local governments with general powers have less authority to take certain actions. The Montana Constitution provides that communities with general powers have only those powers that are provided or implied by law. Municipal powers are set forth in 7-1-4124, MCA, which, among other things, authorizes municipalities to "exercise powers not inconsistent with law necessary for effective administration of authorized services and functions." The authority of counties to regulate appears to be more limited than municipalities. However, it is clear that a county may levy and collect taxes for public or governmental purposes unless otherwise prohibited by law. Section 7-1-2103, MCA.

Emergency response fees are not specifically prohibited by Montana law, and the power to enact emergency response fees does not fall within the category of powers that must be delegated to local governments. Because emergency response fees are not specifically prohibited by state law

[5] *See* Polson Rural Fire District Trustee minutes, January 20, 2011, available at: http://www.polsonfire.org/minutes.html; *See* also Sasha Goldstein, "Fire Board Passes Response Fee," The Missoulian, January 20, 2011.

and because all doubt must be resolved in favor of self-governing authority, self-governing entities most likely have the authority to charge drivers a fee for responding to accidents with emergency services and personnel. Currently the majority of municipalities are vested with self-governing powers, while only two counties are self-governing: Fergus County and Butte-Silver Bow County.

Any fee enacted as an emergency response fee must be reasonable and related to the cost of the service. The Local Government Budget Act, 7-6-4001 through 7-6-4036, MCA, provides that if a local government has the authority to charge a fee for service, the fee must be "reasonable and related to the cost of providing the service." Section 7-6-4013, MCA. In addition, the governing body of the local government proposing to enact an emergency response fee must hold a hearing and establish the fees by resolution.

Nevertheless, there may be a relevant legal distinction between whether the charge is considered a fee or a tax. Opponents of accident response fees may argue that the fee is akin to a tax, which could limit whether a self-governing community may enact an accident response fee. As noted above, a local government with self-governing powers is prohibited from taxing income or the sale of goods or services. Section 7-1-112(1), MCA. However, not all charges imposed by a local government may be considered a tax. According to the Montana Supreme Court [a] tax is levied for the general public good, and without special regard to the benefit conferred upon the individual or property subject thereto . . . " *Lechner v. City of Billings*, 244 Mont. 195, 207, 797 P.2d 191, 199 (1990).

A fee is usually not considered a tax if it is used primarily as a tool of regulation and not to raise revenue. In a decision addressing system development fees used to fund the cost of the expansion of water and sewer systems, the Montana Supreme Court noted that fees are not taxes if "they are not placed in a general revenue fund; and there is a reasonable relationship between the fees and the uses to which they are put." *Lechner*, 244 Mont. at 208, 797 P.2d at 199. In that decision, the Court upheld the system development fees in part because the fees were imposed to benefit new sewer and water users and were earmarked for expanding those water and sewer systems for future needs.

The Court reached the opposite decision in an earlier case that addressed whether the City of Billings could charge a daily occupancy fee to hotel and motel guests. In *Montana Innkeepers Assoc. v. City of Billings*, 206 Mont. 425, 671 P.2d 21 (1983), the Court concluded that the occupancy fee imposed by the city amounted to an illegal sales tax on lodging because the fee was not tied to a regulatory function of the City. More recently, in 2003, the Court reaffirmed the rule that "if charges are primarily to raise money, they are taxes. If the charges are primarily tools of regulation, they are not taxes." *Montana-Dakota Utilities Co. v. City of Billings*, 2003 MT 332, ¶ 25, 318 Mont. 407, ¶ 25, 80 P.3d 1247, ¶ 25.

Applying these principles to the current question, an accident response fee will likely be upheld in the context of a self-governing community as long as it is tied to a regulatory function of the

government and is not intended to generally raise revenue. As in the decisions referenced above, an accident response fee must bear a reasonable relationship to the cost of providing the emergency service. In addition, any funds received from the collection of the fees should not be placed in a general revenue account.

Local governments with general powers, however, likely do not have the authority to charge accident response fees. Unlike governments with self -governing powers, local governments with general powers have only those powers provided or implied by law. State law has not specifically authorized those governments or other local entities, such as fire districts, to charge accident response fees. Although it is difficult to predict how a court would rule on the question, it appears unlikely that a court would conclude that a local government with general powers could adopt accident response fees for the cost of providing emergency services.

A court could reach the same conclusion when assessing the authority of other local entities such as rural fire districts to charge accident response fees. Rural fire districts are authorized by state law and may be established by a board of county commissioners or upon petition of the owners of real property in the district. Section 7-33-2101, MCA. Through a contract, a city or town or other entity may furnish fire protection services to properties within the district or the board of county commissioners may appoint trustees to manage the district. Section 7-33-2104, MCA.

The powers of rural fire district trustees are set forth in 7-33-2105, MCA. Among other things, district trustees are authorized to prepare annual budgets and request special levies, enter into contracts, secure financing, and appoint and form fire companies. The authority to enact fees for responding to emergencies does not appear and, therefore, a court may conclude that the power to enact the fees has not been authorized by state law and cannot be implied from the districts' duties and responsibilities.

Conclusion

Because emergency response fees are not specifically prohibited by state law, local governments with self-governing powers may have the authority to charge drivers a fee for responding to accidents with emergency services. Nevertheless, there may be a relevant legal distinction between whether the charge is considered a fee or a tax. A court could conclude that an accident response fee is akin to an unlawful tax on services and is invalid under state law. Local governments with general powers, however, likely do not have the authority to charge an accident response fee. Unlike governments with self-governing powers, local governments with general powers have only those powers provided or implied by law. State law has not specifically authorized local governments with general powers or other local entities, such as fire districts, to charge accident response fees, and it is unlikely that this authority exists.

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