March 27, 2014

HAND-DELIVERED

Mayor & Commissioners
City of Bozeman
121 North Rouse Ave.
Bozeman, MT 59715

Re: Your Consideration of Proposed Non-Discrimination Ordinance

Dear Mayor, Deputy Mayor & Commissioners:

I am writing at this time to express some very serious legal concerns I have with your potential enactment of the proposed non-discrimination ordinance (NDO). I have thoroughly reviewed applicable state law, relevant case law, and the draft ordinance, itself. Even putting aside the inescapably related issue of its probable infringement on certain closely-held, constitutionally-protected rights and, most notably, the free exercise of religious beliefs, it is my sincere and considered opinion that its passage, in any form, would be ill-advised and essentially unlawful.

My analysis is based on two distinct, but inseparably interrelated, fundamental concepts: (1) that the entire field of anti-discrimination regulation of this nature is clearly a matter of statewide concern preempted by, and exclusively reserved to, state law and the State Legislature, and (2) that a municipality, such as the City of Bozeman, also would be acting well beyond the scope of its recognized legal authority in attempting to create new avenues of legal redress in the process. The fact that other sister cities (Missoula, Helena and Butte) may have acted hastily in their respective passage of similar ordinances would not, of course, warrant or justify Bozeman heading down this same path.

Summary

It is my understanding that you are under a considerable amount of pressure from the ACLU to enact the NDO and, as so often happens in these cases, this kind of unrelenting lobbying effort is unsurprising. In any event, I did have an opportunity to review a previous opinion letter from the ACLU's Montana Public Policy Director addressed to the issue of potential state preemption of a similar local ordinance seeking to regulate discrimination based on sexual orientation and gender identity. The essence of the ACLU's contention in this regard is as follows:

> "The local ordinance is creating a separate scheme, with its own violations, enforcement mechanism, and remedy, thereby not implicating the [Montana Human Rights Act] or state constitution."

Not only does this contention beg the issue, but the conclusion is patently mistaken. It also bears mentioning that the Montana Supreme Court case upon which the ACLU apparently relies for support of this proposition, *American Cancer Society v. State,* 100 P. 3d 1085 (2004), dealt with the right of a locality to enact an anti-smoking ordinance for buildings open to the general public, and whether the state legislature could thereafter validly enact a bill to exempt and/or surcharge certain local establishments. Consequently, it is easily distinguishable in its facts and analysis. However, to the extent *American Cancer Society* may have any application to the present controversy, it would stand in stark opposition to, rather than in support of, passage of the NDO.

Apart from acknowledging that the Legislature can effect a prohibition of the enactment of a city ordinance through express prohibitory language, the Court's opinion in *American Cancer Society* further observed:

> "Alternatively, a legislative prohibition can arise through a direct inconsistency between a state legislative act and the legislation of a self-governing unit. For example, the City of Billings could not supersede the state statutory requirement that charges against a suspended firefighter must be presented to the city council for a hearing." Id. at 1089, ¶14. (citation omitted)

Additionally, the Court in *American Cancer Society* underscored:

> "The Legislature has very clearly delineated fourteen powers that self-governing municipalities are 'prohibited' from exercising. Section 7-1-111, MCA. It has also set forth five specific powers that local governments with self-government powers are 'prohibited' from exercising 'unless the power is specifically delegated by law. ...' Section 7-1-112, MCA. Together, these two statutes constitute prohibition through express statutory language." Id. at ¶16.

In relevant part, §7-1-111, MCA, expressly prohibits a self-governing city, such as Bozemen, from exercising "(1) any power that applies to or affects any private civil relationship, except incident to the exercise of an independent self-government power." Section 7-1-112, MCA, expressly provides that among those powers requiring a legislative delegation is "(4) the power to exercise any judicial function, except as incident to the exercise of an independent self-government administrative power." Clearly, either, or both, of these statutes would invalidate the NDO being urged by the ACLU, and currently under consideration by Bozeman – not to mention those similar ordinances already enacted elsewhere.

It seems beyond cavil that the Montana State Legislature has signified its intent to preempt, and control, virtually the entire field of discrimination law on a uniform, statewide basis, and thereby avoid what already has occurred in the cities of Missoula, Helena and Butte – piecemeal, and conflicting, legislation at the local level. This intent to legislate within, and thereby effectively preempt the field of anti-discrimination law, is clearly manifested in the relevant provision of the Montana Human Rights Act (MHRA), §49-2-512(1), MCA, which requires that the pursuit of any discrimination-based claim first comply with, and exhaust, clearly delineated administrative procedures through the Montana Human Rights Bureau, as a prerequisite to filing an appropriate action, if at all, in *district* court. This section expressly provides:

> The provisions of this chapter establish the *exclusive remedy* for acts constituting an alleged violation of Chapter 3 or this Chapter, *including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, Section 4, of the Montana Constitution* or 49-1-102. *A claim* or request for relief based upon the acts *may not be entertained by a district court other than by the procedures specified in this Chapter*. (emphasis added)

In *Harrison v. Chance*, 797 P. 2d 200, 203 (Mont. 1990), the Supreme Court acknowledged that the MHRA provides the exclusive remedy for any acts of alleged discrimination thereunder. Moreover, those few cases in Montana which have urged the consideration of the sexual orientation classification, although arising in different contexts, have maintained that any potential right to protection thereunder would necessarily come, if at all, within the meaning of Article II, Section 4. Therefore, given the plain language of this statute, it is apparent that the Legislature fully intended to reserve to itself the authority to regulate the entire field of discrimination law on a statewide basis, and the potential inclusion of this classification has been considered, but thus far rejected, at the State level. Consequently, because of the prospect of conflicting policies, operational effect and the need for uniformity, the State scheme is so pervasive that it was intended to exclusively occupy the field and thereby precludes the co-existence of municipal regulation. A number of courts in other jurisdictions, which have addressed similar issues, have invalidated municipal incursion into such matters of statewide concern.

For example, in *Lilly v. City of Minneapolis*, 527 N.W. 2d 107 (Minn. App. 1995), rev den. (1995), a concerned resident and taxpayer sought a restraining order to enjoin the city from implementing a local resolution to grant insurance benefits to an expansive list of relatives, and same sex domestic partners, not defined as "dependents" in a corresponding state statute. Following a hearing, the district court determined that the city's resolutions were *ultra vires* under Minnesota law, and that providing such coverage for same sex domestic partners contravened a countervailing state public policy and, therefore, violated state law. The court thereafter granted the plaintiff's motion for a declaratory/summary judgment, as well as a

permanent injunction. In upholding the rulings of the district court, the appellate court disregarded the city's claim (which essentially mirrors that of the ACLU) that in "matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld." (527 N.W. 2d at 111) In rejecting this argument, the court in *Lilly* observed in relevant part:

> "A municipality has no inherent powers, but only such powers as are expressly conferred by statute or are implied as necessary in aid of those powers which are expressly conferred. ... [I]f a matter presents a statewide problem, the implied necessary powers of a municipality to regulate are narrowly construed unless the legislature has expressly provided otherwise." (citations omitted) Id.

Most importantly, however, the court in *Lilly* further underscored that "the city's actions also concern the statewide problem of discrimination. This court has previously held that discrimination is a statewide concern and therefore, the authority of the city of Minneapolis to combat discrimination must be narrowly construed." Id., citing *City of Minneapolis Comm'n on Civil Rights v. University of Minn.*, 356 N.W. 2d 841, at 843 (Minn. App. 1984). Consequently, the court in *Lilly* concluded:

> "*A home rule charter city is exactly that – 'home rule' on matters of a purely local nature.* A home rule city may not exceed statutory authority by its mere fiat as was done here. ... when the legislature by clear definition has made the subject matter one of statewide concern and has defined who may receive such benefits, [since] *discrimination, as well as the definition of family relationships and dependent status, are statewide concerns."* (Id. at 113) (emphasis added)[1]

Similarly, in *McCrory Corp. v. Fowler,* 570 A. 2d 834, at 838 (Md. 1990), the court invalidated a county code because it was not, in reality, a "local law" within the meaning of the state constitution since it purported to authorize a circuit court civil action for damages by any person who had "been subjected to any act of discrimination prohibited under this division ...." The court in *McCrory* also declared that "the creation of new causes of action in the courts has traditionally been done either by the General Assembly or by [the Supreme Court] under its authority to modify the common law" and that the "creation of new judicial remedies has traditionally been done on a statewide basis." Id. Accordingly, the court in *McCrory* concluded that "an ordinance attempting to combat employment discrimination by creating a new private judicial cause of action is not a 'local law' under the ... the Maryland constitution, and thus not within the power of Montgomery County to enact." Id. See also, *Sweeney v. Hartz Mountain Corp.*, 573 A. 2d 32, at 34 (Md. 1990), invalidating a similar county ordinance.

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[1] Moreover, the court in *Lilly* made this determination despite the fact that its legislature had previously included "sexual orientation" within its suspect classifications.

Conversely, in *City of Atlanta v. McKinney*, 454 S.E. 2d 517, 521 (Ga. 1995), the court upheld an aspect of a city's anti-discrimination ordinance, premised on sexual orientation, but only to the extent that it pertained solely to the city's power to implement policies governing its own employees and property, and because the challenged ordinances did not purport to regulate either private employers or public employers other than those employed by the city of Atlanta. On that basis alone, the court in *McKinney* concluded that the ordinances could be construed as reasonable laws "related to the city's own affairs and local government." Id. at 521-22. Importantly, however, a strong, and perhaps better reasoned, concurring and dissenting opinion in *McKinney* noted that Georgia law "recognizes and protects certain classifications of people from discrimination," and concluded in relevant part:

> *"By these general laws, Georgia has clearly entered the field of anti-discrimination law, yet has not included a person's sexual orientation among the proscribed bases of discrimination. Therefore, sexual orientation ordinances, like the registry ordinance, are preempted by the general law of this state*. (citations omitted)
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> The Fair Employment Practices Act of 1978, ... prohibits employment discrimination by the State because of race, color, religion, national origin, sex, handicap, or age. (citation omitted) I agree a municipality may pass a law on the same subject matter which is not inconsistent with the State's version.... In my opinion, however, *an ordinance which protects more classes than does the Fair Employment Practices Act is inconsistent with the Act.* However, even if the sexual orientation ordinances were consistent with the ... Act, the other provisions of general law enumerated above, which apply to the City and private employers as well as the State, preempt the sexual orientation ordinances." Id. at 524-25. (emphasis added)

Also see, *Delaney v. Superior Fast Freight*, 18 Cal. Rptr. 2d 33, at 35-37 (Cal. App. 1993) [holding that a city's attempted ban on sexual orientation discrimination was effectively preempted by a state ban on the very same subject matter]. Similarly, in *Yellow Freight Systems v. Mayor's Comm'n*, 791 S.W. 2d 382 (en banc) (Mo. 1990), the court invalidated a city's attempt to create a new private cause of action as a remedy for discrimination sought to be prohibited by ordinance. Therefore, these courts understandably have resisted the notion that municipalities should be able to create separate substantive law in areas generally reserved to the concept of statewide uniformity. See, e.g., *City of Bloomington v. Chuckney*, 331 N.E. 2d 780, 783 (Ind. App. 1975) ["a city should not be able to enact its own separate law of contracts or domestic relations since these areas are unsuited to less than statewide legislation"].

In *Yellow Freight Systems,* the city of Springfield, a home rule charter city, adopted an ordinance which established a Mayor's Commission on Human Rights (as authorized by state law), but which also purported to create a municipal agency with the power to hear contested

cases of discrimination in employment and housing, and give relief in accordance with its stated purpose. The ordinance further provided that an appeal, or the enforcement of the commission's decision, could be brought in the county circuit court and that the city attorney could bring proceedings in the city's municipal court against anyone allegedly violating the ordinance. An action was initiated by a former employee, after which the commission ordered the defendant-company to reinstate the terminated employee, and awarded her backpay damages. Yellow Freight then sought a judicial declaration that the commission's decision violated provisions of the State Constitution, exceeded statutory authority; exceeded authority granted by the city charter, and requested injunctive relief against the commission. The trial court eventually granted the relief requested by the aggrieved company, after which the City, its Mayor's Commission and the individual plaintiff, appealed. In relevant part, the Missouri Supreme Court observed that "the instant ordinance creates a right and liability which do not exist at common law and prescribes the remedy." (citations omitted) 791 S.W. 2d at 384. The court further observed:

> "A well-established general rule illustrates the basic limitation upon the authority of a city to create a cause of action for recovery by an individual: '[A] municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves.'" (citing 6E. McQuillin, Mun. Corporations, Section 22.01 3rd ed. Rev. 1988)
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> "The State by granting to [the] City the right to adopt and frame a charter for its own government did not confer upon [the] City the right to assume under its charter all of the powers which the State may exercise within the City, but conferred the right to assume those powers incident to it as a municipality." Id. at 385
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> Finally, it is unsurprising that the Missouri Supreme Court concluded:
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> Section 213.030 [of the state statute], in terms similar to §213.020.3, vests the State Commission on Human Rights with the power and duty to "seek to eliminate and prevent discrimination.' Yet, in addition to that phrase, §213.030 expressly grants the State Commission power and authority to hold hearings and pass upon complaints of violation of state law in accordance with [the] procedure prescribed by §213.075. A [local] commission created by virtue of §213.020.3 can seek to eliminate discrimination as an advisory commission. Nothing in subsection 213.020.3 gives every city, town, village or county the power to create a cause of action for the violation of an anti-discrimination ordinance and to create an agency to determine and enforce a violation of that ordinance. The failure of the legislature to include in §213.020.3 an express grant of power to determine violations and make

> awards, such as that deemed necessary in §213.030, establishes its intent that such power is not included in §213.020.3. Id. at 387.

Consequently, if the reasoning of the ACLU – which, unfortunately, was adopted by Bozeman's sister cities – is to be accepted, any political subdivision within this state could, through enactment of ordinances, simply bypass the legislature; effectively influence state jurisprudence regardless of legislative intent, and essentially compel enforcement of its own, albeit conflicting, local procedures. In the process, this clearly and unmistakably would violate the principle of state sovereignty over its political subdivisions – amounting to a patent expansion, and corresponding usurpation, of respective power and authority.

To this end, the district courts in Montana have original jurisdiction in all civil matters at law and in equity, along with criminal and probate jurisdiction under §3-5-302, MCA, as well as appellate jurisdiction from all inferior courts within a given county, under §3-5-303, MCA. Conversely, the jurisdiction of a municipal court is far more limited, including its relative jurisdictional limit (i.e., the amount in controversy cannot exceed $12,000); §3-10-301, MCA. While it is tritely true that municipal courts are said to have exclusive jurisdiction over civil and/or criminal offenses involving the violation of city ordinances, such jurisdiction is, by its very nature, otherwise limited to specified categories of offenses not remotely related to anti-discrimination legislation of this nature. See §§3-11-103(1),(2), MCA.

Therefore, even putting aside the preemption issue as it pertains to the regulation of discrimination law, a local government with self-government powers, such as Bozeman, nevertheless would be usurping the legislative function by attempting to establish and implement civil remedies in its municipal court for *any* type of alleged discrimination since §7-1-111(1), MCA, expressly prohibits the municipality from exercising any power that "applies to or affects any private or civil relationship." Suffice it to say that matters involving housing and employment – areas to which the proposed ordinance purports to apply – are just such private and civil relationships and, not coincidentally, already are regulated under the provisions of the MHRA and otherwise. For example, §7-1-111(13), MCA, clearly prohibits the exercise of any power that would tend to regulate landlords for matters already covered under the Montana Landlord-Tenant Act, Title 70, Chapters 24-25. Of course, these very statutory enactments reflect the relevant preemption holding, as discussed in the Montana Supreme Court's *American Cancer Society* opinion.

Additionally, in seeking to create such a private right of action, and purporting to give any person alleged to have been aggrieved thereunder the right to seek unspecified civil remedies (presumably including damages), Section 1.C. of the proposed ordinance effectively grants the local municipal court broad power to impose "injunctive relief," ... or "other equitable relief" – powers clearly and unequivocally reserved solely to the state district courts or, in the case of the MHRA, to the Department of Labor – and beyond the scope of those powers granted to the

municipal courts. Any such jurisdiction of a municipal court to potentially impose affirmative relief of this nature is, quite clearly, limited to orders of abatement or correction under the municipal infraction statute, §7-1-451(4)(d), MCA. There is no corresponding authority granted under any of the other sections pertaining to municipal court jurisdiction; §§3-6-103, 3-10-301, MCA, or under §3-11-102, MCA, which conceivably empower a municipal court to award or fashion affirmative or equitable relief of this nature.

Finally, §7-1-113, MCA, expressly provides that local governmental powers cannot be "inconsistent" with state law in any area affirmatively subjected to state control. Obviously, this is a legislative mandate respecting the concept of field preemption. As stated above, Title 49 expressly provides that discrimination is "exclusively" within the province of the Montana Human Rights Bureau; the Department of Labor & Industry and, if necessary, the jurisdiction of the district court. While the proposed Bozeman ordinance essentially recognizes, and acknowledges, this fundamental precept, on the one hand, it nevertheless attempts a legal end-run under the auspices that the ordinance would recognize "violations [premised on the sexual orientation and gender identity classification] ... not specifically addressed by Montana State law." ... As stated above, it is clear that the determination of those classes to be protected from discrimination falls squarely within the purview of legislative control, rather than being subject to local control and, of course, the legislature has thus far determined *not* to include sexual orientation and/or gender identity within the suspect categories. Consequently, the omission of this classification has, of course, come after repeated deliberations at the State level, and within the Legislature's exclusive power, thereby obviating the authority of a locality, such as Bozeman (Missoula, Helena, Butte or otherwise), from attempting to regulate or control the same at the local level.

Conclusion

As stated above, this is a very serious matter, warranting the careful evaluation of the City and its Commission.

If called upon to review the potential invalidity of this kind of ordinance, I firmly believe that the Montana District and Supreme Courts would unhesitatingly adopt and follow the reasoning and analysis of the above-referenced body of case law from those other jurisdictions which have dealt with, and squarely addressed, these preemption issues.

Based on all of the above, it is respectfully requested that the Commission resist any urge to overstep its bounds and wade into this area of regulation which, as matter of law, is reserved to our State Legislature. Another factor you may want to consider is the large contingent of local residents who diametrically oppose this measure on other grounds, as well.

Thank you for your time and consideration in this matter and, if you or the City Attorney (to whom a courtesy copy of this correspondence is being provided) would care to discuss these issues, please feel free to contact me at your earliest convenience.

Very Truly Yours,

MICHAEL J. SAN SOUCI

MJSS:mw
cc: Greg Sullivan, Esq.
Chris Kukulski