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**IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY**

TERRY HOUSER, CLAYTON FISCUS,)	
TERRY ODEGARD, MAE WOO,)	Case No. DV 18-0778
THOMAS ZURBUCHEN, KATHRYN)	
ZURBUCHEN, ROGER WEBB, on behalf)	Hon. Greg Pinski
of themselves and all others similarly)	
situated,)	FIRST AMENDED COMPLAINT
)	
Plaintiffs,)	
)	
v.)	
)	
CITY OF BILLINGS,)	
)	
Defendant.)	

COMES NOW PLAINTIFFS Terry Houser, Clayton Fiscus, Terry Odegard, Roger Webb, Mae Woo, Kathryn Zurbuchen, and Thomas Zurbuchen, on behalf of themselves and all others similarly situated, hereby bring this action against the City of Billings and allege as follows:

INTRODUCTION

1. Plaintiffs challenge the unlawful practice of the City of Billings (hereinafter, the “City”) of raising revenue for its general fund by extracting monies from Plaintiffs and other similarly situated persons through the imposition of “franchise fees” for water, sewer services, and garbage disposal services.

2. The City has engaged in a pattern of unlawfully imposing, under the guise of “fees,” taxes on the sale of goods or services, including the unlawful imposition of a hotel occupancy fee (*Montana Innkeepers Assoc. v. City of Billings*, 206 Mont. 425, 671 P.2d 21 (1983)), an illegal “business license fee” (*Brueggemann v. City of Billings*, 221 Mont. 375, 719 P.2d 768 (1986)), and most recently, unlawful “franchise fees” on utilities and other nongovernmental entities using the City’s rights-of-way (*Montana-Dakota Utilities Co. v. City of Billings*, 2003 MT 332, 318 Mont. 407, 80 P.3d 1247).

3. In each of these cases, the Montana Supreme Court struck down the “fees” imposed by the City as an unlawful tax on the sale of goods or services prohibited under Mont. Code Ann. § 7-1-112(1).

4. In *Montana-Dakota Utilities*, the Montana Supreme Court reached the merits -- even though Billings voters had repealed the “franchise fee” at issue prior to the court’s ruling -- in order to send a message to the City and other local governments that taxes enacted in violation of Mont. Code Ann. § 7-1-112(1)

could not survive scrutiny by being labeled as “franchise fees”:

Given the inclination of Montana’s local government leaders to exploit potential new sources of revenue, we anticipate the question of whether the Montana Legislature has checked the power of local governments to charge franchise fees will, in the absence of appellate review, arise again.

Montana-Dakota Utilities, ¶ 10.

5. Despite the Supreme Court’s rulings, the City continues to impose a 4% “franchise fee” upon the City’s rates for water and sewer and a 5% “franchise fee” upon the City’s rates for garbage disposal services.
6. The City imposes so-called “franchise fees” even though there are no franchises involved. The City contracts directly with its utility customers when providing monthly water, sewer services, and garbage disposal services. It does not provide these services through a franchisee.
7. In spite of the absence of any franchise agreements relating to its provision of water, sewer services, and garbage disposal services, in its resolutions, minutes, rate notices, ordinances, regulations, budgets, annual financial statements, website, and other communications the City deliberately mischaracterizes its surcharges on monthly water, sewer, and garbage disposal rates as “franchise fees” and denotes them as such on its monthly invoices sent to every water, sewer, and garbage disposal customer.
8. The City has perpetuated this fiction to conceal the fact that these “franchise fees” are illegal taxes on the sale of goods and services.

9. Several ratepayers and City officials have objected to the “franchise fees” during City Council meetings since the 2003 decision in *Montana-Dakota Utilities*.

10. For example, Plaintiff Clayton Fiscus attended a City Council meeting on February 23, 2004, and objected to the City’s illegal sales tax on water, wastewater, and solid waste disposal services and further stated that the Montana Supreme Court held that “government demand for money for the purpose of raising revenue is a tax.” See Exhibit 1 (Bates Stamp Nos. 594-95).

11. City Councilmember Brown made the same objection during the February 23, 2004 meeting and stated further that when franchise fees go into the general fund, as the fees on monthly water, sewer, and garbage rates do, they are illegal taxes. See Exhibit 1 (Bates Stamp No. 594).

12. At a City Council meeting on April 27, 2005, a citizen named Bruce Simon stated that because proceeds from “franchise fees” are deposited in the general fund, the fees are illegal taxes. See Exhibit 2 (Bates Stamp No. 6993).

13. Mr. Simon repeated his objection to the “franchise fees” being an illegal sales tax during a City Council meeting on April 14, 2008 and expressed his fears that the City would be required to pay it back someday if it was sued. See Exhibit 3.

14. Another City Councilmember, Larry Brewster, told his fellow council members during a City Council meeting on May 22, 2017, that the “franchise fees”

were illegal sales taxes. Exhibit 4.

15. When campaigning for Mayor in October 2017, Bill Cole (now Mayor Cole) had this to say when asked about the legality of the “franchise fees”:

Billings has had a bad track record in the Montana Supreme Court on a lot of fees that have been determined to be taxes and that go beyond their statutory authority, and I think they’ve lost – the City’s lost about four different lawsuits on that question over time....The City has been desperate in the past because it has bucked up against the ’74 general fund charter mill cap and I’m hoping the with the two-year reappraisal and a better economy that there is less pressure to cause them to do that. On that specific issue, I guess if the way you describe it is correct ...and those dollars do not go to the sewer and wastewater treatment – I imagine there’s some debate about that, it’s rarely that clear – but if that’s the case, then yeah, you may be right and we should do something about that.¹

16. City Administrator Bruce McCandless admitted that it was not until Plaintiffs told the City of their intention to sue that the City finally ceased imposing “franchise fees,” at least for now.²

17. Given the City’s intransigence concerning fees that the Montana Supreme Court has invalidated over the past several decades, the City should be enjoined from ever reinstating these “franchise fees.”

18. Additionally, the City should be ordered to refund the illegal taxes it has previously extracted from Plaintiffs and similarly situated persons.

¹ A recording of Mayor Cole’s statements can be found at <<https://www.facebook.com/KULR8News/videos/10154760243476433/>>

² See https://billingsgazette.com/news/government-and-politics/billings-residents-demand-response-possible-repayment-in-lawsuit-over-water/article_daf2b5fb-f9ac-5669-9e98-5b51044a7882.html

PARTIES

19. Plaintiff Terry Houser has resided in Billings, Montana since 1971. She is currently, and since 1971 has been, a consumer of water, sewer, and garbage disposal services provided by the City and has paid the “franchise fees” charged monthly by the City on those goods and services.

20. Plaintiff Clayton Fiscus has resided in Billings, Montana since 1971. He is currently, and since 1976 has been, a consumer of water, sewer, and garbage disposal services provided by the City and has paid the “franchise fees” charged monthly by the City on those goods and services.

21. Plaintiff Terry Odegard has resided in Billings, Montana since 1990. He is currently, and since 1990 has been, a consumer of sewer and garbage disposal services provided by the City and has paid the “franchise fees” charged monthly by the City on those goods and services.

22. Plaintiff Roger Webb has resided in Billings, Montana since 1990. He also owns and operates rental properties in Billings, Montana. He is currently, and since 1990 has been, a consumer of water, sewer, and garbage disposal services provided by the City and has paid the “franchise fees” charged monthly by the City on those goods and services.

23. Plaintiff Mae Woo has resided in the Billings, Montana metropolitan area since 1989. She is currently, and since 2012 has been, a consumer of water, sewer,

and garbage disposal services provided by the City and has paid the “franchise fees” charged monthly by the City on those goods and services.

24. Plaintiff Kathryn Zurbuchen has resided in Billings, Montana since 1946. She is currently, and since 1986 has been a consumer of garbage disposal services and has paid the “franchise fees” charged monthly by the City on those services. She is currently, and since 1990, has been a consumer of sewer services provided by the City and has paid the “franchise fees” charged monthly by the City on those services.

25. Plaintiff Thomas Zurbuchen has resided in Billings, Montana since 1949. He is currently, and since 1986 has been a consumer of garbage disposal services and has paid the “franchise fees” charged monthly by the City on those services. He is currently, and since 2005, has been a consumer of sewer services provided by the City and has paid the “franchise fees” charged monthly by the City on those goods and services.

26. Defendant City of Billings is a self-governed municipality which may exercise only those powers not prohibited by the Constitution or laws of the State of Montana.

JURISDICTION AND VENUE

27. The City violated Mont. Code Ann. § 7-1- 112(1) by imposing illegal taxes on the sale of goods and services upon Plaintiffs and other similarly situated

persons. Pursuant to Mont. Code Ann. § 3-5-302(1), this Court has subject matter jurisdiction over this action.

28. The City's acts giving rise to liability in this matter occurred within Yellowstone County in the State of Montana.

29. Pursuant to Mont. Code Ann. § 25-2-126(2), venue is proper in the Thirteenth Judicial District Court.

FACTUAL ALLEGATIONS

A. The City and Its Utilities

30. At all times pertinent to this action, the City has sold water to residents and businesses located within its service area by means of a municipally-owned and operated utility.

31. At all times pertinent to this action, the City has provided sewer services to residents and businesses located within its service area by means of a municipally-owned and operated utility.

32. At all times pertinent to this action, the City has provided solid waste disposal services to residents and businesses located within its service area by means of a municipally-owned and operated utility.

33. The above-described utility systems are owned, operated, maintained, supervised, and controlled by the City.

B. The City's Taxation of Water, Sewer, and Garbage Disposal Services

34. Article XI, Section 6 of the Montana Constitution provides that a “local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter.”

35. Mont. Code Ann. § 7-1-112(1) specifically prohibits a local government with self-government powers from exercising the “power to authorize a tax on income or the sale of goods or services[.]”

36. Although the City refers to the tax imposed upon its sale of water, sewer and garbage disposal services as a “franchise fee,” it is in fact a tax on the sale of goods and services.

37. A franchise fee is a payment for “the special privilege awarded by government to a person or corporation and conveys a valuable property right.”

Montana-Dakota Utilities Co., ¶ 14.

38. The City's Right-of-Way Management Ordinance, Section 7-1405, defines a franchise as “a legal authorization granted by the city to install, erect, hang, lay, bury, draw, emplace, construct, reconstruct, maintain, operate communications facilities or utility facilities upon, across, beneath, over, or in any public right-of-way for the purpose of providing any telecommunications services or utility service to persons located in the city for such term, for such purpose, and upon such terms and conditions as are set forth in a franchise agreement.”

39. The City's Right-of-way Management Ordinance, Section 7-1405, defines "person" as "any individual, corporation, partnership, association, joint-stock-company, trust, governmental entity, or any other legal entity, *but not the city*," (emphasis added), confirming that the City can not grant a franchise to itself.

40. The monthly bills for water, sewer services and garbage disposal services do not arise from or relate to a franchise agreement between the City and a franchisee.

41. At all times pertinent to this action, the City's rates for water included an amount above its actual cost of providing that service equal to four percent (4%) of its annual gross revenues from its water customers.

42. At all times pertinent to this action, the City's rates for sewer service included an amount above its actual cost of providing that service equal to four percent (4%) of its annual gross revenues from its sewer customers.

43. Commencing July 1, 2012, the City's rates for garbage disposal service included an amount above its actual cost of providing that service equal to five percent (5%) of its annual gross revenues from its garbage disposal customers.

44. The City failed to give any notice to Plaintiffs or other similarly situated persons that the "franchise fees" it imposed on its rates for water, sewer, and garbage disposal services were, in fact, taxes.

45. The water, sewer, and garbage disposal "franchise fees" were imposed by the City for the primary purpose of raising general revenue for the City.

46. At all times pertinent to this action, the City's costs of providing water, sewer, and garbage disposal services are reflected in the rates charged by the City for the services.

47. The "franchise fees" are in addition to the rates charged for these services and bear no relationship to the City's cost of providing water, sewer, and garbage disposal services to Plaintiffs and similarly situated persons.

48. The City has deposited all funds derived from the "franchise fees" into the City's general fund.

49. These funds were used for other services provided by the City, including financing of the mayor's office, city council, city administrator, human resources, city attorney, municipal court, code enforcement, parks, recreation, public lands, finance, and public safety.

50. The "franchise fees" were unilaterally imposed by the City and made a part of the City's contracts for the provision of water, sewer, and garbage disposal services with Plaintiffs and other members of the class.

51. The City was the sole provider of water, sewer, and garbage disposal services available to Plaintiffs and other members of the class.

52. The City's contracts with Plaintiffs and other members of the class were contracts of adhesion whose terms were drafted and dictated by the City.

53. If Plaintiffs had failed to pay the franchise fees assessed against their

monthly charges for water, sewer, and garbage disposal services, the City would have terminated its provision of these essential and necessary services to Plaintiffs. See City's Rules & Regulations Governing Water & Wastewater Service Sections 4-5, 6-8, and 8-4; City Code Sec. 26-102.

54. The wrongful assessment, collection, and use of these "franchise fees" by the City have damaged Plaintiffs and those similarly situated.

CLASS ALLEGATIONS

55. All previous paragraphs are hereby incorporated as though fully stated herein.

56. Plaintiffs bring these class action claims on behalf of themselves and all other persons similarly situated pursuant to Mont. R. Civ. P. Rules 23(a), (b)(1), (b)(2), and (b)(3). Specifically, Plaintiffs bring this action on behalf of the following proposed classes:

1) a class consisting of all persons who, since January 18, 2010, have paid monthly metered water charges and the "franchise fees" on water rates in accordance with Sections 16-2 and 16-11 of the City's Rules & Regulations Governing Water & Wastewater Service – this class shall hereinafter be described as the "Water Class";

2) a class consisting of all persons who, since January 18, 2010, have paid monthly wastewater service charges and the "franchise fees" on wastewater rates in accordance with Sections 16-6 and 16-11 of the City's Rules & Regulations Governing Water & Wastewater Service – this class shall hereinafter be described as the "Wastewater Class";

3) a class consisting of all persons who, since July 1, 2012, have paid the

City's assessment for solid waste disposal services and the "franchise fees" on solid waste disposal rates in accordance with Section 21-226 of the City's Solid Waste Collection Code and City Resolution Nos. 12-19179, 13-19277, 14-10349, 15-10460, 16-10560 and 17-10635 – this class shall hereinafter be described as the "Solid Waste Disposal Class."

57. The proposed classes are sufficiently numerous to make joinder impractical, given that the total number of members of each class exceeds 30,000. See City's Fiscal Year 2017 Comprehensive Annual Financial Report, p. 206.

58. The questions of law and fact raised by Plaintiffs' claims are common to, and typical of, those raised by the classes they seek to represent.

59. Class members paid the illegal sales taxes charged by the City.

60. Common issues of law and fact predominate over any individualized issues.

61. Questions of fact common to the classes include: the monthly billing by the City of the members of the classes; the establishment of rates for each class; imposition of "franchise fees" on monthly rates charged to class members; the contractual terms between the City and the class members relating to the provision of water, sewer, and garbage disposal services; the absence of any franchise agreements relating to the City's provision of water, sewer, and garbage disposal services; the termination of services class members faced by refusing to pay the "franchise fees;" the transfer of "franchise fees" to the City's general fund; the City's mischaracterization of sales taxes as "franchise fees"; and the lack of any prepayment or postpayment procedures to resolve disputes or seek refunds relating

to the sales taxes imposed by the City under the guise of “franchise fees.”

62. Questions of law common to the classes include whether the City’s franchise fees on the sale of its water, sewer and garbage disposal services are unlawful sales taxes under Mont. Code Ann. § 7-1-112(1); whether the City, in adopting, imposing and collecting the “franchise fees,” has violated Mont. Const. Art. XI, § 6; whether the City breached its covenant of good faith and fair dealing in its contracts with members of the class; whether the City deprived the class members of due process by failing to provide any prepayment or postpayment procedures to resolve disputes relating to or seek refunds of the franchise fees; and appropriate remedies available to members of the class.

63. The violations of law and resulting harms suffered by the named Plaintiffs are typical of the legal violations and harms suffered by all members of the classes.

64. If brought individually, the claims of the members of the classes would necessarily require proof of the same material and substantive facts and would likely necessitate the same remedies.

65. The claims of the named class representatives and the absent members of the classes have a common origin and share a common basis as their claims originate from the same wrongful conduct and policies of the City.

66. The City has acted in the same way towards Plaintiffs and all members of the classes.

67. Consequently, Plaintiffs and all members of the classes have similarly been harmed by the City's actions.

68. Plaintiffs are willing and prepared to serve the proposed classes in a representative capacity.

69. Plaintiffs will fairly and adequately protect the interests of the classes and have no interests adverse to, or that directly and irrevocably conflict with, the interests of other members of the classes.

70. Plaintiffs, as the class representatives, will vigorously prosecute the action on behalf of members of the classes.

71. Plaintiffs are represented by attorneys experienced with complex litigation, including cases involving government liability and taxation. Plaintiffs' attorneys are also experienced in litigating class action suits.

72. Plaintiffs' attorneys have identified and thoroughly investigated the claims in this action and have committed sufficient resources to represent members of the classes.

73. A class action is superior to other available methods for the fair and efficient adjudication of justice because individual joinder of claims by the members of the classes is impractical.

74. In light of the relatively small amount of potential damages that would be available to individual class members if individual actions were brought, there are

no individualized interests in controlling the prosecution of separate actions.

75. The prosecution of separate actions by individual members of the classes could result in inconsistent or varying adjudications with respect to individual members of the classes.

76. In addition, adjudications with respect to individual members of the classes would, as a practical matter, be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interest.

77. By way of example, a ruling on the legality of the City taxes could create binding precedent for the adjudication of all other claims that are identical to those presented by Plaintiffs.

78. The City has acted on grounds generally applicable to all members of the classes, necessitating declaratory and injunctive relief for the classes.

79. In comparison to more complex class actions, the present proposed class action will clearly be manageable as the members of the classes are readily identifiable and share common issues of fact and law, and counsel has already identified proper mechanisms for communicating with the classes.

CAUSES OF ACTION

COUNT I – DECLARATORY & INJUNCTIVE RELIEF REGARDING THE CITY’S VIOLATION OF MONT. CODE ANN. § 7-1-112(1)

80. All previous paragraphs are hereby incorporated as though fully stated

herein.

81. Article XI, Section 6 of the Montana Constitution provides that a “local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter.”

82. Mont. Code Ann. § 7-1-112(1) specifically prohibits a local government with self-government powers from exercising the “power to authorize a tax on income or the sale of goods or services[.]”

83. At all times pertinent to this action, the City imposed “franchise fees” upon water, sewer services, and garbage disposal services.

84. These “franchise fees” were based upon gross revenue received by the City when providing water, sewer services, and garbage disposal services.

85. The City collected the “franchise fees” for purposes of generating revenues for its general fund rather than placing the funds in a segregated account to be used for the costs of providing water, sewer and garbage disposal services.

86. The funds collected from the “franchise fees” supported the general administrative costs of the City and other services provided by the City, including but not limited to public safety, municipal court, parks, recreation, public lands, and City administrative and finance costs.

87. The City’s “franchise fees” were not reasonably related to the City’s cost of providing water, sewer, and garbage disposal services.

88. The City's "franchise fees" are, therefore, taxes imposed upon the sale of goods or services to Plaintiffs and other persons similarly situated in violation of Mont. Code Ann. § 7-1-112(1).

89. The City failed to give notice to Plaintiffs and similarly situated persons of the amount of the taxes due on its sale of water to Plaintiffs and similarly situated persons.

90. The City failed to give notice to Plaintiffs and similarly situated persons of the amount of the taxes due on its sale of sewer services to Plaintiffs and similarly situated persons.

91. The City failed to give notice to Plaintiffs and similarly situated persons of the amount of the taxes due on its sale of garbage disposal services to Plaintiffs and similarly situated persons.

92. In adopting, imposing, and collecting the illegal sales taxes, the City has exceeded the authority granted to it under Article XI, Section 6 of the Montana Constitution which prohibits the City from exercising a power prohibited by law.

93. Because the City did not have the authority under Mont. Const. Art. XI, § 6 to impose the illegal sales taxes disguised as franchise fees, the franchise fees are unconstitutional.

94. Plaintiffs and other persons similarly situated are entitled to (1) a declaration from this Court that the franchise fees are unlawful sales taxes under Mont. Code

Ann. § 7-1-112(1); (2) a declaration from this Court that the City exceeded its grant of authority under Mont. Const. Art. XI, § 6 in adopting, imposing and collecting the sales taxes under the guise of franchise fees, rendering those taxes unconstitutional; and (3) an injunction prohibiting the City from imposing these or similar taxes on the sale of water, sewer, and garbage disposal services in the future, unless and until such taxes are authorized by the Montana Legislature.

COUNT II – BREACH OF CONTRACT

95. All previous paragraphs are hereby incorporated as though fully stated herein.

96. The City and its utility customers, including Plaintiffs, entered into agreements for the provision of water, sewer service, and garbage disposal services.

97. Implied in each and every agreement is a covenant of good faith and fair dealing. Mont. Code Ann. § 28-1-211.

98. Stubbornly ignoring the 2003 *Montana-Dakota Utilities* ruling from the Montana Supreme Court striking down under Mont. Code Ann. § 7-1-112(1) a similar illegal sales tax scheme involving “franchise fees” on utilities, the City deliberately chose to continue imposing illegal sales taxes on its water, sewer, and garbage disposal revenues.

99. The City has also deliberately disregarded the Montana Supreme Court’s

1983 *Montana Innkeepers Assoc.* decision and the 1986 *Brueggemann* decision striking down City-imposed fees on revenues of hotels and businesses as illegal sales taxes under Mont. Code Ann. § 7-1-112(1).

100. The City has once again deliberately exceeded the limitations on its authority as a self-governed municipality set forth in Mont. Const. Art. XI, § 6 by authorizing an illegal tax on the sale of goods or services, a power specifically prohibited by the Montana Legislature under Mont. Code Ann. § 7-1-112(1).

101. The City has attempted to conceal its unlawful exercise of authority by misrepresenting the illegal sales taxes to its water, sewer, and garbage disposal customers as “franchise fees,” referring to them as “franchise fees” in its resolutions, minutes, rate notices, monthly invoices, ordinances, regulations, budgets, annual financial statements, website, and other communications.

102. The City’s misrepresentation of its illegal taxes as “franchise fees” is particularly egregious in view of the facts that (i) there are no franchise agreements in existence relating to the City’s provision of water, sewer and garbage disposal services; (ii) the City sells water, sewer and garbage disposal services directly to Plaintiffs and other members of the class, and not through a franchisee; and (iii) the City’s own Right-of-Way Management Ordinance, Section 7-1405, precludes the issuance of any franchise from the City to itself.

103. For these reasons, the City has breached the covenant of good faith and fair

dealing implied as a matter of Montana law in its water, sewer, and garbage disposal contracts with Plaintiffs and other members of the class.

104. This breach by the City damaged Plaintiffs and others similarly situated.

COUNT III – RESTITUTION

105. All previous paragraphs are hereby incorporated as though fully stated herein.

106. The right of restitution has long been recognized when a person has been unjustly enriched at the expense of another.

107. The City has wrongfully exacted payments from Plaintiffs and others similarly situated by collecting from them illegal taxes imposed on the sale of water, sewer services, and garbage disposal services in violation of Mont. Code Ann. § 7-1-112(1).

108. If the City is allowed to keep the wrongfully exacted payments made by Plaintiffs and other similarly situated persons, the City will be unjustly enriched.

109. The Court should provide restitution to Plaintiffs and others similarly situated in order to prevent the unjust enrichment of the City.

COUNT IV – VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

110. All previous paragraphs are hereby incorporated as though fully stated herein.

111. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, “the state must provide taxpayers with not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation but also a clear remedy for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is meaningful one.” *McKesson v. Florida Div. of Alcoholic Bev.*, 496 U.S. 18, 39 (1990).

112. If a state or local government has not provided any mechanism for prepayment resolution of tax disputes between it and its citizens, due process requires the state or local government to afford taxpayers “a meaningful opportunity to secure postpayment relief” for taxes previously paid under a tax scheme that is found to be illegal. *Id.* at 22.

113. The “franchise fees” imposed by the City are illegal taxes on the sale of goods or services prohibited by Mont. Code Ann. § 7-1-112(1).

114. Because the City did not have the authority under Mont. Const. Art. XI, § 6 to impose the illegal sales taxes disguised as franchise fees, the franchise fees are unconstitutional under Montana law.

115. The City has failed to provide any prepayment procedure allowing Plaintiffs and similarly situated persons to challenge the legality of the sales taxes imposed in the form of “franchise fees” on the City’s sale of water, sewer, and garbage disposal services.

116. The City has further impeded the ability of Plaintiffs and similarly situated persons from challenging the legality of the sales tax by failing to give notice to Plaintiffs and similarly situated persons that the “franchise fees” on the City’s sale of water, sewer, and garbage disposal services were, in fact, taxes.

117. Although the City is not required to provide a predeprivation procedure, *McKesson* at 37, if it chooses not to do so it must then “afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.” *Id.* at 22.

118. The City has failed to satisfy the due process requirements of the Fourteenth Amendment because it has not provided Plaintiffs and other members of the class with either a predeprivation procedure to challenge the franchise fees as illegal sales taxes or a postpayment remedy for its collection of the unlawful sales taxes.

**COUNT V – VIOLATION OF THE MONTANA CONSTITUTION’S
RIGHT TO DUE PROCESS**

119. All previous paragraphs are hereby incorporated as though fully stated herein.

120. Article II, § 17 of the Montana Constitution guarantees that no person shall be deprived of property “without due process of law.”

121. Following the federal courts in construing the Fourteenth Amendment of the U.S. Constitution as it relates to the imposition of taxes, the Montana Supreme Court has stated that a taxpayer is not required to be provided with a prepayment

procedure to challenge a tax, as long as there is a postpayment procedure allowing the taxpayer to seek a refund of the tax. *Abrams v. Feaver*, 212 Mont. 57, 60-61 (1984).

122. The City has failed to satisfy the due process requirements of Article II, § 17 of the Montana Constitution because it has not provided Plaintiffs and other members of the class with either a predeprivation procedure to challenge the franchise fees as illegal sales taxes or a postpayment remedy allowing the taxpayers to seek a refund of the unlawfully collected sales taxes.

PRAYER

A. For an order certifying the classes defined herein, appointing undersigned counsel as class counsel, approving Plaintiffs as class representatives, and requiring notice to the class at the City's expense, pursuant to Mt. R. Civ. P. 23;

B. For declaratory and injunctive relief, including (1) a declaration that the franchise fees are unlawful sales taxes under Mont. Code Ann. § 7-1-112(1); (2) a declaration that the City exceeded its grant of authority under Mont. Const. Art. XI, § 6 in adopting, imposing and collecting the illegal sales taxes, rendering them unconstitutional; and (3) an injunction prohibiting the City from imposing similar taxes (regardless of their characterization by the City as a fee, tax, or other surcharge) on the sale of water, sewer, and garbage disposal services in the future, unless and until such taxes are authorized by the Montana Legislature;

C. For judgment on behalf of the classes as defined herein for the amount of any payments made to the City with interest thereon;

D. For reasonable attorneys fees and costs; and

E. For such other and further relief as this Court deems equitable or just under the circumstances.

Dated September 20, 2018

s/ Kristen G. Juras
Kristen G. Juras

s/Matthew G. Monforton
Matthew G. Monforton

Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following person by U.S. Mail, postage prepaid on September 20, 2018:

Doug James
Ariel Overstreet-Adkins
P.O. Box 2559
Billings, MT 59103-2559

Hon. Greg Pinski
415 2nd Avenue North
Great Falls, MT 59401

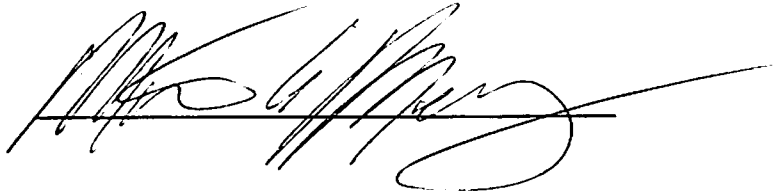
A handwritten signature in black ink, appearing to read "Doug James", written over a horizontal line.

EXHIBIT 1

REGULAR MEETING OF THE BILLINGS CITY COUNCIL

February 23, 2004

The Billings City Council met in regular session in the Council Chambers located on the second floor of the Police Facility, 220 North 27th Street, Billings, Montana. Mayor Charles F. Tooley called the meeting to order and served as the meeting's presiding officer. The Pledge of Allegiance was led by the Mayor, followed by the Invocation, which was given by Councilmember Jan Iverson.

ROLL CALL - Councilmembers present on roll call were: Gaghen, McDermott, Brewster, Brown, Ruegamer, Iverson, Boyer, Clark and Jones. Councilmember Poppler was excused.

MINUTES -- February 9, 2004. Approved as printed.

COURTESIES - NONE

PROCLAMATIONS -- Mayor Tooley. - NONE

BOARD & COMMISSION REPORTS

▪ **Downtown Billings Partnership – Greg Krueger**

DBP Executive Director Greg Krueger thanked all participants in the recent Town Meeting sessions that were very productive. He said the DBP is committed to staying involved and working with the City staff in all areas of the downtown. He acknowledged the City's work on the TIF expansion and noted the groundbreaking for the Rocky Mountain Health Network construction, the first new building in the downtown area in a long time.

▪ **Yellowstone County Air Pollution Control – Russ Boschee**

Yellowstone County Air Pollution Control Director Russ Boschee gave a report of the agency's activities as of 2/13/04. He summarized the programs within the agency's jurisdiction including the Air Monitoring Program, the Source Compliance Program, the Open Burning Permit Program, and the Complaint Management Program. He noted the mission statement and purpose of the agency is to prevent, abate and control air pollution in Yellowstone County.

Mr. Boschee said the agency spends approximately 52% of its time and resources on City of Billings' issues, 46.5% on Yellowstone County issues and 1.5% on the City of Laurel's issues. He noted that the adopted 2003-2004 budget was included in the handout to the Council.

Councilmember Brown asked if the emissions measured in the City of Billings sandblasting complaints were above EPA standards. Mr. Boschee said they were below EPA standards. He added the monitoring at 15th Street and 6th Avenue were below EPA standards over a week's period of testing. Councilmember McDermott asked about the status of the new Interlocal Agreement. City Administrator Kristoff Bauer said it is in draft form with one piece still under review, a process on allocating the costs from the different agencies in order to prepare the budget on an annual basis. This will be presented to the Council, the Commissioners and other affected

eliminated to get to the net amount. Many of the employees eliminated would be junior employees with smaller salaries.

Councilmember Boyer asked the City Attorney to elaborate on the legality of these fees. City Attorney Brent Brooks noted that the Supreme Court has said that franchise laws in Montana are largely undeveloped. He noted his February 13th memo to the Council is the best "snapshot" he could provide the Council.

Councilmember McDermott asked that the Task Force mailing not be considered for elimination and to look elsewhere for funds to keep that program. These are neighborhood groups that are donating their time to make their neighborhoods a better place to live.

Councilmember Brown said when franchise fees go into the General Fund rather than into the funds that generated the revenue they are, in his understanding, considered an illegal tax.

Councilmember Brewster asked the City Attorney to outline why the precedent the Court set with the other utility franchise fee does or does not apply in this case. Mr. Brooks said the Court limited its ruling to revenue generated on unrelated non-governmental utilities. He said the City is not dealing with a privately owned utility that is a non-governmental utility. This is why there is not much direction from case law. He said the Court did not really venture into the franchise area. Councilmember Brewster restated that this fee is negotiated with ourselves and therefore the City can adopt a fee under those standards. Mr. Brooks said because the City is a self-governing entity, if the statutes are silent or reasonable doubt arises the ruling is in favor of the self-governing entity exercising that power. Mr. Bauer noted that the State has delegated the Council "plenary authority" to establish rates and fees in the operation and maintenance of the utilities that are managed by the Council. There is a different relationship between the utilities that are being assessed here and those discussed in the court case.

Councilmember Brown re-emphasized the funds that are raised from this franchise fee are not used for managing the utility but for General Fund use.

Mayor Tooley called for a five-minute recess at 7:52 P.M.

Mayor Tooley reconvened the meeting at 8:00 P.M.

The public hearing was opened. BRUCE SIMON, 217 CLARK AVENUE, said the presentation was an interesting presentation about the City's budget problems, but that is not the issue before the Council tonight. He said he believes the franchise fee is a sales tax therefore is illegal. If the revenue stayed in the Utility Department and did not go into the General Fund he would not consider it a sales tax. He said this is the same path taken with the earlier franchise fee. He urged the Council not to use the budget problems to confuse the issue. He asked where the 3% convenience fee for credit card processing goes. The answer to that should be revealed before the Council makes their decision, he added. He said the people that pay by cash may be subsidizing the people who pay with credit cards. He urged the Council to take a good look at the 3% fee as it may create slow payments or more delinquency and those costs may be greater than the 3% fee.

CLAYTON FISCUS, 1111 MAIN STREET, said he speaks against the "5% sales tax" on the water, wastewater and solid waste operations. He said "this is what Judge

Baugh called it when it is applied to the gas, phone and electric utilities". He read "this Court has held that a government demands for money for the purpose of raising revenue is a tax". This is from the Supreme Court decision. He said the City cannot implement a sales tax. He said if the Council approves the Staff's recommendation, they would be, in his opinion ignoring the Montana Supreme Court, Judge Baugh and overturning the vote of the people who voted against it on the other three utilities. He said this should be put to a vote of the people.

There were no other speakers. The public hearing was closed. Councilmember Brewster moved for approval of the 3% Convenience Fee for water/wastewater credit/debit/charge card transactions, seconded by Councilmember Jones. Councilmember McDermott asked Staff to answer Mr. Simon's questions about what the 3% fee is comprised of and where it would go. Mr. Bauer said the City does not currently accept debit or credit card payments for utility charges. Automatic transfers are accepted and that practice would not be impacted by the levy of this fee. He said this is the best estimate for passing along the fees that are charged by credit card companies to the City for using their services to collect the funds and retransmit them to the City - through the public's use of credit/debit and charge cards. These funds would go to the Utility Division to reimburse them for the reduction in the amount that is taken by the credit card companies as their fees to process these transactions. Mr. Bauer said 10% of the customers are asking for this service. Councilmember Ruegamer asked what the cost is of processing NSF checks. Mr. Bauer said a collection agency that levies their own fees is used to handle all of the City's NSF checks and there is a high recovery rate of collection. He said the City does not have documentation of the cost of staff time involved in referring NSF checks to the collection agency. The City is responding to requests from citizens who would like the convenience of using an alternative payment method. This convenience has a cost involved with it. He added that 3% is the best estimate of those costs. These fees will be monitored over time and adjusted as needed. On a voice vote, the motion was unanimously approved.

Councilmember Brewster moved for adoption of the 5% Water Franchise Fee and the 5% Wastewater Franchise Fee excluding System Development Fees and Construction Fees from the 1% increase, seconded by Councilmember Gaghen. Councilmember Jones said this is increasing the franchise fee by 25% of the current franchise fee. He said the City is doing this unilaterally and he is concerned with that issue. He said the method is fair, but he would like to see this go to a vote of the public before the Council approves it. On a roll call vote, the motion failed on a tie vote with Councilmembers Gaghen, Brewster, Iverson, Boyer and Mayor Tooley voting "yes" and Councilmembers McDermott, Brown, Ruegamer, Clark and Jones voting "no".

Councilmember Brewster moved for adoption of the 5% Solid Waste Franchise Fee, seconded by Councilmember Iverson. Councilmember Jones said his previous comments pertain to this motion as well. Councilmember Clark asked for verification that a negative vote for these motions would only be disapproving the 1% fee and the current 4% franchise fee remains in place. Mayor Tooley verified that was correct. On a roll call vote, the motion failed 4-6 with Councilmembers Gaghen, Iverson, Boyer, and Mayor Tooley voting "yes" and Councilmembers McDermott, Brewster, Brown, Ruegamer, Clark, and Jones voting "no".

EXHIBIT 2

SPECIAL MEETING OF THE BILLINGS CITY COUNCIL

April 27, 2005

The Billings City Council met in special session in the Council Chambers located on the second floor of the Police Facility, 220 North 27th Street, Billings, Montana. Mayor Charles F. Tooley called the meeting to order and served as the meeting's presiding officer. The Pledge of Allegiance was led by the Mayor, followed by the Invocation, which was given by Mayor Tooley.

ROLL CALL – Councilmembers present on roll call were: Gaghen, McDermott, Brown, Ruegamer, Veis, Boyer, Ulledalen, Clark and Jones. Councilmember Brewster was excused.

RECONSIDERATION:

Councilmember Brown moved to **reconsider** Item A4 from the April 25th Agenda: **W.O. 04-11: SID 1373: South Billings Boulevard – King Avenue East to Underpass Avenue**, seconded by Councilmember Clark. Councilmember Brown said there were issues surrounding the letting of the bid that appear irregular and the Council should discuss this. Mayor Tooley and City Attorney Brent Brooks confirmed this is a special meeting and is the next scheduled meeting where Council can take action, so it is appropriate to reconsider this item.

Councilmember Ruegamer asked if there is a public notice issue with this item, or can the Council hear this tonight. Mr. Brooks confirmed that the rules allow the Council to take action on this issue tonight. Mayor Tooley added the parties involved have been informed that this action may take place tonight. On a voice vote for the reconsideration, the motion was unanimously approved. This item was added as Item #2.

Councilmember Clark moved to **reconsider** the **water rate portion** of the increase of Item 11 from the April 25th Agenda: **Water and Wastewater Rate Schedule Adjustments**, seconded by Councilmember McDermott. On a voice vote, the motion was approved with Councilmembers Boyer, Ruegamer and Mayor Tooley voting "no". This item was added as Item #3.

PUBLIC COMMENT on "NON-PUBLIC HEARING" Agenda Item: #1-3. Speaker sign-in required. (Comments offered here are limited to 1 minute per speaker.)

- EARL HANSON, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL FOR JTL GROUP – MT/WY, spoke in regard to the bid award on the W.O. 04-11 project that include specifications (general and specific) in the bid package. Mr. Hanson said the City must follow the rules in the Montana Public Works pamphlet regarding the specification requirements relating to the unit price extension. He said there is an error in the bid from Chief Construction concerning item 336 and the integrity of the bid process is at stake. He noted that had JTL been in the same position they would expect to have their bid refused. Mr. Hanson said this sets a precedent and puts the bidders at a disadvantage if the bids are rejected because confidential bid pricing has now been made known.

- **BILL COLE, ATTY FOR CHIEF CONSTRUCTION**, spoke in regard to the bid award on W.O. 04-11. He said there are two issues with the bid award to JTL Group. He objected to the reconsideration at the last meeting because the debate during the public comment period after the issue was first delayed influenced the outcome and is against Council rules of procedure. He said Chief Construction just wants the opportunity to present legal issues for consideration by the Council. He said the issue is that the Council is throwing away \$63,000 and ignoring the low bid from a qualified bidder. The issue is a misplaced decimal point that in no way affected the bottom line of the bid. He said the rule that Mr. Hanson refers to is a situation where there is a legitimate disagreement between the City and the contractor. There is no disagreement in this case, he added; City Staff understands the decimal point error. He noted the unit bid amount was correct in another area of the bid. Mr. Cole said his client would like a delay to have the opportunity to discuss the error with the City Staff. If bids are rejected, some information has been made public (to the City's benefit) but all parties are "in the same boat".
- **JOHN BREWER, PRESIDENT OF THE CHAMBER OF COMMERCE**, said the Chamber's mission is to support the quality of life in the Billings' community through the creation of a vibrant economy. The issue of the transfer center is important to the future of our community and economy. He said the board representing the Chamber's 836 members supports the Ad Hoc Committee and their mission and process. The Chamber also supports the four recommended sites and asked the Council to allow the community the process it needs to evaluate the merits of each site.
- **JAMIE RING, 3423 TIMBERLINE**, said the transfer center location is important to the community but it must meet the needs of the pedestrians and vehicles. She is concerned about buses that will be entering and exiting at or near busy intersections. Some of the sites include major east/west crosstown arterial streets in the community. She asked if some of the sites would require reduced speed limits and increased street widths to accommodate bus traffic. Ms. Ring is also concerned about the diesel fumes that would be generated in the enclosed area at the 4th and Broadway site. She said that area is used by the Deaconess Classic and is vital to the downtown.
- **BRUCE SIMON, 217 CLARK**, said he would like to speak on the reconsideration of the water rate increase and the Ad Hoc committee's recommendations for the transfer center. He said he considers that when raising water rates the City is also raising another tax. He said the franchise fee on the water rates goes into the General Fund and not into the Utility Fund. He said he believes that fee is an illegal tax, which is against state law. He asked the Council to request an Attorney General's opinion on the franchise fee. He commended the work of the Ad Hoc Committee on the transfer center but said another public hearing is needed to gather input for their new selections. He urged the Council to have a public hearing to allow citizens more than one minute to give their input prior to the Council's decision.
- **KAY ERICKSON, CHAIR OF THE CHURCH COUNCIL OF FIRST UNITED METHODIST CHURCH**, asked the Council to seriously consider the recommendations of the Ad Hoc Committee for the transfer center. She is concerned that the City will be seriously considering the 4th and Broadway site. She said she is opposed to that site for the transfer center as it would negatively impact their mission and service to the community and because of the emissions, safety, noise and

EXHIBIT 3

REGULAR MEETING OF THE BILLINGS CITY COUNCIL April 14, 2008

The Billings City Council met in regular session in the Council Chambers on the second floor of the Police Facility, 220 North 27th Street, Billings, Montana. Mayor Ron Tussing called the meeting to order at 6:30 p.m. and served as the meeting's presiding officer. Councilmember Ruegamer gave the invocation.

ROLL CALL – Councilmembers present on roll call were: Ronquillo, Gaghen, Pitman, Stevens, Veis, Ruegamer, McCall, Ulledalen, Astle, Clark.

MINUTES – March 24, 2008, approved as distributed

COURTESIES – Lloyd Mickelson, Montana Library Association Trustee of the Year Award
National Crime Victims Rights Week (Brent Brooks)

PROCLAMATIONS – National Library Week – April 13-19, 2008
Crime Victims Rights Week – April 13-19, 2008
Administrative Professionals Week – April 20-26, 2008
Fair Housing Month – April, 2008

ADMINISTRATOR REPORTS – Tina Volek

- City Administrator Tina Volek advised that Friday packets included a letter from the owner of the Don Luis Restaurant regarding its application for a street closure for the Cinco de Mayo Celebration, Consent Agenda O1. The letter requested a time extension for the street closure, but a second letter was received prior to that evening's meeting that withdrew the request for the extended hours, so the original application would be considered. Both letters were available in the Ex-parte Notebook in the back of the room for public viewing.

Councilmember Astle pointed out that the application listed the 100 block of North 26th Street but the diagram on the application showed the 0-100 block and that appeared to be an error.

- Ms. Volek advised that additional information for Items 8a and 8b had been distributed in the Friday packet and was available in the Ex-parte Notebook in the back of the room for public viewing.
- Ms. Volek advised that the following items had been distributed that evening and were available in the Ex-parte Notebook in the back of the room for public viewing
 - Item 5 – Schedule II of Attachment A, which was not printed properly in the Council packets
 - Item 5 – Miscellaneous correspondence items related to the item
 - Items 8a and 8b – correspondence from the Chamber of Commerce

times when there was contention in the effort to determine equitable rates and what was needed to be able to continue to provide the utility services.

The public hearing was opened.

- **Rod Wilson, 422 Shamrock Lane**, said he served on the System Development Fee/Construction Fee Fees Advisory Committee. He said it was an incredible learning opportunity. He said his premise was to understand the facts, figure out the problems, look at the opportunities and reach the conclusion, which was how the group started. He said the group didn't talk about dollars until the fifth month of discussion but instead talked about facts and the consultant kept them on track and answered all of the questions. He noted that system development fees were an interesting creature and with the impact fee laws, the City followed them and would continue that practice. He said someone told him he was happy with his water and his water bill and asked why he had to pay more. Mr. Wilson said his response was that the federal government regulated the water quality and it changed constantly and those demands had to be met. He said that it couldn't be left alone for people who had lived here but then proceed to build a new plant for the new people who moved to town. He said the only way for people to pay their fair share was through the system development fee for new construction and the water rate increase. He said he read all the reports and felt he understood the issues. He said replacement of existing water lines was \$38 million and that needed to be covered through rates and new people should pay the new rates as well.
- **Dave Brown, 544 Wigwam Trail**, said he didn't mean to mislead on the Tax Increment District during his previous comment. He said that parks used to be watered with ditch water, then City water was used and now they were sprinkled. He stated that the cost of that water went back to the taxpayers in the form of fees. He said sewer was included in those fees, yet the water department didn't have sewers to speak of. He said he was curious about the Lockwood situation where the City gave them sewer. He asked if that would be passed on in the City of Billings water bills.

Mayor Tussing responded to Mr. Brown that he believed the consensus was 'no.'

- **Bruce Simon, 217 Clark**, said he testified the last time water and sewer rate increases were discussed and brought up the fact that when that was done, another tax was raised at the same time and that wasn't on the agenda. He said the franchise fee was raised, which was 4% of the gross revenues and additional money would come to the general fund since that amount had to be paid by taxpayers. He said he stated 3 or 4 years ago that the Council had to find out if that was legal. He said a higher authority needed to be asked if that was an illegal sales tax because he feared it was and the City would be liable to have to pay it back someday if it was sued. He challenged Council to move ahead and find out if the franchise fee was legal. He said the rate increase was complicated. He stated that when the notice arrived with his bill there was a number to call regarding the water rate adjustment so he called it. He indicated

that when he talked to someone the tiered system wasn't explained, only that water and sewer rates would increase. He said he wasn't told about the tiers and it was difficult for the public to testify because it didn't have the information. He said it was wise to look at the system development fees to encourage infill development where the infrastructure was already in place. He said there may be additional provisions required on the system development fees and the City had made a move in the right direction.

Councilmember Veis stated that that issue was discussed during the committee meetings, and committee member Tom Llewellyn was in favor of Workforce Housing Authority's review of system development fees. He noted that Councilmember Ronquillo served on that task force as well. He said the wish of the water and wastewater group was that the workforce housing group reviewed that particular instance of system development fees for infill development. He said the City would be happy to hear about it. Mr. Simon said he served on that committee as well and he thought something would be brought forward on that topic.

Councilmember Ulledalen said it was complicated and that the City faced approximately \$270 million in expenses in the next 10 years to upgrade the system to adjust it to fit new federal regulations and to account for new growth. He said the level fee charged everyone the same rate but the current proposal was a tiered fee and the system development fees were changed. He asked if there were other ideas that could be considered because an issue the Council struggled with was how to pay for growth. Mr. Simon said he tried to turn the City inward to look at infill development rather than expansion. He said he felt the City made a terrible error when it annexed Briarwood because the cost of extending services to that area was enormous; millions of dollars that ratepayers had to pay. He said water quality standards were revised to make sure the drinking water was safe and he had lived here 66 years and thought the water was fine, so he didn't know why it had to keep getting better. He said he didn't understand why the standards changed so much. He said he lived in a house that was almost 100 years old and that property had paid for almost 100 years so there should be money set aside and available when waterlines needed to be replaced in front of his house, not to be used for annexation miles from the city limits.

- **Tom Llewellyn, 5819 Rimrock**, said he served on the rate study committee and was proud to be from Billings because things were done right. He said he studied communities in the state of Montana and Billings was the only one that had gone through the process correctly. He said some things discussed at that water rate committee and with the workforce housing group was that the City tried to use the tier to encourage smaller lots for the infill areas to bring more people back into the City. He said one of his ideas was that a house could be delivered within a given dollar amount under a formula in which the City would return half of the system development fee. He said there was a misnomer that development didn't pay its own way, but everything that went into a subdivision was paid for by the developer. He stated that the combination construction and system development fee meant the developer paid for the lines and it wasn't a burden on the ratepayer. He noted that new subdivisions paid their own way and

EXHIBIT 4

REGULAR MEETING OF THE BILLINGS CITY COUNCIL

May 22, 2017

The Billings City Council met in regular session in the Council Chambers located on the second floor of the Police Facility, 220 North 27th Street, Billings, Montana. Mayor Hanel called the meeting to order at 6:30 p.m. and served as the meeting's presiding officer. Mayor Hanel gave the invocation.

ROLL CALL: Councilmembers present on roll call were: Cromley, Yakawich, Brewster, McFadden, Friedel, Sullivan, Swanson, Clark and Brown. Councilmember Cimmino was excused.

MINUTES: April 24, 2017 and May 8, 2017– Councilmember Brewster moved for approval, seconded by Councilmember Sullivan. On a voice vote, the motion was unanimously approved.

COURTESIES:

- Ms. Volek introduced John Brewer and William Cole of the Billings Chamber of Commerce who presented a check for \$33,000 to the City for the Yellowstone Kelly Interpretive Site, in reference to Item 1B. Mr. Cole corrected the amount on this donation and stated the change order was for \$56,628, however the donation was for \$33,000 and the monies on hand already would more than cover the amount of the change order. He continued by thanking TrailNet, the Bair Family Trust and Hardy Construction for their contributions. He concluded by stating the project was scheduled for completion late summer 2017. Ms. Volek presented the check to the City Clerk for deposit.
- Ms. Volek introduced Jim Ronquillo and Matt Lundgren, representatives of the Southside Neighborhood Task Force, who presented a check for \$1,200 for the South Park Splash Park, in reference to Item 1C. Mr. Ronquillo stated the task force had held a couple of fundraisers to make the donation. Mr. Lundgren thanked the Council for improving the quality of life in the South Park area. Ms. Volek presented the check to the City Clerk for deposit.
- Councilmember Cromley recognized Riverstone Health as receiving the DeWitt C. Baldwin, Jr. Award for Excellence in providing services and education to the residences. He gave special recognition to Dr. Roxanne Fahrenwald, Senior Vice President, Clinical and Educational Integration, for her excellent direction.

PROCLAMATIONS:

- Mayor Hanel read a proclamation that declared May 13, 2017 as Letter Carriers Food Drive Day.

and in the event the septic system had failed, it would have placed the City's fresh water at risk.

There were no further speakers, and the public hearing was closed.

Councilmember Cromley moved for approval of Item 2, seconded by Councilmember Swanson.

Councilmember Yakawich stated he opposed the increases as proposed and encouraged staff to develop a different tier structure. He stated he would vote against the motion.

Councilmember Brewster stated his concern about the franchise fee and warned that the Supreme Court had ruled against the City for a right-of-way fee to utility companies. He stated the Court's ruling was that it was not a fee because the revenues generated were used broadly by the General Fund, not specifically for use in the right-of-way. He continued that the Court determined it was really a sales tax. He stated the City's franchise fee may be against the law. He continued that sales taxes were against the law in Montana. He continued that when it was agreed that Parks' water would be placed in the General Fund at no cost to the Park's Department, it may have been a violation of the Charter. He stated the Charter defines where revenues are derived for the General Fund, which is from the mills. He stated that when the costs were moved from the utility it basically backdoor attaching to the General Fund. He stated the Council was obligated to check into the matter. He voiced his opposition with the franchise fee and would vote against the motion.

Councilmember Sullivan stated he supported a "WaterShare" program. Councilmember Sullivan moved for an amendment to Councilmember Cromley's motion to direct staff to investigate the creation of a "WaterShare" program and provide the information to Council by June 30th, 2017, seconded by Councilmember Brewster. Councilmember Cromley stated he would vote in opposition of the amendment to the motion and that it would have been better as a Council initiative.

Councilmember Brewster stated he believed assistance programs such as LEIAP were operated by not-for-profit organizations and were not handled by the utility companies or municipalities. He stated local government was not in the welfare business and that was more of a state government function.

Councilmember Clark stated he would not want an assistance program to cause additional burden to City staff. He stated he wanted a nonprofit organization to implement an assistance program.

Councilmember Sullivan stated the amendment was not to hire additional City staff, but for staff to research the opportunities to create an assistance program and come back to the Council with their findings. He acknowledged that the amendment may be better suited as an initiative.