

Town of West Yellowstone
Special Town Council Meeting
Tuesday, September 8, 2015
West Yellowstone, Montana
Town Hall, 440 Yellowstone Avenue
6:00 PM
Agenda

Public Comment Period/Council Comments

Public Hearing: FY 2016 Final Budget Hearing

Resolution No. 669, FY 2016 Mill Levy

Discussion/Action ∞

Resolution No. 670, FY 2016 Municipal Budget Adoption

Discussion/Action ∞

Resort Tax Exemptions

Discussion ∞

The Public is invited to attend.



NOTICE OF PUBLIC HEARING

The Town Council of the Town of West Yellowstone will hold a formal budget hearing for the fiscal year 2015-2016 budget. Said hearing will be held during the regular Town Council meeting, Tuesday, September 8, 2015, which begins at 7:00 PM, The hearing will be held in the Town Hall Council Chambers, located at 440 Yellowstone Avenue.

The public hearing will review revenue sources, maintenance, operation, capital projects, debt service payments and equipment purchases for the General Fund, Special Revenue Funds, Debt Service Funds, Capital Project Funds, and the Enterprise Funds for Fiscal year 2015-2016. The Public is invited to attend and any taxpayer or resident may be heard, for or against, any portion of the proposed budget.

The proposed final budget is available for public review at the Town Offices, located at 440 Yellowstone Avenue, West Yellowstone, Montana. Personnel at the Town Offices can be reached at 406-646-7795

The West Yellowstone Town Council will consider adoption of the proposed fiscal year 2015-2016 budget resolution and set the mill levy during a regular meeting of the Town Council on September 8, 2015 held at 7:00 PM at the Town Hall Council Chambers, located at 440 Yellowstone Avenue, West Yellowstone, Montana. The Public is invited to attend.

RESOLUTION NO. 669

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF WEST YELLOWSTONE, MONTANA, IN THE COUNTY OF GALLATIN AND STATE OF MONTANA, DETERMINING THE AMOUNT OF TOWN TAXES AND ASSESSMENTS FOR ALL PURPOSES, GENERAL, AND SPECIAL, TO BE LEVIED AND ASSESSED ON TAXABLE PROPERTY IN THE TOWN OF WEST YELLOWSTONE, STATE OF MONTANA, AND LEVYING AND ASSESSING SUCH TAXES, FOR THE FISCAL YEAR ENDING JUNE 30, 2016.

BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF WEST YELLOWSTONE, MONTANA.

Section 1. That pursuant to the provisions of Title 7, Chapter 6, and Chapter 12, MCA, as amended, there is hereby levied and assessed on the taxable per Centrum of the assessed value of the taxable property of the town of West Yellowstone, State of Montana, as fixed and found by the Board of County Commissioners of Gallatin County, Montana, sitting as a County Board of Equalization, for the current fiscal year ending June 30, 2016 a tax of:

62.44 MILLS AS ALL PURPOSE LEVY

29 MILLS GENERAL OBLIGATION BOND ASSESSMENT

To be assessed on all property and improvements in West Yellowstone, Montana including property otherwise exempt from real property taxes.

FOR A TOTAL MILL LEVY OF 91.44

Section 2. That if any part of the determinations, assessments and levies herein and hereby made shall be declared invalid, unconstitutional, or against the law, the validity of any other part of this Resolution shall not be hereby affected.

Section 3. That, pursuant to the provisions of Title 7, Chapter 6, Section 4407 MCA, and Title 7, Chapter 12, Section 4184, MCA, as amended the Town Clerk is directed to at once certify and transmit to the County Clerk & Recorder of Gallatin County, Montana, a copy of this Resolution for the collection of the taxes herein and hereby levied, by the County Treasurer as in Chapter 6 MCA, provided.

Section 4. That pursuant to the provisions of Title 7, Section 6, 4233 MCA the Town Clerk is directed to at once certify and transmit to the Montana Dept of Commerce, in Helena, Montana, a copy of this Resolution.

PASSED AND ADOPTED BY THE TOWN COUNCIL AND APPROVED BY THE MAYOR OF THE TOWN OF WEST YELLOWSTONE, MONTANA, THIS 8th DAY OF SEPTEMBER 2015.

Mayor

ATTEST
Town Clerk

STATE OF MONTANA)

)
) ss:
)
)
)

COUNTY OF GALLATIN

I, Elizabeth Roos, do hereby certify that I am the duly appointed qualified and acting Town Clerk of the Town of West Yellowstone, state of Montana, that as such Town Clerk, I have in my custody and am the keeper of records and minutes of the proceedings of said Town Council, that the above foregoing is a full, true, and correct, and complete copy of said Town Council's Resolution # 669, fixing, determining, assessing, and levying taxes for the said Town of West Yellowstone, for the fiscal year of said Town of West Yellowstone commencing on the first day of July 2015 ,A.D. and ending on the 30th day of June 2016, A.D. as the same is on record and on file in my office as such Town Clerk, and was passed and adopted by the said Town Council on the 1st day of September, 2015, A.D. and as approved by the Mayor of said Town of West Yellowstone on the 8th day of September, 2015, A.D.

This certificate is made pursuant to the direction of said Council contained in Section 3 of said Resolution, and pursuant to the provisions of Title 7, Chapter 6, Section 4407, MCA, and as further directed by Section 4 of said Resolution and Title 7 Chapter 6, Section 4233, MCA and Title 7 Chapter 12 Section 4181, MCA.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Corporate Seal of the Town of West Yellowstone, Montana, this 8th day of September, 2015.

Town Clerk as Aforesaid

RESOLUTION NO. 670

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF WEST YELLOWSTONE,
IN THE COUNTY OF GALLATIN AND STATE OF MONTANA TO ADOPT THE BUDGET
AND CAPITAL IMPROVEMENT PLAN FOR THE FISCAL YEAR 2015-2016.

BE IT HEREBY RESOLVED BY THE TOWN COUNCIL OF THE
TOWN OF WEST YELLOWSTONE, MONTANA:

1. That we adopt a general fund revenue budget in a total amount of \$3,374,654 and a General Fund expenditure budget in a total amount of \$4,538,371. The Town Court Judge wages are reflected in the general fund budget and will be hereby adopted in the general fund budget and will be adopted along with the adoption of Resolution #670.
2. That we fully fund an unassigned fund balance in the General Fund that is equal to two times the average monthly General Fund expenditure for the previous fiscal year. During the Fiscal Year 2015 the average monthly expenditure was \$265,312. The unassigned fund balance is \$530,624
3. That we adopt special revenue funds, revenue budget in the amount of \$4,346,760 and special revenue funds expenditure budget in the amount of \$4,869,436.
4. That we adopt a debt service funds revenue budget in the amount of \$140,000 and a debt service funds expenditure budget in the amount of \$130,883.
5. That we adopt a Capital Improvement Program funds revenue budget in the amount of \$397,119. Capital Improvement Program funds expenditure budget in the amount of \$306,000. The capital improvement program funds are to be used for street and building maintenance, replacement and acquisition of equipment for the town, and construction, remodeling and improvement of town buildings and land or to be set aside for the future purchase thereof.
6. That we adopt water and sewer enterprise revenue budgets in the amount of \$732,400 and water and sewer enterprise expenditure budgets in the amount of \$982,314.
7. That a copy of said budget is attached hereto and by this reference made a part of the Resolution # 670.

BE IT HEREBY RESOLVED BY THE TOWN COUNCIL OF THE
TOWN OF WEST YELLOWSTONE, MONTANA:

1. That we adopt the budget and work plan of the Tourism Business Improvement District (TBID) as proposed by the TBID board for Fiscal Year 2015-16.
2. That a copy of said budget is attached hereto and by this reference made part of the Resolution #670

BE IT HEREBY RESOLVED BY THE TOWN COUNCIL OF THE
TOWN OF WEST YELLOWSTONE, MONTANA:

1. That we adopt the 2016-2020 Capital Improvement Plan for the Town of West Yellowstone for Fiscal Year 2016.
2. That a copy of said Capital Improvement Plan is attached hereto and by this reference made a part of the Resolution #670.

PASSED AND ADOPTED BY THE TOWN COUNCIL OF THE TOWN OF WEST
YELLOWSTONE, MONTANA, THIS 8th DAY OF SEPTEMBER, 2016 AND APPROVED
BY THE MAYOR OF THE TOWN OF WEST YELLOWSTONE.

Mayor

ATTEST
Town Clerk

3.12.010 Created--General provisions--Imposed.

A. There is imposed a resort tax on the retail value of all goods and services sold or provided by businesses, groups or organizations located within the town, regardless of the method or manner of the transaction, by the following:

1. Hotels, motels, condominiums, vacation rentals, cabins and any other nightly or weekly lodging or camping facilities;
2. Restaurants, fast food stores, convenience stores, and other food service establishments;
3. Taverns, bars, nightclubs, lounges and other public establishments that serve beer, wine, liquor or other alcoholic beverages by the drink;
4. Groups, organizations, or temporary vendors, with or without tax exempt status;
5. Any business that sells luxuries as defined in 3.12.040 below.

Businesses or organizations that sell luxuries must collect a tax on such luxuries.

3.12.020 Definitions.

A. The terms "luxuries," "medical supplies," and "medicine" shall be defined as set forth in MCA Section 7-6-1501, and as set forth in more detail below.

B. All references to the "resort tax" and "tax" in this chapter shall refer to the resort tax passed by the electorate of West Yellowstone and as enacted by the ordinance codified in this chapter.

3.12.030 Imposed.

There is imposed a duty on each operator of any of the establishments mentioned in this chapter to collect, upon sale, the tax imposed as set forth in this chapter on all customers, regardless of state or federal tax status, with the only exceptions being those set out in § 3.12.130.

3.12.040 Luxuries tax.

Each business, group or organization subject to the tax shall collect the same on the retail value of all goods and services sold within the town by the establishments set forth in Section 3.12.010. All luxuries shall be taxed.

"Luxuries" shall include but not be limited to:

- a.) any gift item, luxury item or service, or other item, or other item normally sold to the public or to transient visitors or tourists; but the term does not include unprepared food, medicine, medical supplies and services, or any necessities of life.
- b.) sporting goods or the rental thereof,
- c.) rentals on or for the following snowmobiles, automobiles, all-terrain vehicles, motorcycles, bicycles, skis, boats, campers, boat motors;
- d.) recreational lessons and recreational services, including float trips, guided trips, skiing, fishing trips, hunting trips, backcountry dining trips, other outfitter trips; horseback riding; golfing, rock climbing, cycling, rafting, canoeing, kayaking, dog sledding and ballooning, tours and other attractions;
- e.) all souvenir and localized items such as imprinted hats and T-shirts and curios; all nonfood items such as , housewares (other than household appliances), automotive supplies and parts; ice; retail liquor, beer and wine, except that sold at state stores.
- f.) all attractions such as arcades, bowling centers, concerts, movie/theater tickets and all concessions; event and entertainment tickets (regardless of the method or location of purchase), cover charges, rodeo tickets, voluntary recreational activities such as golfing, swimming, skiing, tanning beds , and other voluntary recreational daily tickets and season passes.
- g.) any other goods or services not exempt by §3.12.130 below.

3.12.050 Rate--Duration.

- A. The exact rate of the resort tax is three percent.
- B. The duration of the resort tax as approved by the voters on November 5, 1985 is twenty years from its effective date. The effective date of the resort tax is January 1, 1986.
- C. The duration of the resort tax renewal as approved by the voters on November 5, 2002, is twenty years from its effective date. The effective date of the resort tax renewal is January 1, 2006.

3.12.060 Resort tax payment.

The resort taxes collected by a business in any month are to be paid to the town on or before the twentieth day of the following month, or if such day falls on a Saturday, Sunday or holiday, then on the next business day. Resort tax payments sent by mail or private courier must be received by the town on or before the twentieth day of each month, or if such day falls on a Saturday, Sunday or holiday, then on the next business day.

3.12.070 Collection duties and responsibilities.

- A. The office responsible for receiving and accounts for the resort tax receipts is the town clerk and treasurer.
- B. The operations manager and his/her agents shall be responsible for enforcing the collection of resort taxes and shall be responsible for overseeing the methods and procedures to be used in enforcing the collection of the resort taxes.

3.12.080 Resort tax collection fee.

Each collecting merchant shall be entitled to withhold two and one-half percent of the resort taxes collected to defray costs for collecting the resort tax, providing that resort tax payments are timely made in accordance with Section 3.12.060. The resort tax collection fee may be withheld by the business at the time of paying the tax to the town. Failure to withhold the fee shall constitute waiver and forfeiture of the same.

3.12.090 Records and forms.

The town shall provide each business that is required to collect resort tax with the proper forms for reporting and making payment to the town. Resort tax payments to the town shall be tabulated and accounted for on forms prescribed and furnished to the business by the town. The records and forms held by the town shall be confidential, and shall not be open to inspection by the public unless so ordered by a court of competent jurisdiction. Each business that is required to collect resort tax must maintain adequate accounting records and pay the resort tax to the town on the forms provided by the twentieth day of the following month. The accounting records maintained must be accurate, verifiable, and provide a reasonable audit trail. Failure to maintain adequate accounting records constitutes a violation of this chapter.

3.12.100 Preservation of records.

Every business required to collect and pay resort tax shall keep and preserve for a period of not less than three years all records necessary to determine the accuracy of the taxes paid, and shall make these records available for audit or inspection on its business premises at all reasonable times. Any audit or inspection shall be conducted in West Yellowstone on the premises of the business or establishment collecting the resort tax or at such other location as the town may determine.

3.12.110 Random audit.

Periodic random audits shall be conducted under the direction of the mayor, operations manager or a designated representative and all business operators shall cooperate in all respects in the conduct of the audits. Any random audit shall be for the previous calendar year, and shall be conducted in West Yellowstone on the premises of the business or establishment collecting the resort tax or at such other location as the town may determine. If the audit determines a deficiency it will be at the discretion of the town to audit the previous two years and require a follow up audit on the next reporting year. **Payments and or arrangements for payment of the amount determined as outstanding resort tax owed must be paid or arranged within thirty (30) days of the date of the notification of the audit results.** Failure to cooperate in any audit or inspection of records, **including the failure to make the appropriate records available within fourteen (14) calendar days of the auditor's scheduled audits in West Yellowstone,** may result in an automatic non-renewal of the business license for the subsequent business license year and shall constitute a violation of the provisions of this chapter.

3.12.120 Appeals.

Any business may appeal to the town council any assessment of penalty or interest; provided, that notice of appeal in writing is filed with the town clerk within thirty days of the serving or mailing of the determination of the amount of penalty and interest due. The town council shall on the next immediate regular town council meeting fix the time and place for hearing the appeal and the town clerk shall cause notice in writing to be personally served by a peace officer upon the operator. The findings and decision of the town council shall be final and conclusive and shall be served upon the appellant in the manner prescribed for service of notice of hearing or by certified mail directed to the business operator's last known address. Any amount found to be due shall be immediately payable upon service of the findings and decision.

3.12.130 Exemptions.

Notwithstanding Section 3.12.040, however, the following goods and services shall be exempt from the tax:

- A. Utilities and utility services;
- B. Medical supply services and medicine;
- C. Wholesale merchandise for resale at retail or used in the purchaser's business as supplies;
- D. Gasoline and other motor vehicle fuel;
- E. Liquor sold at state liquor stores;

F. Propane and similar home fuels;

G. Sales of automobiles, trucks, snowmobiles, motorcycles, all-terrain vehicles, bicycles, skis, boats, outboard motors and chain saws;

H. Labor on automobiles, trucks, snowmobiles, motorcycles, all-terrain vehicles, bicycles, boats, outboard motors and chain saws;

I. All non-recreational labor, services and non-recreational state licensed professions and trades;

J. All payroll and business and labor costs;

K. Lumber, building supplies and tools, and other tools;

L. Household appliances;

M. Any hotel, motel, campground or other lodging facility occupancy, with respect to any person or persons who occupy a room or a space for a period longer than thirty consecutive calendar days; provided, that such person certifies prior to occupancy that the occupancy will exceed thirty consecutive calendar days and does in fact exceed thirty consecutive calendar days;

N. All sales of goods from businesses via the Internet, catalog or telephone that are shipped out of town and the purchaser never enters the boundaries of the town shall be exempt. Any goods, services or luxuries that are sold by any means and that will either be obtained, consumed, or enjoyed within the town are not exempt. Further, the services described in 3.12.040 above and sold by a business located within the town but consumed or enjoyed outside the boundaries of the Town are not exempt, regardless of the method of payment.

3.12.140 Use of tax moneys.

A. The tax moneys derived from the resort tax may be appropriated by the town council for any activity, undertaking, or administrative service that the municipality is authorized by law to perform, including costs resulting from the imposition of the tax.

B. There is established a marketing and promotion (MAP) fund for the town. Two and one-half percent of the three percent resort tax collected by the collecting merchant shall be dedicated exclusively to the MAP fund, which fund shall be used solely for the marketing and promotion of West Yellowstone and the surrounding area, as well as the associated costs of administering the fund. The town council may appropriate additional resort tax receipts to the MAP fund.

C. The town council shall by resolution establish a board of not less than three or more than seven qualified persons to oversee the MAP fund. At least one member of this board shall be a sitting member of the town council or the council's designee. The board shall establish policies and procedures for its operation and the general management of the fund in accordance with the council's resolution establishing the board. The board shall also select individual marketing and promotion projects and approve expenditure of funds for such projects, subject to approval by the town council.

3.12.150 Reduction of property tax levy.

Annually anticipated receipts from the resort tax must be applied to reduce the municipal property tax levy for the fiscal year in an amount equal to five percent of the resort tax revenues derived during the preceding fiscal year.

3.12.160 Property tax relief fund.

In the event the town receives more resort tax revenues than had been included in the annual municipal budget, it shall establish a municipal property tax relief fund, and all resort tax revenues received in excess of the budget amount must be placed in the fund. The entire fund must be used to replace municipal property taxes in the ensuing fiscal year.

3.12.170 Resort tax administration.

The town shall administer resort tax collections according to the following rules:

- A. Resort tax payments shall be made to the town finance office by the established deadline.
- B. Failure to report or make resort tax payments by the payment deadline shall result in forfeiture of the resort tax collection fee for the month in which the payment is due.
- C. Failure to pay resort tax before the end of the month in which the payment is due shall result in an administrative fee of either: (1) twenty-five dollars for businesses with gross sales of one thousand five hundred dollars or less for the reported month; or (2) fifty dollars for businesses with gross sales in excess of one thousand five hundred dollars for the reported month, which shall be in addition to any civil penalties awarded to the town in a suit for collection of resort tax.
- D. At the end of each subsequent month after the original payment is due, the town will assess interest at the rate of three percent (3%) of any delinquent resort tax, which shall be assessed on the first business day of the subsequent month and on the first day of each month thereafter until the total amount due, including the

administrative fee, is paid in full. This and all administrative fees shall be assessed in addition to any civil penalties awarded to the town in a suit for collection of resort tax.

E. The town may revoke the business license of any person or business that violates any provision of this chapter. The town may revoke a violator's business license either through the administrative procedure described in Chapter 5.04 or through a court order or judgment in accordance with Section 3.12.180.

3.12.180 Violation--Civil penalties.

For failure to report taxes when due, failure to pay taxes when due, and other violations of this chapter, the town may seek the following penalties or remedies:

A. A court judgement in the amount of all unpaid resort taxes, including any unpaid administrative fees assessed under Section 3.12.170 and any resort tax collection fees forfeited in accordance with Section 3.12.080;

B. Interest at the rate of ten percent (10%) per annum on unpaid resort taxes or administrative fees from the due date or assessment date until paid;

C. A civil penalty in the amount of fifty percent (50%) of the unpaid resort taxes, which includes forfeited resort tax collection fees, plus all costs and attorney's fees incurred by the town in any court action;

D. An order requiring the delinquent business to undergo a financial audit by the town or its representatives to determine the proper amount of resort taxes due, including payment by the business of all audit costs and expenses incurred by the town or its representatives;

E. Revocation of the violator's town business license, either through judicial order or the administrative procedure described in Chapter 5.04;

F. Any other penalty, remedy or judicial relief to which the town is entitled.

3.12.190 Violation--Criminal penalties.

A person or business violating any provision of this chapter is guilty of a misdemeanor and subject to a fine not exceed one thousand dollars for each violation, or imprisonment not to exceed six months for each violation, or both.

JAMISON LAW FIRM
ATTORNEYS AT LAW

4G POWER BLOCK BUILDING, 7 W. 6th AVE.
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MEMORANDUM
Opinion #54

TO: Board of Directors
Big Sky Resort Area District

FROM:  Mona Jamison, Attorney
Roy H. Andes, Attorney

DATE: November 12, 2003

ISSUE

Are non-profit corporations required to collect the resort tax at their fund-raising events on the sale of goods and services otherwise taxable?

CONCLUSION

Non-profit organizations do not have any statutory exemption from the obligation to collect the resort tax on the goods and services they sell which would otherwise be taxable. Ordinance 98-01, section 10(r), should be amended by the Board to reflect the criteria, by which specific non-profit fund-raising events, if any, may be exempt from resort tax collection.

DISCUSSION

BSRAD Ordinance 98-01-ORD, at section 10 (r) states, "the following items are not subject to tax: ... (r) non-profit fund-raising activities." The question has arisen as to what types of products, goods, or services are subject to this exemption, and which are not. This issue is closely allied to a previous opinion which considered whether non-profit organizations are exempt from *payment* of resort tax on the goods and services they *purchase*.¹ Parts of that opinion are pertinent to this discussion also.

¹Opinion #46, Jamison Law Firm, 12-20-01.

The Montana Legislature, in sections 7-6-1501 to 1550, M.C.A. (hereafter referred to as the Resort Tax Act or Act), has empowered certain qualified communities to impose the resort tax on the following:

(2) (a) The resort tax is a tax on the retail value of all goods and services sold, except for goods and services sold for resale, within the resort community or area by the following establishments:

- (i) hotels, motels, and other lodging or camping facilities;
 - (ii) restaurants, fast food stores, and other food service establishments;
 - (iii) taverns, bars, night clubs, lounges, and other public establishments that serve beer, wine, liquor, or other alcoholic beverages by the drink; and
 - (iv) destination ski resorts and other destination recreational facilities.
- (b) Establishments that sell luxuries shall collect a tax on such luxuries.

As we noted in Opinion #46, the resort tax is an “excise tax.” Such taxes are presumed to be constitutional and will not be set aside by a court unless it so clearly contravenes constitutional limits as to leave “no reasonable doubt” that it offends the Constitution.² While a variety of Federal constitutional issues may apply to state taxation, the enactment, enforcement, and interpretation of state taxing authority is almost exclusively the province of state legislatures and state courts.³

The exemption of non-profits from taxation of their revenue established through section 501(c)(3) of the Internal Revenue Code applies *only* to federal income taxation, not to state taxation. As we stated in our earlier opinion, *there is no federal constitutional or statutory requirement that any particular group or set of individuals shall be exempt from state excise taxation.* Thus, exemptions from the resort tax, if any, are provided solely by Montana state law under Montana statutes and cases.⁴ Opinion #46 also noted that absent a specific statutory exemption, *all persons* remain obligated to *pay* the tax on covered goods and services they purchase.⁵

The same general rules also apply to tax collectors of an excise tax. The treatise, 68 Am Jur 2d, Sales and Use Taxes §241, stated it as follows,

²Opinion #46, at p. 2, citing 71 Am Jur 2d, State and Local Taxation, §73.

³A state legislature needs no express constitutional authorization to enact excise taxes, it is inherent in state governmental power. *Welsh v. Sells*, 244 Ind. 423, 192 NE 2d 755 (1963), app. dismsd. 376 U.S. 649.

⁴*S&M Finance Co. v. Iowa State Tax Comm.*, (Ia. 1968); 68 Am Jur 2d, Sales and Use Taxation, §42.

⁵Opinion #46, at p. 3, citing, *Tax Commissioner v. Sisters of Sorrowful Mother*, 186 Okla. 339, 97 P.2d 888 (1939).

Where a sales or use tax statute imposes an obligation on a seller to collect sales tax from customers, the seller may avoid such an obligation if it can be proven that the transactions are within a *statutory exception*, . . . To take advantage of the exemption, however, applicable *statutory procedures* . . . *must be observed*, as a seller's subjective belief that a transaction is nontaxable may not provide a basis for exemption from sales tax . . . [emphasis added]

The Resort Tax Act provides some specific exemptions from taxation. Luxuries are taxed, most non-luxuries are not.⁶ Section §7-6-1501 defines luxuries as follows:

(1) "Luxuries" means any gift item, luxury item, or other item normally sold to the public or to transient visitors or tourists. The term does not include food purchased unprepared or unserved, medicine, medical supplies and services, appliances, hardware supplies and tools, or any necessities of life.

(2) "Medical supplies" means items that are sold to be used for curative, prosthetic, or medical maintenance purposes, whether or not prescribed by a physician.

(3) "Medicine" means substances sold for curative or remedial properties, including both physician prescribed and over-the-counter medications.

The plain language of §§7-6-1501 and 1503 spell out the only statutory exemptions from payment and collection of the resort tax. Under the authority of §7-6-1505(4), BSRAD's Ordinance interprets those sections by providing greater detail for the day-to-day guidance of the District. *However, Montana's resort tax statute has no exemption that excuses non-profit organizations from collecting resort tax on all their fund-raising activities.* It thus becomes necessary to reconcile the statutory language with the Ordinance to find the appropriate application for each.

It could be reasonably assumed, pursuant to Section 10(r) of Ordinance 98-01-ORD, that any type of fund-raising activity by any recognized 501(c)(3) corporation is automatically exempt from collection of the resort tax, even if it involves the sale of "luxuries," and even if the sale is made by a "destination recreation facility." The problem with that interpretation, however, as noted above, is that it finds no support in the Act.

In addition, the definition of "non-profit corporation" as it appears in the Federal Internal Revenue Code, has grown to encompass such a large range of organizations, that an exception for their fund-raising could seriously impact resort tax collection. The federal list of "non-profits" now includes not only religious, charitable, and educational organizations, but also "title holding companies," "pleasure, recreation and social clubs," "employee's associations," "business leagues," "fraternal societies," "labor organizations," "credit unions," "mutual insurance companies," and many others. Thus, for example, if the fund-raising exemption were to include all such "non-profits" a

⁶§7-6-1501, M.C.A.

restaurant could take advantage of that exception by organizing as a “social club,” charge a nominal “membership fee” to dine, and escape resort tax on all its sales.⁷

Another interpretation is that Section 10(r) of the Ordinance was intended to exempt sales of certain types of goods and services such as bake sales, Boy Scout car washes, and theater productions by amateur drama groups. However, if the activity generates any substantial commercial profit for a person or entity, then it is taxable.

In support of this interpretation we first note that the Resort Tax Act contains *no exemption* whatever for non-profit or charitable sales. We also note, however, that several key terms are undefined in the Act: “establishment,” “sell,” and “normally sold to the public or to transient visitors or tourists.” And we note, the case law from other states which deal with the issue of sales by non-profits generally focus on the type of transaction, the type of good or service, and the purpose or disposition of the sales revenue.

In *Tony and Susan Alamo Foundation, Inc. v. Ragland*,⁸ the Arkansas court refused to exempt sales by a bona fide charity’s restaurant, grocery store, service stations, clothing store and auto repair shop from the sales tax. The only customers were the members of the charity association, who were also employees of the charity. Based on a distinction in the state statute between for-profit activities of charities, and charitable ones, the tax was deemed applicable to the charity’s sales.

In *Good Shepherd Lutheran Home v. State Bd. of Equalization*,⁹ application of the sales tax was affirmed as to sales from “thrift” stores which the charity operated to fund its work with the developmentally disabled. Because the statute discriminated between sales which “benefitted” the purchaser versus those which netted a profit for the charity, the court found the transactions taxable.

In *Follett’s Illinois Book & Supply Store, Inc. v. Isaacs*,¹⁰ sales of textbooks by campus bookstores were taxed because the statute allowed an exemption only if the items were offered for educational purposes, and were not substantially available from other commercial sources. On the

⁷See, *contra*, *Green v. Surf Club, Inc.*, 136 So. 2d 354 (Fla. Dist. Ct. App. 3d Dist, 1961) [since sales tax statute exempted only “charitable” activities, social club could not qualify for exemption].

⁸295 Ark. 12, 746 SW2d 45 (1988).

⁹139 Cal. App. 3d 876, 189 Cal. Rptr. 242 (2nd Dist 1983).

¹⁰27 Ill. 2d 600, 190 NE2d 324 (1963).

other hand, in *University of Michigan Bd. of Regents v. Department of Treasury*,¹¹ it was held that a bed tax was not to be imposed on lodging charged to continuing education students attending courses on weekends, because the statute, taxed “furnishing accommodations that are available to the public on the basis of a commercial and business enterprise, ..” And in *St. John's Medical Center, Inc. v. Spradling*,¹² sales at a hospital’s gift shop and cafeteria were exempted from sales tax, even though the operations were profitable, because the net profits all went to support the hospital’s overall charitable purpose. The Missouri statute vaguely exempted charities from taxation, “.. in their charitable .. functions and activities.”

Under their respective state statutes, exemption from taxation in the foregoing cases turned on the type of transaction, the type of good or service sold, and the purpose or disposition of the sales revenue. Montana’s resort tax statute is arguably the most vague of all on this particular point.

However, interpreting the legislature’s intention requires us to read the Resort Tax Act as a whole, not just look piecemeal at parts of it.¹³ In doing so, as noted, the terms : “establishment,” “sell,” “goods and services,” and “normally sold to the public or to transient visitors or tourists,” are undefined by the legislature. Yet, these words and phrases are important to initially determine what is and is not subject to taxation. Also, in describing the explicit applications and exemptions from taxation, the Act focuses on who is the seller, and what is the commodity (ie, luxuries).¹⁴ We focus particular attention to the phrase “normally sold to the public or to transient visitors or tourists.”

Combined with the use of the word “establishment” in section 7-6-1503 to describe the tax collectors, it is our opinion that the legislature intended to tax sales that are *substantially commercial* in character. It does not appear however, that it intended to tax non-commercial fund-raising activities like bake sales or charity car washes, for example. Charity fund-raisers are not “normally sold to the public” because they tend to be (1) short-term events of a non-permanent character, (2) the labor and often the materials used to implement the events are mostly donated, and (3) because the substantial net revenue serves a non-profit purpose. If any one of those three ingredients shifts toward the commercial, then a “normal” sale to the public emerges and the event becomes taxable.

¹¹217 Mich. App. 665, 553 NW2d 349 (1996).

¹²510 SW2d 417 (Mo. 1974).

¹³§1-2-101, M.C.A.

¹⁴§§7-6-1501 & 1503, M.C.A.

Two examples illustrate the distinction. A pancake breakfast held in Big Sky as a fund-raiser by a Rotary Club to support its non-profit functions would not be taxed, since most of the labor and materials would be donated, the net revenue would enure to the non-profit club, and the Rotary Club is not part of a routine business "establishment." Yet, if the Rotary Club were paid a set fee by a pancake manufacturer to host a pancake breakfast, and a fee was charged to the customers for the breakfast with the profits enuring to the pancake manufacturer, then the proceeds from this pancake breakfast should be taxed. The latter takes on a *substantially commercial character*. To hold otherwise would tend to create an absurdity in Big Sky, where a restaurant serving the same pancake breakfast for a fee would be required to collect the tax, but the pancake manufacturer paying Rotary a fee to host the breakfast, but keeping the profits, would not.

Conclusion

As non-profit organizations do not have any statutory exemption from the obligation to collect the resort tax, those organizations must collect the tax on the sale of goods and services they sell for fund-raising purposes which would otherwise be taxable. Specific fund-raising activities of non-profit organizations however, which are substantially non-commercial in character, may be exempt by the Board from tax collection, if such exemption is adopted by Ordinance.

-END-

TOWN OF WEST YELLOWSTONE

MONTANA

Policy No. 7: A Policy for Determining Exempt Status

Regarding the Collection of the Resort Tax

If the sale of merchandise is the sole source of financial support for a community based, not-for-profit organization then these organizations will be exempt from collection of the resort tax. Community based organizations such as Beta Sigma Phi, United Women, Boy Scouts of America, Girl Scouts, and classes and organizations affiliated with the West Yellowstone School System are specifically exempted by this policy.

Fund-raising events such as auctions or sales held by 501 (c) (3) organizations shall be exempt from resort tax collections. Retail sales by 501 (c) (3) organizations (for example: mugs, t-shirts, hats) shall not be exempt from collecting the resort tax.

Not-for-profit organizations that sell merchandise to supplement their fund-raising efforts will not be exempt from collecting the resort tax.

Adopted
7-21-09 TE
CR

TOWN OF WEST YELLOWSTONE
MONTANA

DRAFT

**Policy No. 7 Amended: a Policy for Determining Exempt Status
Regarding the Collection of the Resort Tax**

United Women, Boy Scouts of America, Girl Scouts, and classes and organizations affiliated with the West Yellowstone School System are specifically exempted from collecting Resort Tax

BIG SKY RESORT AREA DISTRICT

ORDINANCE No. 98-01-ORD, as amended
Adopted on: January 14, 2015
(Effective on: June 1, 2015)

AN ORDINANCE PROVIDING FOR THE ADMINISTRATION OF THE RESORT TAX IN THE BIG SKY RESORT AREA DISTRICT

PURSUANT TO THE AUTHORITY VESTED IN THE BIG SKY RESORT AREA DISTRICT BOARD OF DIRECTORS UNDER §§ 7-6-1505, 7-6-1542 and 7-6-1547, MCA, BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE BIG SKY RESORT AREA DISTRICT TO AMEND ORDINANCE NO. 98-01-ORD AS FOLLOWS:

Section 1. Definitions: For purposes of this Ordinance, the following definitions apply, some of which are the same definitions as set forth in section 7-6-1501, MCA:

(1) “Administrative Officer” means the person hired by the District Board to assist in the administration of the resort tax and who serves at the pleasure of the District Board.

(2) “District” or “Big Sky Resort Area District” means the district created under sections 7-6-1531 through 1550, MCA, that has been established as a resort area under section 7-6-1508.

(3) “District Board” means the board of directors of the Big Sky Resort Area District elected pursuant to Title 7, Chapter 6, Part 15, MCA.

(4) “Luxuries” means any gift item, luxury item, or other item normally sold to the public or to transient visitors or tourists. The term does not include food purchased unprepared or unserved; medicine, medical supplies and services; appliances; hardware supplies and tools; or any necessities of life.

(5) “Medical supplies” means items that are sold to be used for curative, prosthetic, or medical maintenance purposes, whether or not prescribed by a physician.

(6) “Medicine” means substances sold for curative or remedial properties, including both physician prescribed and over-the-counter medications.

(7) “Prepared food” means

(a) Food sold in a heated state or heated by the seller; or

(b) Two or more food ingredients mixed or combined by the seller for sale as a single item, but not including food that is only cut repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer.

(c) Food sold with eating utensils “provided by the seller” including plates, knives forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food. Under the approved interpretation of the “Streamlined Sales and Use Tax Act (SSUTA),” a 75% (3/4) Threshold Test was created to add consistency to the meaning of the term “provided by the seller”.

The calculation is as follows:

- The numerator includes sales of “Prepared food” under (a) and (b) of the definition and food where plates, bowls, glasses or cups are necessary to receive the food (e.g. dispensed mil, fountain beverages, and salad bar). Alcoholic beverages are not included in the numerator.
- The denominator includes sales of all food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks. Alcoholic beverages are not included in the denominator.

(i) For sellers with a sales percentage of 75% or less, utensils are provided by the seller if the seller’s practice for the item (as represented by the seller) is to physically give or hand the utensil to the purchaser, except that plates, bowls, glasses, or cups necessary for the purchaser to receive the food (e.g., dispensed milk, salad bar) need only be made available.

(ii) When a seller sells food items that have a utensil placed in a package by a person other than the seller, and that person’s North American Industry Classification System (NAICS) classification code is that of a manufacturer (sector 311), the seller shall not be considered to have provided the utensil except as provided in 1-3 above. For any other packager with any other NAICS classification code (e.g., sector 722 for caterers), the seller shall be considered to have provided the utensil.

(d) “Prepared food” does not include the following sold without eating utensils:

(i) Food sold by a seller whose proper primary NAICS classification is manufacturing in section 311, except food gift items sold as a package or unit;

(ii) Food sold in an unheated state by weight as a single item;

(iii) Food sold in an unheated state by volume, (items that contain four or more servings), as a single item; or

(iv) Bakery items, including bread, rolls, buns biscuits, bagels, croissants, pastries, donuts, cakes, tortes, pies, tarts, muffins, bars, cookies and tortillas.

(8) "Served" means a response made to an order for one or more individual portions of food in a form that is edible without washing, cooking, or additional preparation.

(9) "Food service establishment" means:

(a) A fixed or mobile restaurant, coffee shop, cafeteria, short-order cafe, luncheonette, grille, tearoom, sandwich shop, soda fountain, food store serving food or beverage samples, food or drink vending machine, tavern, bar, cocktail lounge, nightclub, industrial feeding establishment, catering kitchen, commissary, private organization routinely serving the public, or similar place where food or drink is prepared, served, or provided to the public at retail, with or without charge.

(b) The term does not include:

(i) Operations, vendors, or vending machines that sell or serve only packaged, nonperishable foods in their unbroken, original containers;

(ii) A private organization serving food only to its members;

(iii) Custom meat cutters or wild game processors who cut, process, grind, package, or freeze game meat for the owner of the carcass for consumption by the owner or the owner's family, pets, or nonpaying guests;

(iv) An establishment, as defined in 50-51-102, that serves food only to its registered guests and day visitors."

(10) "Resale" means goods and services sold for wholesale purposes.

Section 2. Effective Date of the Resort Tax: The resort tax became effective on June 1, 1992.

Section 3. Duration of the Resort Tax: The duration of the resort tax is for twenty years commencing on June 1, 1992 and terminating on June 1, 2012. On November 7, 2006, by a majority vote of the qualified electors, the District was extended twenty (20) years to 2032.

Section 4. Effective Date of the Big Sky Resort Area District: The District became effective on April 7, 1998.

Section 5. Rate of the Resort Tax: The rate of the resort tax is three percent (3%) of the retail value of luxuries, and goods or services sold at designated establishments as set forth in sections 8, 9 and 10 below.

Section 6. Imposition of Resort Tax in the Big Sky Resort Area District: Pursuant to the election held on April 13, 1992 in Gallatin County, and the election held on April 21, 1992 in Madison County, a resort tax was imposed on the retail value of luxuries, and goods and services sold within the Gallatin County and Madison County segments of the District.

Section 7. Collection of Resort Tax: Establishments that sell luxuries, goods or services within the District must collect the resort tax on said luxuries, goods or services.

Section 8. Taxation of Goods and Services Sold at Enumerated Establishments: All goods and services sold at the following establishments in the District, other than those sold for resale within the District, are subject to the resort tax:

- (1) Hotels, motels, and other lodging or camping facilities;
- (2) Restaurants, fast food stores, and other food service establishments;
- (3) Taverns, bars, night clubs, lounges, and other public establishments that serve beer, wine, liquor, or other alcoholic beverages by the drink; and
- (4) Destination ski resorts and other destination recreational facilities.

Section 9. Luxuries Subject to the Resort Tax: Goods and services purchased, reserved, committed or occurring fully or partially within the boundaries of the District are considered to be sold in the District. The following goods and services sold at establishments in the District other than those establishments enumerated in section 8 above, are deemed to be luxuries and subject to the resort tax unless sold for resale within the District:

- (1) All clothing including, but not limited to, furs, logo wear, recreational clothing, gear and accessories;
- (2) Sporting goods;
- (3) Automobile rentals and rental of all recreational equipment, including but not limited to snowmobiles, all-terrain vehicles, skis, snowboards, bicycles, kayaks, motorcycles, campers, boats and boat motors;
- (4) Voluntary recreational activities:

(a) Golfing, swimming, skiing and other voluntary recreational daily tickets and season passes;

(b) Discretionary or voluntary ski and golf fees and dues.

(5) All recreational lessons and guided tour services provided on land, water or in air, including, but not limited to, skiing, snowboarding, fishing trips, hunting trips, backcountry dining trips, and other outfitter trips; horseback riding, golfing, rock climbing, cycling, rafting, canoeing, kayaking, dog sledding and ballooning;

(6) All souvenirs, curios, jewelry, books, and home accessories; gift, art and photographic items; food gift items prepared and sold as a package or unit, flowers not used in landscaping; and sales of fireworks;

(7) All prepared or served food and catering;

(8) All alcoholic beverages, including, but not limited to, beer, wine, liquor or other alcoholic beverages sold in an open container or by the drink;

(9) All non-alcoholic beverages sold in an open container or by the drink;

(10) All entertainment, including, but not limited to, tickets or other admissions to concerts, theatres, movies, shows, plays, sporting events and firework shows; rental movies, rental video games and all related rental equipment;

(11) Massages, unless prescribed by a physician, facials and other spa services, and manicures and pedicures.

(12) All rental agreements for lodging facilities, except rental agreements for a duration longer than thirty (30) days and employee housing regardless of duration or location within the District.

(13) Services for private events such as weddings, meeting groups and reunions, including, but not limited to space rental, equipment rental, photography, florist, catering and event management.

Section 10. “Necessities of Life” Exempt from the Resort Tax. The following goods and services sold at establishments in the District other than those establishments enumerated in section 8 above, are deemed “necessities of life” and exempt from the resort tax:

(1) Food purchased unprepared or unserved;

(2) Medicine, medical supplies and services;

- (3) Appliances;
- (4) Hardware supplies and tools;
- (5) School activities and nonprofit youth programs;
- (6) All other goods and services not subject to taxation as set forth in section 9 above.

Section 11. Time of Remittance of Resort Tax:

(1) For establishments that remit resort taxes on a monthly basis, the resort taxes collected must be received by the District on or before the last day of each month for the prior month.

(2) For establishments that remit resort taxes on a quarterly basis, the resort taxes collected must be received by the District on or before the last day of April, July, October, and January for the prior quarter.

(3) If the last day falls on Saturday, Sunday or a holiday, resort taxes collected must be received on the next business day.

(4) Resort taxes collected must be mailed to the following address: Big Sky Resort Area District, P.O. Box 161331, Big Sky, Montana, 59716.

(5) Tax payments received after the last day of a month, following the reporting month or quarter, will be deemed delinquent and subject to the penalties, interest and late fees described in section 14.

(6) Establishments that collect less than \$1,000.00 of resort taxes in the prior year, extending from January through December, may remit the resort taxes collected on a quarterly basis as set forth in (2) above.

Section 12. Remittance of Resort Tax to District Board: The District Board, or the Administrative Officer if so authorized by the District Board, is responsible for the resort tax.

Section 13. Enforcement of Collection of Resort Tax: The District Board shall enforce the collection of the resort tax and oversee the methods and procedures to be used in the enforcement as described in Ordinance No. 2008-1.

Section 14. Penalties, Interest, Late Fees and Liens:

(1) The following penalties, referrals, or liens may be imposed as authorized by section 7-6-1505, MCA, for failure to report resort taxes due, failure to remit resort taxes due, and violations of this Ordinance:

(a) A criminal penalty, not to exceed a fine of \$1,000.00 or six months imprisonment, or both;

(b) A civil penalty if the District prevails in a suit for the collection of resort taxes, not to exceed fifty percent (50%) of the resort taxes found due, plus the costs and attorney fees incurred by the District in the enforcement action;

(c) Upon referral to the County Commissioners of Gallatin or Madison Counties, revocation of the county license held by the offender, if applicable;

(d) Upon proper legal procedure secure and file a lien against the property of the establishment failing to report, collect or remit resort taxes.

(2) Delinquent taxes shall bear interest at the rate of one percent (1%) per calendar month, for the delinquent month (12% per annum). The assessed interest of one percent (1%) per month, shall apply after the last day of the month in which the payment is due, and to each subsequent month, regardless of when the payment is made; and

(3) A one-time late fee of \$30 shall be assessed for each reporting month that is delinquent.

Section 15. Administration Fee for Each Vendor and Commercial Establishment: Pursuant to section 7-6-1505, MCA, each establishment collecting resort taxes is entitled to withhold the authorized maximum of five percent (5%) of the resort taxes collected to defray the establishment's costs for the administration of the tax collection. The administration fee may be withheld by the establishment at time of remitting the resort taxes to the resort area district.

Section 16. Reporting Forms for Resort Tax - Confidentiality:

(1) The District Board shall provide each establishment in the District responsible for collecting the resort tax with the proper forms for reporting and accounting for the resort taxes collected.

(2) The records and forms submitted to the District Board by the establishments shall be confidential and not open to public inspection unless so ordered by the District Board pursuant to Article II, Sections 9 and 10, of the Constitution of the State of Montana, a court of competent jurisdiction, or upon the filing of an action in District Court.

Section 17. Audits: Under the direction of the District Board, audits may be conducted of establishments collecting the resort tax. All establishments and recipients must cooperate in the conduct of said audits. Failure to cooperate with an audit shall constitute a violation of this Ordinance.

Section 18. Maintenance of Records by Establishments: Each establishment required to collect and remit resort taxes to the District Board shall keep and maintain all records necessary to determine the verity of the taxes collected and remitted for a period of not less than five (5) years. Such records, upon request, must be made available for audit and inspection at all reasonable times. Such records include but are not limited to: electronic documents and materials, books, ledgers, registers; original records necessary to document gross receipts of the establishment; specific documentation of exempt sales; and correct copies of state and federal income tax returns, schedules and forms.

Section 19. Appropriation, Expenditure, and Purpose of Resort Tax:

(1) The revenue derived from the imposition of the resort tax will be appropriated by the District Board and expended for infrastructure facilities (as that term is commonly defined) in the Big Sky Resort Area District; public services, including but not limited to the establishment and maintenance of an adequately-sized post office; ambulance and other emergency medical services; public transportation systems; snow plowing; tourism development for the Big Sky Resort Area District; other services that provide for the public health, safety, and welfare within the Big Sky Resort Area District; and reimbursement or payment to the resort area district of the costs associated with the collection, administration, and litigation of the resort tax.

(a) The Board may issue bonds and pledge the proceeds to implement the appropriation, expenditure and purpose of the resort tax as authorized in section 7-6-1542, MCA, and as more fully described in an Ordinance.

Section 20. Authority to Hire Administrative and Other Employees: The District Board may hire an administrative officer and other employees to assist in the administration of the resort tax who shall serve at the pleasure of the District Board.

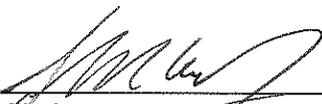
Section 21. Ratification: The District Board hereby ratifies all prior appropriations and obligations of resort tax funds made by the Madison and Gallatin County Commissions which preceded the creation of the District.

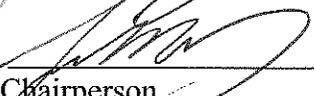
Section 22. Severance Clause: If any section, subsection, subdivision, paragraph, sentence, or phrase of this Ordinance or any part thereof is for any reason held to be unconstitutional or in violation of any law, such decision shall not affect the validity of the remaining portions of this Ordinance or any part thereof.

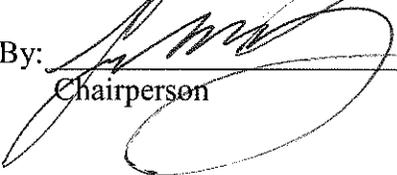
Section 23. Amendment of Ordinance: This Administrative Ordinance may be amended at any time thereafter as may be necessary to effectively administer the resort tax and must include the requirements of section 7-6-1505, MCA, but may not be amended to alter the specifications contained in the original ballot approved by the electors creating the resort area and imposing the resort tax.

Section 24. Map of Big Sky Resort Area District: A map of the District as approved by the electors on April 7, 1998, is attached to this Ordinance for reference.

Passed by the District Board of the Big Sky Resort Area District on the following dates:

1st Reading  _____ Vote: Unanimous Date: December 10, 2014
Chairperson

2nd Reading  _____ Vote: Unanimous Date: January 14, 2015
Chairperson

By:  _____ Date: January 14, 2015
Chairperson