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Legal Opinion 2017-007

TO: City Council; John Engen, Mayor; Dale Bickell; Ginny Merriam; Marty Rehbein; Kirsten Hands; Kelly Elam; Leigh Griffing; Steve Johnson

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE February 28, 2017

RE: Montana Recall Act narrowly limits statutory grounds for recall of public officers

FACTS:

Monday evening, February 27, 2017, during the city council meeting a citizen called for the recall of eleven (11) City Council members apparently for not adequately monitoring the Mayor's conduct in her opinion. This legal opinion is issued in order to educate everyone as to the Montana state statutory grounds for recalling an elected municipal official as well as to limit potential citizen attempted intimidation or harassment of city elected officials.

ISSUE(S):

Pursuant to the Montana Recall Act, what are the limited statutorily identified grounds for recalling a municipal elected official?

CONCLUSION(S):

The statutorily identified grounds, for qualified electors, to attempt to recall a municipal elected official are expressly limited by statute to "only" (a) physical or mental lack of fitness; (b) incompetence; (c) violation of oath of office; (d) official misconduct; or (e) conviction of a felony offense enumerated in Title 45.

LEGAL DISCUSSION:

The provisions of the "Montana Recall Act" are set forth in Title 2, Chapter 16, §2-16-601 through 2-16-635 MCA. Section 2-16-603 MCA statutorily identifies the only grounds for recall of public officials/officers by the qualified electors of the political subdivision. Section 2-16-603 MCA provides:

2-16-603. Officers subject to recall -- grounds for recall. (1) Any person holding a public office of the state or any of its political subdivisions, either by election or appointment, is subject to recall from office.

(2) A public officer holding an elective office may be recalled by the qualified electors entitled to vote for the elective officer's successor. A public officer holding an appointive office may be recalled by the qualified electors entitled to vote for the successor or successors of the elective officer or officers who have the authority to appoint a person to that position.

(3) Physical or mental lack of fitness, incompetence, violation of the oath of office, official misconduct, or conviction of a felony offense enumerated in Title 45 are the only grounds for recall. A person may not be recalled for performing a mandatory duty of the office that the person holds or for not performing any act that, if performed, would subject the person to prosecution for official misconduct. (Emphasis added.)

Note that subsection 2-16-603(3) MCA explicitly states that the statutory grounds for recall set forth in subsection 2-16-603(3) “are the only grounds for recall”. (Emphasis added) Also, note that the first sentence of subsection 2-16-603(2) MCA states “a public officer holding an elective office may be recalled by the qualified electors entitled to vote for the elective officer's successor.” (Emphasis added) Thus, if a recall election pertained to a city council member, only qualified electors of the city council member’s ward would be eligible to vote.

Pursuant to subsection 2-16-603(3) MCA, the only statutory grounds for recalling a public officer such as a municipal elected official are:

1. Physical or Mental lack of fitness;
2. Incompetence;
3. Violation of Oath of Office;
4. Official Misconduct; or
5. Conviction of a felony criminal offense enumerated in Title 45 MCA.

Section 7-1-4137 MCA of Montana’s Municipal Government Statutes is entitled “Oath of Office” and states in pertinent part in subsection 7-1-4137(1) MCA “(1) Every elected and appointed municipal officer shall take the oath of office prescribed in Article III, Section 3, of the Montana Constitution.” (Emphasis added)

The Montana Constitutional oath of office set forth in Article III, Section 3, states:

Section 3. Oath of office. Members of the legislature and all executive, ministerial and judicial officers, shall take and subscribe the following oath or affirmation, before they enter upon the duties of their offices: “I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States and the constitution of the state of Montana, and that I will discharge the duties of my office with fidelity (so help me God).” No other oath,

declaration, or test shall be required as a qualification for any office or public trust. *(Emphasis added)*

The crime of official misconduct set forth in section 45-7-401, MCA provides:

45-7-401. Official misconduct. (1) A public servant commits the offense of official misconduct when in an official capacity the public servant commits any of the following acts:

- (a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction;
- (b) knowingly performs an act in an official capacity that the public servant knows is forbidden by law;
- (c) with the purpose to obtain a personal advantage or an advantage for another, performs an act in excess of the public servant's lawful authority;
- (d) solicits or knowingly accepts for the performance of any act a fee or reward that the public servant knows is not authorized by law; or
- (e) knowingly conducts a meeting of a public agency in violation of 2-3-203.

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The district court has exclusive jurisdiction in prosecutions under this section. Any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from office without pay pending final judgment. Upon final judgment of conviction, the public servant shall permanently forfeit the public servant's office. Upon acquittal, the public servant must be reinstated in office and must receive all backpay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect an impeachment or removal. *(emphasis added)*

Section 2-3-203 MCA cross referenced to in subsection 45-7-401(1)(e) MCA is Montana's open public meeting law.

There is no other Montana statutory definition for the terms "official misconduct" or "misconduct" in conjunction with elected officials. These terms generally refer to acts or actions specifically related to the conducting of government business or exercising the authority, powers, duties or responsibilities of the official office held by the government official.

Black's Law Dictionary, Eighth Edition at page 1019 defines the term "official misconduct" as follows:

Official misconduct. A public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance. – Also termed *misconduct in office; misbehavior in office; malconduct in office; misdemeanor in office; corruption in office; official corruption; political corruption*. (*Emphasis added*)

Some other important aspects of the Montana Recall Act include:

- (1) Pursuant to subsection 2-16-615(1) MCA recall petitions for elected municipal officials would be required to be submitted to the county elections administrator who also administers all city municipal elected official elections.
- (2) Pursuant to subsection 2-16-617(3) MCA prior to being able to circulate a recall petition a proposed sample recall petition must be submitted to the officer with whom the petition must be filed, which would be the county election administrator.
- (3) Pursuant to subsection 2-16-612(3) MCA any one signing the recall petition with respect to a municipal officer, would have to be an eligible qualified elector of the political subdivision as well as the city council ward if the recall pertained to a city council member. See subsection 2-16-603(2) MCA, *supra*.
- (4) Pursuant to 2-16-614(4) MCA recall petitions for Montana municipal elected officials "MUST CONTAIN THE SIGNATURES OF QUALIFIED ELECTORS EQUALING AT LEAST 20% OF THE NUMBER OF PERSONS REGISTERED TO VOTE AT THE PRECEDING ELECTION FOR THE MUNICIPALITY" (*Emphasis added*)

Subsection 2-16-614(4) MCA provides in its entirety that:

(4) Recall petitions for elected or appointed officers of municipalities or school districts must contain the signatures of qualified electors equaling at least 20% of the number of persons registered to vote at the preceding election for the municipality or school district. (*Emphasis added*)

This provision would likely be interpreted by the county election administrator as 20% of the qualified electors of the city council member's ward, if the recall pertains to a city council member.

CONCLUSION(S):

The statutorily identified grounds for qualified electors to attempt to recall a municipal elected official are expressly limited by statute to “only” (a) physical or mental lack of fitness; (b) incompetence; (c) violation of oath of office; (d) official misconduct; or (e) conviction of a felony offense enumerated in Title 45.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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