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Legal Opinion 2012-014

TO: John Engen, Mayor; City Council; Bruce Bender; Marty Rehbein; and Brentt Ramharter

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE October 26, 2012

RE: Montana Recall Act grounds for recalling elected government officials.

FACTS:

Local news media has been reporting that some citizens are interested in initiating a recall of a City of Missoula City Council Member allegedly because during the City Council Member's 2011 election campaign for City Council he did not disclose to them that the City Council Member Elect might propose a zoning regulation amendment that could allow accessory dwelling units to be within zoning classifications generally referred to as residential single dwelling unit zoning district.

ISSUE(S):

Pursuant to the Montana Recall Act pertaining to the potential recall of an elected government official from an elective government office, what are the grounds for potential recall?

CONCLUSION(S):

Pursuant to the Montana Recall Act "the only grounds for recall" that are authorized are 1.) Physical or mental lack of fitness; 2.) Incompetence; 3.) Violation of the oath of office; 4.) Official Misconduct; or 5.) Conviction of a felony offense enumerated in Title 45, Montana's Criminal Code of 1973.

LEGAL DISCUSSION:

The Montana Recall Act is set forth in Title 2, Chapter 16, Part 6 Montana Code Annotated (MCA). Section 2-16-603 MCA of the Montana Recall Act sets forth the only grounds for recall stating:

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)

Thus, subsection 2-16-603(3) MCA specifically states that “the only grounds for recall” of an elected official are 1.) Physical or mental lack of fitness; 2.) Incompetence; 3.) Violation of the oath of office; 4.) Official misconduct; or 5.) Conviction of a felony offense enumerated in Title 45. Title 45 is entitled “Crimes” and is commonly referred to as the Montana Criminal Code.

Sections 1-2-106 and 1-2-107 MCA of Montana’s Statutory Rules of Construction (Interpretation) state as follows:

1-2-106. Construction of words and phrases. Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law or are defined in chapter 1, part 2, as amended, are to be construed according to such peculiar and appropriate meaning or definition.

1-2-107. Applicability of definitions. Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears. (Emphasis supplied)

There is no definition in Montana State Law of the phrase “physical or mental lack of fitness”. However, Montana State Law does define the terms “mentally defective” and “mentally incapacitated” which could potentially be of some value in determining the meaning of the phrase “physical or mental lack of fitness”. Subsections 45-2-101(40) and 41 MCA of the Montana Criminal Code set forth the following definitions:

(40) “Mentally defective” means that a person suffers from a mental disease or defect that renders the person incapable of appreciating the nature of the person’s own conduct.

(41) “Mentally incapacitated” means that a person is rendered temporarily incapable of appreciating or controlling the person’s own conduct as a result of the influence of an intoxicating substance. (Emphasis added)

The only Montana State Law definition related to “incompetence” is “incompetent person” which is set forth in subsection 53-24-103(9) MCA of Montana’s alcoholism and drug dependence laws as follows:

“(9) Incompetent person means a person who has been adjudged incompetent by the district court. (Emphasis added)

A third potential ground for recall of an elected official pursuant to the Montana Recall Act is violation of the oath of office”. Section 7-1-4137 MCA of Montana’s general municipal government is entitled “oath of office” and states as follows:

7-1-4137. Oath of office. (1) Every elected and appointed municipal officer shall take the oath of office prescribed in Article III, section 3, of the Montana constitution. Before the officer performs any official duties, the oath of office, certified by the official before whom the oath was taken, must be filed. An elected officer shall file the oath with the county election administrator. Except as provided in subsection (2), an appointed officer shall file the oath with the city clerk.

(2) A person appointed to fill a vacancy in an elected municipal office shall file the oath of office with the county election administrator. (Emphasis added)

Article III, Section 3 of Montana’s Constitution 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 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).

A fourth ground for official misconduct is “Official Misconduct”, The meaning of the phrase “official misconduct” in Montana for the purposes of the Montana Recall Act is the meaning set forth in section 45-7-401 MCA of Montana’s Criminal Code. Foster v. Kovich, 207M 139, 673 p2d 1239(1983)

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)

The Montana Supreme Court in Foster v. Kovich, supra, indicated that a public official has not committed "official misconduct" within the meaning of the Montana Recall Act unless the public official has committed one or more of the acts set forth in section 45-7-401MCA.

It is also important to note and emphasize that the Montana Attorney General pursuant to 38 Attorney General Opinion 41 (1979) held that an allegation that a public official voted in a manner contrary to the wishes, will or desires of his constituents is not a sufficient ground for recall. The Attorney General noted that the only bases for recall are enumerated in Section 2-16-603 MCA of the Montana Recall Act.

A fifth potential ground for recall of an elected person pursuant to the Montana Recall Act is "Conviction of a felony offense enumerated in Title 45 "MCA, Title 45" MCA, Title 45 MCA is entitled "Crimes" and is commonly referred to as Montana's Criminal Code.

The term "felony" is defined in subsection 45-2-101(23), MCA as follows:

"(23) "Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in a state prison for a term exceeding one year."

Section 2-16-614 MCA of the Montana Recall Act is entitled "Number of electors required for recall petition." Subsection 2-16-614(4) MCA pertains to recall of Municipal officials provides:

(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)

CONCLUSION(S):

Pursuant to the Montana Recall Act “the only grounds for recall” that are authorized are 1.) Physical or mental lack of fitness; 2.) Incompetence; 3.) Violation of the oath of office; 4.) Official Misconduct; or 5.) Conviction of a felony offense enumerated in Title 45, Montana’s Criminal Code of 1973.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN:tfa