From:	Jim Nugent
To:	Daniel Carlino
Cc:	Ryan Sudbury; Grp. City Council and City Web Site; Dept. Mayors Office; Dept. City Clerk; Jaeson White; Scott Hoffman; Mike Colyer; Richard Stepper; Jake Rosling; Laurie Clark; Mike Brady; Dept. Attorney; Angela Simonson
Subject:	RE: Entheogenic plants
Date:	Tuesday, April 19, 2022 4:05:07 PM

DANIEL:

I think that there are substantive problems/flaws with the newest draft resolution you sent me this morning.

Some examples of issues include; but are not necessarily limited to the following:

1. The resolution title declares that no City of Missoula funds will be used for investigation and arrest of individuals involved. City funds pay the salaries of city police officers, gas for motor vehicles, etc.. Thus, in essence the proposed resolution is a ban on city staff members being involved in any investigation or arrest. A total ban goes beyond attempted prioritization of law enforcement of crimes. That 7-5-131(2)(e) MCA prohibits.

2. Page 2, the final WHEREAS states the City of Missoula wishes to declare its desire not to expend resources in any investigation, detention, arrest, or prosecution solely based on violations of state or federal law. City resources must include city salaries for city staffs members, fuel for motor vehicles, etc.. Once again this is total ban that goes beyond attempted prioritization of law enforcement of crimes that 7-5-131((20(e) MCA prohibits.

3. Page 2, the first NOW THEREFORE be it resolved states that no department, officer or employee of the city including without limitation the Missoula police department personnel shall use any city funds or resources to assist in enforcement of laws for the use and possession of Entheogenic Plants City funds includes police and other city staff salaries, fuel for motor vehicles, etc.; Once again this is a total ban that goes beyond attempted prioritization of law enforcement of crimes that 7-5-131(2)*(s) MCA prohibits

4. Page 2, first BE IT FURTHER RESOLVED states that it does not authorize or enable activities such as distributing materials at schools, driving under the influence etc.; etc.; but it does not clearly state for or to law enforcement that law enforcement may act to enforce other Montana state laws; even if enforcement might be contrary other language provisions of the resolution. An explicit law enforcement authorization for law enforcement would be prudent.

5. Page 2, the next to last BE IT FURTHER RESOLVED is instructing law enforcement officers to use their discretion not to arrest or charge adults for crimes involving planting, cultivating, purchasing transporting, engaging in practices with and/or possessing Entheogenic Plants. The use of the word “discretion” as well as the subsequent phrase “standalone offenses” would seem to indirectly empower police to perform; an arrest; which would be inconsistent with the aforementioned itemized provisions/items.

6. What are the intended penalties for city police officer or city staff violations(s) of the city policy established pursuant to the resolution. Some thought should be provided to what concerns/stress he resolution might cause to city police officers or other city staffs as they go about their work routines.

7. As I review the draft proposed resolution, I cannot help; but wonder practically what happens what occurs if a city police officer does make an arrest or otherwise acts contrary to the resolution policy? Discipline the police officer? Discipline terminate the police officer? Pursuant to the collective bargaining agreement with the city police association; I have no doubt any disciplined city police officer would challenge any discipline all the way to binding arbitration and likely prevail.

8. There is no policy separation of felonies and misdemeanors. Montana local governments do not possess powers to affect felony criminal offenses. Even the Missoula County Commissioners amended 2006 Missoula Initiative #2 to limit it to misdemeanors.

I recommend that you be working in coordination with the Mayor with respect to your draft resolution language. Pursuant to Montana state law, a mayor has the power and authority to veto any resolution; or line item veto any provision in a resolution. It would require at least a two-thirds city council vote to successfully override a mayoral veto. Pursuant to the form of local government that City of Missoula voters have adopted there are three branches of municipal government. In this instance the legislative and executive branches of municipal government are directly affected.

Pursuant to section 7-32-4103 the executive branch mayor has supervision over the police department, Pursuant to section 7-32-4103 MCA statutorily the mayor makes rules not inconsistent with title 7, chapter 32, part 41 and other laws of the state for the government, direction, direction, management and discipline of the police force. I do not know if Mayor Engen has any current concerns about the draft resolution language; but would definitely recommend that you be discussing the specific resolution language with him..

JIM NUGENT

From: Daniel Carlino <CarlinoD@ci.missoula.mt.us>
Sent: Tuesday, April 19, 2022 10:43 AM
To: Jim Nugent <NugentJ@ci.missoula.mt.us>
Cc: Ryan Sudbury <SudburyR@ci.missoula.mt.us>
Subject: Fwd: Entheogenic plants

Jim, here is the newest version of the resolution that Ryan Sudbury wrote up. Please let us know what you think of this version.

From: Ryan Sudbury <SudburyR@ci.missoula.mt.us>
Sent: Tuesday, April 19, 2022 9:06 AM
To: Daniel Carlino

Subject: Re: Entheogenic plants

Done. Attached in a redline (track changes) version, and a clean version.
Best,

Ryan Sudbury

Deputy City Attorney

City of Missoula

From: Daniel Carlino <CarlinoD@ci.missoula.mt.us>
Sent: Tuesday, April 19, 2022 9:01 AM
To: Ryan Sudbury <SudburyR@ci.missoula.mt.us>
Subject: Re: Entheogenic plants

Great, I see your changes now and agree with them. The only other thing is that it sounds like we must change the name of the resolution to avoid any lowest priority language. We can use this instead, if you wouldn't mind adding it to your version instead of the current title.

A resolution supporting entheogenic plant practices and declaring that no City of Missoula funds will be used in the investigation and arrest of individuals involved with the adult use of entheogenic plants on the federal schedule 1 list

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From: Ryan Sudbury <SudburyR@ci.missoula.mt.us>
Sent: Tuesday, April 19, 2022 8:57 AM
To: Daniel Carlino <CarlinoD@ci.missoula.mt.us>
Subject: Re: Entheogenic plants

The changes should show up in track changes. I resaved and reattached it just in case. You may need to turn on show markup or otherwise fiddle with your review/track changes settings to see them.

Ryan Sudbury

Deputy City Attorney

City of Missoula

From: Daniel Carlino <CarlinoD@ci.missoula.mt.us>
Sent: Tuesday, April 19, 2022 8:54 AM
To: Ryan Sudbury <SudburyR@ci.missoula.mt.us>
Subject: Re: Entheogenic plants

Hey Ryan, do you know what clauses you edited on this resolution? Thanks for helping me avoid any legal challenges. It is a shared goal of mine to avoid the legal challenges, but I still intend to introduce this resolution ASAP after Jim can approve of the changes.

-Daniel Carlino

From: Ryan Sudbury <SudburyR@ci.missoula.mt.us>
Sent: Tuesday, April 19, 2022 8:46 AM
To: Daniel Carlino <CarlinoD@ci.missoula.mt.us>
Subject: Re: Entheogenic plants

I made a couple edits to attempt to avoid this issue. I can't guarantee Jim won't take issue with this as well, but it at least responds to his previously cited issue. See attached.

Ryan Sudbury

Deputy City Attorney

City of Missoula

From: Daniel Carlino <CarlinoD@ci.missoula.mt.us>
Sent: Monday, April 18, 2022 4:46 PM
To: Jim Nugent <NugentJ@ci.missoula.mt.us>
Cc: Grp. City Council and City Web Site <Council@ci.missoula.mt.us>; Dept. Mayors Office <DeptMayor@ci.missoula.mt.us>; Dept. City Clerk <CLERK@ci.missoula.mt.us>; Dept. Attorney <Atty@ci.missoula.mt.us>; Jaeson White <WhiteJ@ci.missoula.mt.us>; Scott Hoffman <HoffmanS@ci.missoula.mt.us>; Laurie Clark <ClarkL@ci.missoula.mt.us>; Mike Colyer <ColyerM@ci.missoula.mt.us>; Richard Stepper <StepperR@ci.missoula.mt.us>; Jake Rosling <RoslingJ@ci.missoula.mt.us>
Subject: RE: Entheogenic plants

Thanks for the information, Jim. It looks like we will need to make amendments to this resolution to change the language around the wording of “lowest priority” to make it something that won’t have legal challenges. I am open to suggestions and will ensure we figure it out before moving forward with a vote on this resolution.

-Daniel Carlino

From: Jim Nugent <NugentJ@ci.missoula.mt.us>
Sent: Monday, April 18, 2022 1:24 PM
To: Daniel Carlino <CarlinoD@ci.missoula.mt.us>
Cc: Grp. City Council and City Web Site <Council@ci.missoula.mt.us>; Dept. Mayors Office <DeptMayor@ci.missoula.mt.us>; Dept. City Clerk <CLERK@ci.missoula.mt.us>; Dept. Attorney <Atty@ci.missoula.mt.us>; Jaeson White <WhiteJ@ci.missoula.mt.us>; Scott Hoffman <HoffmanS@ci.missoula.mt.us>; Laurie Clark <ClarkL@ci.missoula.mt.us>; Mike Colyer <ColyerM@ci.missoula.mt.us>; Richard Stepper <StepperR@ci.missoula.mt.us>; Jake Rosling <RoslingJ@ci.missoula.mt.us>
Subject: RE: Entheogenic plants

DANIEL:

No your summary is not what I am explaining and your summary is not accurate.

I am informing you solely about the substantive aspect off the prohibition in subsection 7-5-131(2)(e) MCA. Thee Montana State Legislature was specifically responding to a Missoula Initiative that formally attempted to prioritize enforcement of criminal laws, The Montana State Legislature was not stating that the local government electors/voters utilized the wrong mechanism by utilizing initiative instead of a resolution or ordinance. The Montana State Legislature did not provide or state that local governments could go ahead and formally prioritize enforcement of Montana state criminal laws; but not by initiative; but instead the local government should do it by resolution or ordinance.

The Montana State Legislature is the appropriate forum for addressing the prioritization of law enforcement's enforcement of Montana state criminal laws.

JIM NUGENT

From: Daniel Carlino <CarlinoD@ci.missoula.mt.us>
Sent: Monday, April 18, 2022 12:15 PM
To: Jim Nugent <NugentJ@ci.missoula.mt.us>
Cc: Grp. City Council and City Web Site <Council@ci.missoula.mt.us>; Dept. Mayors Office <DeptMayor@ci.missoula.mt.us>; Dept. City Clerk <CLERK@ci.missoula.mt.us>; Dept. Attorney <Atty@ci.missoula.mt.us>; Jaeson White <WhiteJ@ci.missoula.mt.us>; Scott Hoffman <HoffmanS@ci.missoula.mt.us>; Laurie Clark <ClarkL@ci.missoula.mt.us>
Subject: Re: Entheogenic plants

Okay, thanks for the information Jim. Per the list you are referencing, you are saying that the city council is denied all of the following powers that were denied for citizens to do ballot referendum/ ballot initiative? Here is the list that you referenced:

(2) The powers of initiative do not extend to the following:

(a) the annual budget;

(b) bond proceedings, except for ordinances authorizing bonds;

(c) the establishment and collection of charges pledged for the payment of principal and interest on bonds;

(d) the levy of special assessments pledged for the payment of principal and interest on bonds;

(e) the prioritization of the enforcement of any state law by a unit of local government; or

(f) the regulation of auxiliary containers, defined in **7-1-121**(5), as prohibited by **7-1-121**(2).

From: Jim Nugent <NugentJ@ci.missoula.mt.us>
Sent: Monday, April 18, 2022 12:04 PM
To: Daniel Carlino
Cc: Grp. City Council and City Web Site; Dept. Mayors Office; Dept. City Clerk; Dept. Attorney; Jaeson White; Scott Hoffman; Laurie Clark
Subject: RE: Entheogenic plants

DANIEL:

Your issue is a Montana state law issue that you should be taking to the Montana State Legislature to address; because you issue pertains to prioritization of Montana state criminal laws, apparently both felony and misdemeanor. If the local government electors/voters are specifically denied a power, local government governing bodies are not empowered to perform what their electors/voters are prohibited from exercising.

Not every conceivable legal issue is addressed by a federal, state or local law; especially when the laws you apparently want to formally prioritize are State of Montana laws; not City of Missoula laws. You also are overlooking the entire government power hierarchy of federal, state and local government level bodies. Municipal; local governments are the lowest level unit of government with respect to federal, state and local government and a lower level government is not empowered to determine enforcement legal issues with respect to upper level governments laws; unless that upper level government has authorized such action by law.

The courts will not allow a local government to exercise any power that attempts to prioritize another higher authority level of government's laws; unless there is a specific authorization to do so established in law. The topic being addressed is Montana state criminal laws; not city ordinances.

While not every conceivable aspect of any legal issue that might arise in society is specifically addressed by a law, federal, state or local ordinance, there is in fact a Montana state law pursuant to which it is clear that the Montana State Legislature intends to generally deny local governments power that affects Montana state criminal laws. Pursuant to subsection 7-1-111(8) MCA the Montana State Legislature denies local governments with self-government powers the exercise of "any power that defines as an offense conduct made criminal by state statute that defines an

offense as felony or that fixes the penalty or sentence for a misdemeanor in excess of a fine of $500 or, 6 months' imprisonment or both, except as specially authorized by statute."

Not every aspect of potential societal law is currently addressed in federal, state or local law; but general legal guidance may be obtained from existing current laws generally addressing the topic. Pursuant to Montana state law subsection 7-1-111(8) MCA, the Montana State Legislature is clearly indicating that there are to be state limitations or restrictions on Montana local governments with respect to both felony and misdemeanor state laws. The Montana state legislature has not adopted any state law that empowers Montana municipal governments with respect to the prioritization of Montana state criminal laws and/or with respect to Montana state felony laws and/or establishing a misdemeans penalty greater than authorized by Montana state law.

JIM NUGENT

From: Daniel Carlino <CarlinoD@ci.missoula.mt.us>
Sent: Monday, April 18, 2022 10:35 AM
To: Jim Nugent <NugentJ@ci.missoula.mt.us>
Subject: Re: Entheogenic plants

Jim, you are referencing the law that prevents ballot initiatives/referendums, not applying to council. Can you show where it says in the law that council can't prioritize the local law enforcements priorities?

From: Jim Nugent <NugentJ@ci.missoula.mt.us>
Sent: Monday, April 18, 2022 9:55:29 AM
To: Grp. City Council and City Web Site <Council@ci.missoula.mt.us>; Dept. Mayors Office <DeptMayor@ci.missoula.mt.us>; Dept. City Clerk <CLERK@ci.missoula.mt.us>; Jaeson White <WhiteJ@ci.missoula.mt.us>; Scott Hoffman <HoffmanS@ci.missoula.mt.us>; Laurie Clark <ClarkL@ci.missoula.mt.us>; Angela Simonson <SimonsonA@ci.missoula.mt.us>
Cc: Dept. Attorney <Atty@ci.missoula.mt.us>; Mike Brady <BradyM@ci.missoula.mt.us>
Subject: FW: Entheogenic plants

From: Jim Nugent
Sent: Monday, April 18, 2022 8:55 AM
To: Marty Rehbein <RehbeinM@ci.missoula.mt.us>; Ryan Sudbury <SudburyR@ci.missoula.mt.us>; Dept. Attorney <Atty@ci.missoula.mt.us>
Cc: Dept. City Clerk <CLERK@ci.missoula.mt.us>; Mike Brady <BradyM@ci.missoula.mt.us>
Subject: RE: Entheogenic plants

CONFIDENTIAL PRIVILEGED ATTORNEY CLIENT COMMUNICATION
MARTY:

The substantive legal issue about whether local government units may assert such control over Montana State Legislature/laws exists whether or not the Montana State Legislature enacted 7-5-131(2)(e)CA.

The substantive legal issue is whether a local government unit may dictate prioritization of state law enforcement. Any local government unit attempted alternative process/procedure efforts does not eliminate the real substantive legal issue.

ff the local elector/voters are not legally able to prioritize enforcement of Montana state laws; where would any legal authority come from for local government governing units to do what the electors/voters are by law prohibited from doing? If any law formal enforcement prioritization is going to occur; legally it is the Montana State Legislature's role to prioritize law enforcement's enforcement of Montana state laws; not local government units.

The legal principle is that a local government unit does not legally have the authority to determine or control law enforcement's enforcement of Montana state laws. Substantively a local government unit may not legally dictate the prioritization of state law. Process/procedure wise whether it is an initiative/ordinance/resolution; the process/procedure of local government is not legally able to establish prioritization of enforcement of Montana state law or federal laws. You are inquiring about process and procedure rather than substance.

The legal issue legal substance is that in the hierarchy of government units; the lesser government does not have the legal authority to assert or determine control over law enforcement of higher government authorities laws. A local municipal government does not have legal authority to determine/control prioritization of law enforcement's responsibility/duty enforcement of state or federal laws.

JIM NUGENT

From: Marty Rehbein <RehbeinM@ci.missoula.mt.us>
Sent: Friday, April 15, 2022 2:50 PM
To: Jim Nugent <NugentJ@ci.missoula.mt.us>; Ryan Sudbury <SudburyR@ci.missoula.mt.us>; Dept. Attorney <Atty@ci.missoula.mt.us>
Cc: Dept. City Clerk <CLERK@ci.missoula.mt.us>; Mike Brady <BradyM@ci.missoula.mt.us>
Subject: RE: Entheogenic plants

Jim,
Does this apply to Council resolution? What if the proposal isn't an initiative?

From: Jim Nugent <NugentJ@ci.missoula.mt.us>
Sent: Friday, April 15, 2022 1:37 PM
To: Ryan Sudbury <SudburyR@ci.missoula.mt.us>; Dept. Attorney <Atty@ci.missoula.mt.us>; Marty Rehbein <RehbeinM@ci.missoula.mt.us>
Cc: Dept. City Clerk <CLERK@ci.missoula.mt.us>; Mike Brady <BradyM@ci.missoula.mt.us>
Subject: RE: Entheogenic plants

CONFIDENTIAL PRIVILEGED ATTORNEY CLIENT COMMUNICATION!!!!!
TO WHOM IT MAY CONCERN:

Okay, I have located the Montana state law that I had been recalling being adopted and existing. with the recollection brainstorming and memory assistance of Mike Brady, I have been able to locate the Montana state law that provides that a local government initiative may not prioritize the enforcement of any Montana state law. Subsection 7-5-131(2)(e) MCA that the powers of initiative shall not extend to the "prioritization of the enforcement of any state law by a unit of local government."

Both Mike Brady and I could recollect how for several years there were citizens who would meet with local government officials periodically to urge that at that time marijuana possession be law enforcement's lowest priority in Missoula County. Eventually in 2006 there was Missoula County wide "Initiative 2" adopted by Missoula County voters to provide that law enforcement make possession of marijuana in 2006 forward law enforcement's lowest priority. The Missoula County Commissioners amended "Initiative 2" adopted in 2006 to only pertain to misdemeanor marijuana crimes.

However, an important legal process/procedure legal issue remained that a Montana local government did not have legal authority to prioritize enforcement of Montana state laws; because Montana local governments do not possess the legal authority to determine/control the prioritization of enforcement of Montana state laws.

Missoula County Attorney Fred Van Valkenburg then advocated to the Montana State Legislature for a Montana state law to specifically address the legal issue/concerns about whether local governments had legal authority by initiative to attempt to determine/control prioritization of enforcement of Montana state laws. Missoula County Attorney Fred Van Valkenburg was successful in having the 2011 Montana State Legislature adopt HB-391(2011) entitled " AN CT PROVIDING THAT THE POWER OF INITIATIVE DOES NOT EXTEND TO THE PRIORITIZATION OF THE ENFORCEMENT OF ANY STATE LAW BY A UNIT OF LOCAL GOVERNMENT; AND AMENDING SECTION 7-5-131 MCA. See LAWS OF MONTANA, SIXTY-SECOND Legislature 2011 volume 1, CHAPTER NO. 161 (HB-391) page 596-597. Hb-391(2011) became effective October 1, 2011.

Subsection 7-5-131(2)(e) MCA today continues to state:

(2) The powers of initiative do not extend to the following:

. . . .

(e) the prioritization of the enforcement of any state law by unit of local government".

A Montana local government unit lacks legal authority to determine/control the enforcement priority of a Montana state law. Until brainstorming with Mike Brady, I was having difficulty locating the Montana state law that I knew had been adopted; because it was set forth in Montana municipal initiative laws and my recollection had forgotten that a Missoula County initiative was involved;. Thanks to Mike Brady for refreshing my memory that a Missoula County wide initiative was involved.

JIM NUGENT

From: Jim Nugent
Sent: Wednesday, April 13, 2022 7:58 AM
To: Ryan Sudbury <SudburyR@ci.missoula.mt.us>; Dept. Attorney <Atty@ci.missoula.mt.us>
Subject: RE: Entheogenic plants

CONFIDENTIAL PRIVILEGED ATTORNEY CLIENT COMMUNICATION!!!
RYAN:

I seem to recall that former county attorney Fred VanValkenburg may have successfully went to the Montana State Legislature many years ago and obtained state legislation that prohibited the mandatory prioritization of criminal offenses local governments.

JIM NUGENT

From: Ryan Sudbury <SudburyR@ci.missoula.mt.us>
Sent: Tuesday, April 12, 2022 5:05 PM
To: Dept. Attorney <Atty@ci.missoula.mt.us>
Subject: Fw: Entheogenic plants

Councilmember Carlino is proposing a resolution to define ethnogenic plants (e.g. magic mushrooms), and declaring that it is the policy of the City to treat the possession of those for personal use to be the lowest priority for law enforcement and that no City funds or resources should be used to enforce laws regarding the possession or use of such plants/substances as a standalone offense. Similar to the way marijuana was handled pre-legalization.

If you have any concerns you can let Marty know as she is helping prepare the proposed resolution.

Ryan Sudbury

Deputy City Attorney

City of Missoula

From: Marty Rehbein <RehbeinM@ci.missoula.mt.us>
Sent: Tuesday, April 12, 2022 4:59 PM
To: Jake Rosling <RoslingJ@ci.missoula.mt.us>; Ryan Sudbury <SudburyR@ci.missoula.mt.us>
Subject: Entheogenic plants

Did you have any comments or changes to the resolution?

https://cityofmissoulagcc-my.sharepoint.com/:w:/g/personal/rehbeinm_ci_missoula_mt_us/EcXxXu3q5cRFoUPazATGffcBVZQafK6XaxNT1BrVIrV5lQ