

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2018-001

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

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE January 2, 2018

RE: Montana state laws pertaining to local government officials ethical rules of conduct and control of conflict of interest.

FACTS:

A city council member request has been made for a city attorney legal opinion addressing local governing body member, city council member, conflict of interest

ISSUE(S):

What does Montana state law provide with respect to local government governing body members rules of conduct and control of conflict of interest?

CONCLUSION(S):

From an economic or financial aspect, Montana state laws generally identify a local governing body member's direct or indirect interest in the profits of a contract, direct personal financial involvement in contracts, as well as potential substantial financial interests or economic benefits in any official act, action or transaction that might be taken as generally a limitation or restriction that prohibits the governing body member from acting without violating Montana state law pertaining to ethics and code of conduct.

LEGAL DISCUSSION:

A specific Montana municipal government law that pertains to potential city council member conflicts of interest is section 7-5-4109, MCA, entitled "CONTROL OF CONFLICT OF INTEREST". This specific Montana state law provides that a mayor, city council member, any municipal officer or any municipal employee "may not be directly or indirectly interested in the profits of any contract entered into by the council while the officer is in office". The section also identifies instances when this statutory limitation may be waived by the city council after a public hearing about the potential waiver. Section 7-5-4109 MCA provides as follows:

7-5-4109. Control of conflict of interest. (1) The mayor, any member of the council, any city or town officer, or any relative or employee of an enumerated officer may not be directly or indirectly interested in the profits of any contract entered into by the council while the officer is or was in office.

(2) The governing body of a city or town may waive the application of the prohibition contained in subsection (1) for a city or town officer or employee, or to the relative of an officer or employee, if in an official capacity the officer or employee does not influence the decisionmaking process or supervise a function regarding the contract in question. A governing body may grant a waiver under this subsection only after publicly disclosing the nature of the conflict at an advertised public hearing held for that purpose. In determining whether to grant a waiver, the governing body shall consider the following factors, where applicable:

- (a) whether the waiver would provide to a program or project a significant benefit or an essential skill or expertise that would otherwise not be available;
- (b) whether an opportunity was provided for open competitive bidding or negotiation;
- (c) whether the person affected is a member of a clearly identified group of persons that is the intended beneficiary of the program or project involved in the contract; and
- (d) whether the hardship imposed on the affected person or the governmental entity by prohibiting the conflict will outweigh the public interest served by avoiding the conflict.

The general governmental standards of conduct for public elected officials as well as municipal officers and employees are set forth in title 2 chapter 2 Montana Code Annotated entitled, “STANDARDS OF CONDUCT”. Part 1 of title 2, chapter 2 MCA is entitled “CODE OF ETHICS”. The initial section of this part provides that this code recognizes distinctions between legislators and state government officials and officers and employees of local government. Thus, each statutory section must be examined to determine the breadth of the scope of its application.

An important statutory definition to be aware of is the definition of “official act” or “official action” which is set forth in subsection 2-2-102(5) MCA and which states:

“(5) "Official act" or "official action" means a vote, decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority.”

Section 2-2-104, MCA, generally is entitled, "RULES OF CONDUCT FOR PUBLIC OFFICERS, LEGISLATORS, AND PUBLIC EMPLOYEES". Section 2-2-104, MCA, sets forth the following general statutory provisions:

- 2-2-104. Rules of conduct for public officers, legislators, and public employees.** (1) Proof of commission of any act enumerated in this section is proof that the actor has breached the actor's public duty. A public officer, legislator, or public employee may not:
- (a) disclose or use confidential information acquired in the course of official duties in order to further substantially the individual's personal economic interests; or
 - (b) accept a gift of substantial value or a substantial economic benefit tantamount to a gift:
 - (i) that would tend improperly to influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or
 - (ii) that the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken.
- (2) An economic benefit tantamount to a gift includes without limitation a loan at a rate of interest substantially lower than the commercial rate then currently prevalent for similar loans and compensation received for private services rendered at a rate substantially exceeding the fair market value of the services. Campaign contributions reported as required by statute are not gifts or economic benefits tantamount to gifts.
- (3) (a) Except as provided in subsection (3)(b), a public officer, legislator, or public employee may not receive salaries from two separate public employment positions that overlap for the hours being compensated, unless:
- (i) the public officer, legislator, or public employee reimburses the public entity from which the employee is absent for the salary paid for performing the function from which the officer, legislator, or employee is absent; or
 - (ii) the public officer's, legislator's, or public employee's salary from one employer is reduced by the amount of salary received from the other public employer in order to avoid duplicate compensation for the overlapping hours.
- (b) Subsection (3)(a) does not prohibit:
- (i) a public officer, legislator, or public employee from receiving income from the use of accrued leave or compensatory time during the period of overlapping employment; or
 - (ii) a public school teacher from receiving payment from a college or university for the supervision of student teachers who are enrolled in a teacher education program at the college or university if the supervision is performed concurrently with the school teacher's duties for a public school district.

(c) In order to determine compliance with this subsection (3), a public officer, legislator, or public employee subject to this subsection (3) shall disclose the amounts received from the two separate public employment positions to the commissioner of political practices.

Note that subsection 2-2-104(1)(a) and (b), MCA, focuses on a public officer or public employee may not disclose or use confidential information acquired in the course of official duties in order to further substantially the individual's personal economic interests or accept gifts of substantial value or a substantial economic benefit as being prohibited.

The next section of Montana state law in this chapter and part is section 2-2-105, MCA, entitled, "ETHICAL REQUIREMENTS FOR PUBLIC OFFICERS AND PUBLIC EMPLOYEES". This section of Montana state law provides:

- 2-2-105. Ethical requirements for public officers and public employees.** (1) The requirements in this section are intended as rules of conduct, and violations constitute a breach of the public trust and public duty of office or employment in state or local government.
- (2) Except as provided in subsection (4), a public officer or public employee may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer's or employee's agency.
- (3) A public officer or public employee may not, within 12 months following the voluntary termination of office or employment, obtain employment in which the officer or employee will take direct advantage, unavailable to others, of matters with which the officer or employee was directly involved during a term of office or during employment. These matters are rules, other than rules of general application, that the officer or employee actively helped to formulate and applications, claims, or contested cases in the consideration of which the officer or employee was an active participant.
- (4) When a public employee who is a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority is required to take official action on a matter as to which the public employee has a conflict created by a personal or private interest that would directly give rise to an appearance of impropriety as to the public employee's influence, benefit, or detriment in regard to the matter, the public employee shall disclose the interest creating the conflict prior to participating in the official action.
- (5) A public officer or public employee may not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking.

Note again in subsection 2-2-105(2) MCA on the statutory language generally establishing a statutory prohibition with respect to actions that “may be directly and substantially affected to its economic benefit by official action to be taken by the officer’s or employee’s agency”.

Section 2-2-121, MCA, is entitled, “RULES OF CONDUCT FOR PUBLIC OFFICERS AND PUBLIC EMPLOYEES” and in subsection 2-2-121(2)(b) and (e) MCA utilizes the statutory phrases, “substantial financial transaction” and “substantial financial interest”. Section 2-2-121, MCA, states as follows:

2-2-121. Rules of conduct for public officers and public employees. (1)

Proof of commission of any act enumerated in subsection (2) is proof that the actor has breached a public duty.

(2) A public officer or a public employee may not:

(a) subject to subsection (7), use public time, facilities, equipment, supplies, personnel, or funds for the officer's or employee's private business purposes;

(b) engage in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties;

(c) assist any person for a fee or other compensation in obtaining a contract, claim, license, or other economic benefit from the officer's or employee's agency;

(d) assist any person for a contingent fee in obtaining a contract, claim, license, or other economic benefit from any agency;

(e) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent; or

(f) solicit or accept employment, or engage in negotiations or meetings to consider employment, with a person whom the officer or employee regulates in the course of official duties without first giving written notification to the officer's or employee's supervisor and department director.

(3) (a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or

oppose a candidate or candidates for public office. With respect to ballot issues, properly incidental activities are restricted to:

(i) the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations;

(ii) in the case of a school district, as defined in Title 20, chapter 6, compliance with the requirements of law governing public meetings of the local board of trustees, including the resulting dissemination of information by a board of trustees or a school superintendent or a designated employee in a district with no superintendent in support of or opposition to a bond issue or levy submitted to the electors. Public funds may not be expended for any form of commercial advertising in support of or opposition to a bond issue or levy submitted to the electors.

(c) This subsection (3) is not intended to restrict the right of a public officer or public employee to express personal political views.

(d) (i) If the public officer or public employee is a Montana highway patrol chief or highway patrol officer appointed under Title 44, chapter 1, the term "equipment" as used in this subsection (3) includes the chief's or officer's official highway patrol uniform.

(ii) A Montana highway patrol chief's or highway patrol officer's title may not be referred to in the solicitation of support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue.

(4) (a) A candidate, as defined in **13-1-101(8)(a)**, may not use or permit the use of state funds for any advertisement or public service announcement in a newspaper, on radio, or on television that contains the candidate's name, picture, or voice except in the case of a state or national emergency and then only if the announcement is reasonably necessary to the candidate's official functions.

(b) A state officer may not use or permit the use of public time, facilities, equipment, supplies, personnel, or funds to produce, print, or broadcast any advertisement or public service announcement in a newspaper, on radio, or on television that contains the state officer's name, picture, or voice except in the case of a state or national emergency if the announcement is reasonably necessary to the state officer's official functions or in the case of an announcement directly related to a program or activity under the jurisdiction of the office or position to which the state officer was elected or appointed.

(5) A public officer or public employee may not participate in a proceeding when an organization, other than an organization or association of local government officials, of which the public officer or public employee is an officer or director is:

(a) involved in a proceeding before the employing agency that is within the scope of the public officer's or public employee's job duties; or

- (b) attempting to influence a local, state, or federal proceeding in which the public officer or public employee represents the state or local government.
- (6) A public officer or public employee may not engage in any activity, including lobbying, as defined in **5-7-102**, on behalf of an organization, other than an organization or association of local government officials, of which the public officer or public employee is a member while performing the public officer's or public employee's job duties. The provisions of this subsection do not prohibit a public officer or public employee from performing charitable fundraising activities if approved by the public officer's or public employee's supervisor or authorized by law.
- (7) A listing by a public officer or a public employee in the electronic directory provided for in **30-17-101** of any product created outside of work in a public agency is not in violation of subsection (2)(a) of this section. The public officer or public employee may not make arrangements for the listing in the electronic directory during work hours.
- (8) A department head or a member of a quasi-judicial or rulemaking board may perform an official act notwithstanding the provisions of subsection (2)(e) if participation is necessary to the administration of a statute and if the person complies with the disclosure procedures under **2-2-131**.
- (9) Subsection (2)(d) does not apply to a member of a board, commission, council, or committee unless the member is also a full-time public employee.
- (10) Subsections (2)(b) and (2)(e) do not prevent a member of the governing body of a local government from performing an official act when the member's participation is necessary to obtain a quorum or to otherwise enable the body to act. The member shall disclose the interest creating the appearance of impropriety prior to performing the official act.

While the word “substantial” is utilized in the state laws set forth in title 2, chapter 2, part 1, MCA, at least a half dozen times, the Montana State Legislature does not statutorily define the word/term “substantial”.

Title 2, chapter 2, part 2, MCA, is entitled, “PROSCRIBED ACTS RELATED TO CONTRACTS AND CLAIMS”. Subsection 2-2-201(1), MCA, in pertinent part provides that city or town officers or employees “may not be interested in any contract made by them in their official capacity or any body, agency, or board of which they are members or employees if they are directly involved with the contract”. Section 2-2-201 MCA states:

2-2-201. Public officers, employees, and former employees not to have interest in contracts. (1) Members of the legislature; state, county, city, town, or township officers; or any deputies or employees of an enumerated governmental entity may not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees if they are directly involved with the contract. A

former employee may not, within 6 months following the termination of employment, contract or be employed by an employer who contracts with the state or any of its subdivisions involving matters with which the former employee was directly involved during employment.

(2) In this section, the term:

(a) "be interested in" does not include holding a minority interest in a corporation;

(b) "contract" does not include:

(i) contracts awarded based on competitive procurement procedures conducted after the date of employment termination;

(ii) merchandise sold to the highest bidder at public auctions;

(iii) investments or deposits in financial institutions that are in the business of loaning or receiving money;

(iv) a contract with an interested party if, because of geographic restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It is presumed that a local government could not otherwise reasonably afford itself of the subject of a contract if the additional cost to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.

(c) "directly involved" means the person directly monitors a contract, extends or amends a contract, audits a contractor, is responsible for conducting the procurement or for evaluating proposals or vendor responsibility, or renders legal advice concerning the contract;

(d) "former employee" does not include a person whose employment with the state was involuntarily terminated because of a reduction in force or other involuntary termination not involving violation of the provisions of this chapter.

While the statutory provisions of Montana state law set forth in this legal opinion are extensive and pertain to many aspects of local government decision making; with respect to potential financial or economic interests, statutory limitation wise what city council members must generally be alert to being a potential statutory conflict of interest for them pursuant to existing Montana state law is a city council member taking any action that constitutes an "official act" or "official action" with respect to the following potential factual circumstances:

- (1) City council member may not be directly or indirectly interested in the profits of any contract. See subsection 7-5-4109(1) MCA.
- (2) City council members may not be interested in any contract made by them in their official capacity. See subsection 2-2-201(1) MCA.
- (3) City council members may not disclose or use confidential information acquired in the course of official duties in order to further substantially the city council member's personal economic interests See subsection 2-2-104(1)(a) MCA.

- (4) City council members may not accept a gift of substantial value or a substantial economic benefit tantamount to a gift that would tend to improperly influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's duties and/or that is intended to reward the person for official action taken. See subsection 2-2-104(1)(b) MCA.
- (5) Generally, a city council member may not acquire an interest in any business or undertaking that the officer or public employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the city council member. See subsection 2-2-105(2) MCA.
- (6) A city council member may not use public time, facilities, equipment, supplies, personnel, or funds for the city council member's (officer's or employee's) private business purposes. See subsection 2-2-121(2)(a) MCA.
- (7) A city council member may not engage in a substantial financial transaction for the city council member's private business purposes with a person whom the officer (or public employee) inspects or supervises in the course of official duties. See subsection 2-2-121(2)(b) MCA.
- (8) A city council member may not perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest. See subsection 2-2-121(2)(e) MCA.

These are Montana state law general statutory limitations. City council members need to also recognize and be aware that potential citizen perception might more broadly perceive conflict of interest than is actually regulated by Montana state law. Perceptions that are not supported by specific Montana state laws are merely perceptions and are not violations of Montana state laws. However, sometimes, some citizens might attempt to make a significant issue out of a perception and city council members will have to consider those factual circumstances on a case by case basis as to how they best serve their respective constituents with respect to any specific action to be considered or taken.

Common sense also must be an aspect of perceived conflict of interest that must always be weighed as well. For example, one aspect of real property tax assessments to keep in mind with respect to perceived conflicts of interest is that with respect to assessing real property taxes as part of the city's annual adoption of the city budget, every city council member has a potential financial interest pertaining to real property taxes, either as a real property owner or as a tenant paying real property taxes through rent. Alleged potential perceived conflict of interest taken to its most extreme could result in someone attempting to argue that state and local governing bodies throughout Montana have a conflict of interest with respect to assessing real property taxes; because it financially affects them personally.

CONCLUSION(S):

From an economic or financial aspect, Montana state laws generally identify a local governing body member's direct or indirect interest in the profits of a contract, direct personal financial involvement in contracts, as well as potential substantial financial interests or economic benefits in any official act, action or transaction that might be taken as generally a limitation or restriction that prohibits the governing body member from acting without violating Montana state law pertaining to ethics and code of conduct.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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