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**OFFICE OF THE CITY ATTORNEY**

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**Legal Opinion 2011-020**

**TO:** John Engen, Mayor; City Council; Bruce Bender; Marty Rehbein; Nikki Rogers; Kelly Elam; Jane Kelly; Brentt Ramharter

**CC:** Dept. Atty

**FROM:** Jim Nugent, City Attorney

**DATE:** October 21, 2011

**RE:** City Council resolutions are legislative acts. City Council resolutions make statements of policy.

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**FACTS:**

The Missoula City Council has placed a referendum on the November 8, 2011 City general election ballot which states that it is a non-binding statement of policy by the citizens of Missoula on the United States Supreme Court decision in *United v. Federal Election Commission*, in which the Court found that corporations are human beings under the First Amendment.

**ISSUES:**

1. What is the state law definition of a municipal city council resolution?
2. In Montana, to what do the powers of initiative and referendum apply regarding municipal administrative and legislative acts?

**CONCLUSIONS:**

1. Montana municipal government law defines “resolution” to mean “a statement of policy by the governing body or an order by the governing body that a specific action be taken,” 7-1-4121(22) MCA.

2. The Montana Supreme Court in *Town of Whitehall v. Preece* (1998) reaffirmed that under Montana’s Constitution the people have retained the powers of initiative and referendum regarding legislative acts. Section 7-5-131 of Montana’s municipal government statutes is entitled “Right of initiative and referendum,” and it indicates that the powers of initiative and referendum reserved for the electors of each local government pertain to “resolutions and ordinances within the legislative jurisdiction and power of the governing body.”

## LEGAL DISCUSSION:

Montana Municipal government law defines the term “resolution,” within the context of city council legislative acts, to mean “a statement of policy by the governing body or an order by the governing body that a specific action be taken,” 7-1-4121(22) MCA. (Emphasis added).

Pursuant to Montana municipal government law the city council is the legislative and governing body. Article XI, subsection 4(2) of the Montana Constitution provides that “the powers of incorporated cities and towns and counties shall be liberally construed.” (Emphasis added). The Montana Supreme Court has indicated that it is a constitutional mandate that the powers of municipal local governments be liberally construed. See *Tipco Corp. Inc. c. City of Billings* (1982), 197 Mont. 339, 642 P.2d 1074; *Stevens v. City of Missoula* (1983) 274, 280, 667 P.2d 440, 443.

The Montana State Legislature defines legislative act in state law as follows.

(c) (i) the term "legislative act" means:

(A) actions by a legislative body that result in creation of law or declaration of public policy;

(B) other actions of the legislature authorized by Article V of The Constitution of the State of Montana; or

(C) actions by a school board that result in adoption of school board policies pursuant to 20-3-323(1);

(ii) the term legislative act does not include administrative actions undertaken in the execution of a law or public policy. MCA 2-9-111(1)(c). (Emphasis added.)

Montana’s rules of statutory construction (interpretation) state the following.

**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. 1-2-107 MCA.

Montana’s municipal initiative and referendum statutes are set forth in 7-5-131 through 7-5-137 MCA. These initiative and referendum statutes apply to resolutions and ordinances “within the legislative jurisdiction and power of the governing body.” The Montana Supreme Court in *Town of Whitehall v. Preece* discussed elector powers of initiative and referendum under both the Montana Constitution and Montana municipal statutes and the Court held that the powers of initiative and referendum were retained as to “legislative acts only.” See ¶ 25.

The Montana Supreme Court in *Town v. Whitehall*, supra, discussed relevant Montana constitutional provisions pertaining to initiative and referendum, stating the following in paragraphs 15 and 16.

Montana’s Constitution reserves to the people of this State the powers to challenge and enact laws through the referendum and initiative processes. In Article V, “the Legislature,” the Constitution provides that “The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.” Art. V., Sec. 1, Mont. Const.

In its General Government Article, Montana's Constitution defines the initiative power at Article III Section 4, and the referendum power in section 5.

**Referendum.** (1) The people may approve or reject by referendum any act of the legislature except an appropriation of money. A referendum shall be held either upon order by the legislature or upon petition signed by at least five percent of the qualified electors in each of at least one-third of the legislative representative districts. The total number of signers must be at least five percent of the qualified electors of the state. A referendum petition shall be filed with the secretary of state no later than six months after adjournment of the legislature which passed the act.

(2) An act referred to the people is in effect until suspended by petitions signed by at least 15 percent of the qualified electors in a majority of the legislative representative districts. If so suspended the act shall become operative only after it is approved at an election, the result of which has been determined and declared as provided by law.

A third reference to the powers of initiative and referendum appears under the Local Government Article. Article XI, Section 8, Mont. Const., provides as follows.

**Section 8. Imitative and referendum.** The legislature shall extend the initiative and referendum powers reserved to the people by the constitution to the qualified electors of each local government unit.

Montana's general local government statutes provides the following in 7-5-131 MCA.

**Right of Initiative and referendum.** (1) The powers of initiative and referendum are reserved to the electors of each local government. Resolutions and ordinances within the legislative jurisdiction and power of the governing body of the local government, except those set out in subsection (2), may be proposed or amended and prior resolutions and ordinances may be repealed in the manner provided in 7-5-132 through 7-5-137.

(2) The powers of initiative shall 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; or
- (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 government. (Emphasis added).

The Montana Supreme Court in the *Whitehall* case then discussed legislative acts stating in paragraphs 17, 20, and 21:

“This Court has long recognized a distinction between legislative and administrative acts as ‘whether the act was one creating a new law (legislative) or executing an already existing law (administrative).”

[ . . . ]

Courts in other jurisdictions with constitutional provisions extending the power of referendum to “acts of legislature” have recognized “act” as a term of art, meaning a bill passed but the legislature and enacted into law. See, e.g., Wennerstrom v. City of Mesa (1991), 169 Ariz. 485, 821 P.2d 146, 149. See also City of Idaho Springs v. Blackwell (Colo. 1987), 731 P.2d 1250, 1253; In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma Numbered 74-1 and 74-2 (Okla. 1975), 534 P.2d 3. The Supreme Court of Nebraska has reasoned:

To allow [the referendum] to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city. In many cases it would entirely prevent the exercise of the executive power necessary to carry out the acts determined upon by the legislative department. In the absence of a very clear declaration to the contrary it must be presumed that the power of referendum was intended to apply solely to the legislative powers of the city. (Emphasis added.)

The Montana Supreme Court went on to discuss the constitutional history of initiative and referendum in Montana in paragraphs 22 through 25.

Montana’s 1889 Constitution reserved to the people “power to propose laws, and to enact or reject the same at the polls.” Art. V, Sec. 1, 1889 Montana Constitution. No case law under the 1889 constitution suggests that the powers of initiative and referendum in Montana ever extended to anything other than legislative acts. Nor does anything in the transcript of the proceedings of the 1972 Constitution suggest an intent to expand the power of initiative and referendum to anything other than legislative power. In fact, in recommending the adoption at the 1972 Montana Constitutional Convention of the referendum provision which was adopted as Article III, Section 5, Delegate Mark Etchart stated, “This provision is parallel to the present referendum provisions as contained in Article V, Section 1, of the present Constitution.” 1972 Mont. Const. Tr., March 18, 1972, Vol. VII at 2217. In short, Montana’s 1972 Constitution does not contain a “very clear declaration to the contrary,” as the Nebraska court suggested is required, to the general rule that the power of referendum is intended to apply solely to legislative powers.”

Instead, as noted above, the provision by which the people retain the right of initiative and referendum appears in the constitutional Article on “The Legislature.” No comparable provisions appear in the Articles concerning

the Executive and the Judiciary. Article VI, Section 4, Mont. Const., vests the judicial power of the state in this Court, the district courts, justice courts, and other courts that the legislature may create. There is no reservation of judicial power to the people by initiative and referendum.

Under Article XI, Section 8, Mont. Const., the Montana Legislature is to extend to the qualified electors of local government units “the initiative and referendum powers reserved to the people by the constitution.” Even under the policy of broadly construing the powers of initiative and referendum, the legislature cannot extend to the people greater powers against local government than those which the people have reserved to themselves in the Constitution. The powers of initiative and referendum have been reserved under the Constitution as to legislative acts only.

For these reasons, we decline to abandon the rule set forth in *Nore* or to adopt the position set forth in the concurring opinion in *Greens*. We reaffirm that under Montana’s Constitution, the people have retained the powers of initiative and referendum as to legislative acts only. Because we so rule, the question here raised as to the constitutionality of § 7-5-131, MCA, is resolved in the statute’s favor. (Emphasis added.)

## **CONCLUSIONS:**

1. Montana municipal government law defines “resolution” to mean “a statement of policy by the governing body or an order by the governing body that a specific action be taken,” 7-1-4121(22) MCA.

2. The Montana Supreme Court in *Town of Whitehall v. Preece* (1998) reaffirmed that under Montana’s Constitution the people have retained the powers of initiative and referendum regarding legislative acts. Section 7-5-131 of Montana’s municipal government statutes is entitled “Right of initiative and referendum,” and it indicates that the powers of initiative and referendum reserved for the electors of each local government pertain to “resolutions and ordinances within the legislative jurisdiction and power of the governing body.”

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JN: mdg