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Legal Opinion 2011-016

TO: Mayor John Engen; City Council; Bruce Bender; Gail Verlanic; Brentt Ramharter; Marty Rehbein; Ginny Merriam

CC: Dept. Attorney

FROM: Jim Nugent, City Attorney

DATE: August 26, 2011

RE: Municipal elected official control of conflict of interest pursuant to Montana state law.

FACTS:

In recent weeks, some city council members have requested information concerning Montana state laws pertaining to municipal elected officials' control of conflict of interest.

ISSUES:

1. What does Montana state law provide regarding city contracts and potential interests of city officials in relation to specific city contracts?
2. Is it sufficient for a city elected official to abstain from voting in potential conflict-of-interest circumstances?

CONCLUSIONS:

1. Pursuant to 7-5-4109 MCA, the mayor, members of the city council, or any city officer "may not be directly or indirectly interested in the profits of any city contract." Further, pursuant to 2-2-121 MCA, a public officer or public employee 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 or is engaged as counsel, consultant, representative, or agent."
2. Yes, it would be acceptable, prudent, and sufficient for a city elected official to abstain from voting whenever a potential conflict of interest circumstance presents itself. There is no

requirement in Montana law that an elected local government official must resign their elected position or any other position if a potential conflict-of-interest circumstance arises.

LEGAL DISCUSSION:

7-5-4109 MCA is entitled *Control of Conflict of Interest*, and it provides the following.

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 decision making 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. (Emphasis added).

General government standards of conduct are also set forth in Montana state law pursuant to 2-2-121 MCA which is entitled *Rules of Conduct for Public Officers and Public Employee*, as amended by the 2011 Montana state legislature pursuant to Senate Bill 338. It provides the following.

"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.

(4) (a) A candidate, as defined in 13-1-101(6)(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." (Emphasis added).

2-2-121(2)(e) MCA is the most pertinent provision to contracts or agreements which might come before the mayor and city council for approval.

Pursuant to Senate Bill 338, the 2011 Montana State Legislature inserted subsection 2-2-121(4)(b) MCA restricting state officers with regard to public services announcements and reporting on expenditures of state funds for public service announcements.

City elected officials should also be generally aware that any public servant could be potentially guilty of the offense of official misconduct if the public servant "knowingly performs an act in an official capacity that the public servant knows is forbidden by law."

Entitled *Official Misconduct*, 45-7-401 MCA provides the following.

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).

“Public servant” is defined by Montana state law in 45-2-101(64) MCA in the following way.

(a) “‘Public servant’ means an officer or employee of government, including but not limited to legislators, judges, and firefighters, and a person participating as a juror, adviser, consultant, administrator, executor, guardian, or court-appointed fiduciary. The term ‘public servant’ includes one who has been elected or designated to become a public servant.

(b) The term does not include witnesses.”

Whenever a city elected official has an identified conflict of interest regarding any contract that comes before the city council for consideration or approval, a prudent and acceptable course of action would be for the city elected official to abstain from voting on that contract.

There is no provision in Montana state law, Montana Supreme Court decision, or Montana Attorney General opinion that requires a city elected official to resign their elected position or any other position if a potential conflict of interest arises. There are no limitations or restrictions that suggest or provide that a local government elected official may not hold an

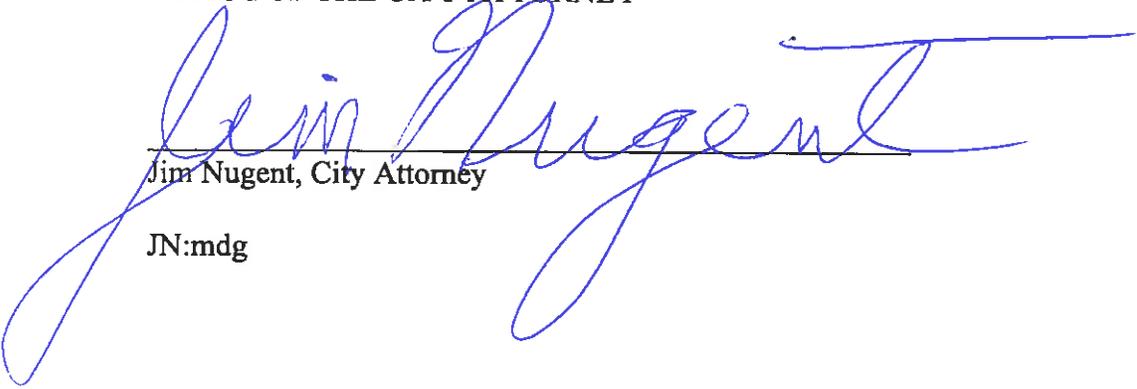
elective office if a conflict of interest arises regarding an item coming before the legislative body for review.

CONCLUSIONS:

1. Pursuant to 7-5-4109 MCA, the mayor, members of the city council, or any city officer "may not be directly or indirectly interested in the profits of any city contract." Further, pursuant to 2-2-121 MCA, a public officer or public employee 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 or is engaged as counsel, consultant, representative, or agent."

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