

November 14, 2005

Mr. Brent Brooks
Billings City Attorney
P.O. Box 1178
Billings, MT 59103-1178

Dear Mr. Brooks:

You have asked for a letter of advice on the following questions:

1. Did the form of the City of Billings' general election ballot, asking Billings voters to consider a mill levy for police, fire, and other public safety costs, comply substantially with the law?
2. Did the ballot language mean that the levy was permanent, or does it sunset after fiscal year 2009?

Because your inquiry is fact specific to the Billings Public Safety Mill levy election, it has been determined that a letter of advice is the appropriate response.

BACKGROUND

On July 12, 2004, the Billings City Council passed Ordinance No. 04-5288 (hereafter Ordinance) and Resolution No. 04-18159 (hereafter Resolution). The Ordinance specifically requests that the Billings City Charter be amended to add Section 1.05.1, providing for a **permanent** mill levy to fund Fire, Police and related safety expenses and submitting the proposed amendment to the electors of the City. The Ordinance specifically states that "the foregoing mill levies are cumulative, permanent, and in addition to any other mill levies authorized by Charter or law." The accompanying Resolution referring the matter to the voters states in three separate locations that the proposed ordinance seeks to amend the City Charter "to provide for a **permanent** mill

levy to fund fire, police and related public safety expenses. . . .” The intent of the City Council to submit to the voters of Billings a request for a permanent and cumulative mill levy could not be more clear.

However, the ballot language accompanying the resolution does not contain the “permanent” language. It does, though, specifically reference the Ordinance. The ballot language states:

PUBLIC SAFETY MILL LEVY RESOLUTION NO. 04-18159.

For the purpose of funding the operation, maintenance and capital needs of the Fire Department, Police Department, and related public safety expenses, the Billings City Council amended the City Charter in Ordinance 04-5288. Shall the City be authorized to levy millage sufficient to raise the following amounts: \$2,600,000 in FY 2005 (approximately 20 mills); \$1,400,000 in FY 2006, 2007, 2008; and in FY 2009 (approximately 10 mills). The property tax impact on a home valued at \$100,000 is approximately \$45.28 for FY 2005 and \$22.64 per year for the next 4 fiscal years. The impact on a home valued at \$200,000 is approximately \$90.55 for FY 2005 and \$45.28 for the next 4 fiscal years.

____FOR amending the City Charter to add a mill levy for Police, Fire and related public safety expenses as provided in Ordinance 04-5288.

____AGAINST amending the City Charter to add a mill levy for Police, Fire and related public safety expenses as provided in Ordinance 04-5288.

The Ordinance and the Resolution were certified by the City Clerk and forwarded to the Yellowstone County Election Officer. He printed the official ballot language as set out in the Resolution without changes. He published Notice of the Special Election and the complete ballot language in the Billings Gazette on October 10, 17, 24, and 31, 2004. The official ballot was also published in The Billings Outpost, a weekly newspaper, on October 28, 2004. Numerous articles were printed in the Billings Gazette prior to the election. Several of these articles detailed the permanent and cumulative nature of the mill levy.

The City Administrator, Fire Chief, and Police Chief made no fewer than 33 presentations to the media and civic organizations about the impact of the mill levy. A PowerPoint presentation was a part of each meeting. The PowerPoint presentation and

further discussion about the levy was broadcast on the local public access Channel 7. Approximately 10,000 pamphlets were distributed at the meetings and throughout the City of Billings by an independent group called Yes! Billings. The pamphlets and PowerPoint presentation clearly emphasize that the majority of the funds from the levy would be used to hire additional fire and police officers. Nothing indicated that these officers would be hired on a temporary basis.

ANALYSIS

Mont. Code Ann. § 15-10-425 provides the requirements for mill levy elections and ballots.

15-10-425 Mill levy election. (1) A county, consolidated government, incorporated city, incorporated town, school district, or other taxing entity may impose a new mill levy, increase a mill levy that is required to be submitted to the electors, or exceed the mill levy limit provided for in 15-10-420 by conducting an election as provided in this section.

(2) An election conducted pursuant to this section may be held in conjunction with a regular or primary election or may be a special election. The governing body shall pass a resolution, shall amend its self-governing charter, or must receive a petition indicating an intent to impose a new levy, increase a mill levy, or exceed the current statutory mill levy provided for in 15-10-420 on the approval of a majority of the qualified electors voting in the election. The resolution, charter amendment, or petition must include:

- (a) the specific purpose for which the additional money will be used;
- (b) the specific amount to be raised;
- (c) the approximate number of mills required; and
- (d) the durational limit, if any, on the levy.

(3) Notice of the election must be prepared by the governing body and given as provided by law. The form of the ballot must reflect the content of the resolution or charter amendment and must include a statement of the impact of the election on a home valued at \$ 100,000 and a home valued at \$ 200,000 in the district in terms of actual dollars in additional property taxes that would be imposed on residences with those values if the mill levy were to pass. The ballot may also include a

statement of the impact of the election on homes of any other value in the district, if appropriate.

(4) If the majority voting on the question are in favor of the additional levy, the governing body is authorized to impose the levy in the amount specified in the resolution or charter amendment.

Mont. Code Ann. § 15-10-425 (emphasis supplied).

Section 15-10-425(2)(a-d) requires that the amending ordinance include:

- (a) the specific purpose for which the additional money will be used;
- (b) the specific amount to be raised;
- (c) the approximate number of mills required; and
- (d) the durational limit, if any, on the levy.

The ordinance stated that the purpose of the levy was for “funding the operation, maintenance and capital needs of the fire department, police department, and related public safety expenses.” It stated the specific amount of money to be raised each year for five years. It stated the approximate number of mills required for those years.

Finally, though the plain language of the statute only requires specification of a durational limit if there is one, the ordinance stated specifically the durational limit: the “foregoing mill levies are cumulative, permanent, and in addition to any other mill levies authorized by Charter or law.” Further, the accompanying resolution states in three separate locations that the levy is permanent. The Ordinance and Resolution comply with the requirements of the statute.

We must next examine the ballot language. Section 15-10-425 requires that the form of the ballot reflect the content of the resolution or charter amendment and include a statement of the impact of the election on a home valued at \$100,000 and a home valued at \$200,000 in the district in terms of actual dollars in additional property taxes that would be imposed on residences with those values if the mill levy were to pass.

The ballot language is set out in the Resolution. The identical language appears on the ballot. The ballot language specifies the purpose of the Ordinance and Resolution. It specifically references the underlying Ordinance. It further specifies the financial impact the levy will have on \$100,000 and \$200,000 homes in the district. The ballot complies with the statutory requirements. As the proposal did not contain a durational limit, none was required to be printed on the ballot.

In 1985, Montana Attorney General, Mike Greely issued an official opinion on a similar issue. 41 Op. Att’y Gen. No. 37 (1985). The City of Malta, in response to legislative mandate, created a Commission to review the form of government that was in place and submit to the voters at the next election a choice between the existing form of government or an alternative form. 41 Op. Att’y Gen. No. 37 at 4. The Commission surveyed local citizens and public officials and held public meetings. Id. From this public input, the Commission concluded that the form of government best suited for the city of Malta was a mayor-council structure with nonpartisan elections. Id.

Malta had traditionally held non-partisan elections and was a mayor-council form of government. Id. at 5. However, the newly-enacted legislation required that cities that kept the mayor-council form of government, rather than adopt an alternative form of government, conduct partisan, rather than non-partisan elections. Id. The final report with this information was presented to the public in many different forums.

The Malta ballot measure offered residents the choice between “[f]or adoption of the Council-Mayor form of government, with general government powers, with elections conducted on a non-partisan basis, as proposed by in the report of the Local Government Study Commission.” or “[f]or the existing form of City Government.” The citizens of Malta voted overwhelmingly to keep the existing form of government. Upon being informed that partisan elections were now required, several citizens complained that the ballots were misleading. Attorney General Greely upheld the election, concluding,

[a]lthough it is easy to understand how an uninformed voter could be misled into believing that a vote for the “existing” form of government was vote for not only the old form of government, but also all of its features, the voters were advised otherwise. The final report of the Malta Local Government Study Commission informed voters of the implications of their votes. It explained that in order to continue with non-partisan elections the alternative, which was recommended by the Commission, should be adopted. . . . I conclude that because the Malta voters in 1976 were advised by publication of the implication of their votes on a form of government, the results of the election are binding.

41 Op. Att’y Gen. No. 37 at 11.

The Montana Supreme Court has consistently held that “[t]here is a strong presumption in favor of the constitutionality of legislative enactments. . . . [T]he party attacking a legislative enactment has a heavy burden of proving a violation of fundamental law. If

doubt exists, it is to be resolved in favor of the legislation.” Harper v. Greely, 234 Mont. 259, 269, 763 P.2d 650, 656 (1988) (citations omitted).

In examining whether a ballot was misleading, the Montana Supreme Court articulated the following standard: “Due process is satisfied if the voters are informed by or with the ballot of the subject of the amendment, are given a fair opportunity by publication to consider its full text, and are not deceived by the ballot’s words.” State, ex rel. Montana Citizens for Perservation of Citizen’s Rights v. Waltermire, 227 Mont. 85, 90, 738 P.2d 1255, 1258 (1987). The Citizens v. Waltermire case is the only case I could locate in which the Court voided an election due to an allegation of a misleading ballot. In that case, the language which appeared in the Voter Information Pamphlet distributed to citizens was incorrect and completely opposite of the intent of the constitutional amendment. Waltermire, 227 Mont. at 89-90. Further, the Secretary of State failed to publish or provide any notice of the ballot measure anywhere in the State, violating requirements found in both the Constitution and corresponding Montana law. Waltermire, 227 Mont. at 90-91. That case is clearly distinguishable from the case at hand. The procedure followed by the proponents of the Billings Public Safety Mill Levy complied substantially with applicable Montana law.

Federal courts have reached similar conclusions in reviewing ballot issues for alleged due process violations. In Caruso v. Yamhill County, 422 F.3d 848 (9th Cir. 2005), 2005 U.S. App. Lexis 19211, the 9th Circuit Court of Appeals reviewed the allegedly misleading ballot language for an initiative proposing a local option tax. In holding the ballot to be acceptable, the court found that the electors could have reviewed “other materials” for clarification. The court concluded,

. . . the three-percent warning is “not completely inaccurate.” To be sure, the three-percent warning might have been read as a misleading suggestion that Measure 36-55 by itself might cause property taxes to increase more than three percent. But, as described above, the warning might also have been read, in context, as an accurate reminder that the proposed local option tax would not be subject to the three-percent limit imposed by the Oregon Constitution. Moreover, although an average voter might have read the three-percent warning as Caruso does “if [he] had to decide what he was voting on from the [warning] alone, . . . he did not have to decide from this summary.” Burton, 953 F.2d at 1271 (quoting Kohler v. Tugwell, 292 F. Supp. 978, 981 (E.D. La. 1968)). Instead, he could look to “other materials”--including the text of Measure 36-55 and the remainder of the ballot title as it appeared in the voters’ pamphlet and, indeed, on the ballot itself, see Or. Rev. Stat. §§ 250.235, 251.315(1)(g), [*40]

280.060(1)(b)--which indicated the actual increase proposed by Measure 36-55, disclosing both the dollar rate of the proposed tax and the estimated levy for a house with an assessed value of \$ 150,000. See Nat'l Audubon Soc'y, 307 F.2d at 858-59. We are thus unpersuaded that the State's choice of ballot language rose to the level of a due process violation under National Audubon Society.

The fact that the three-percent warning would have appeared in the ballot title for Measure 36-55 rather than in an "avowedly partisan portion of the materials" does not change our conclusion. Compare Nat'l Audubon Soc'y, 307 F.3d at 858 (internal quotation marks omitted). Because the three-percent warning could have been interpreted accurately, and because "other materials" would have enforced this interpretation, we cannot say that including the three-percent warning in the ballot title would have "infected" the entire election with "patent and fundamental unfairness." Burton, 953 F.2d at 1271 (internal quotation marks omitted).

Caruso v. Yamhill County, 2005 U.S. App. Lexis 19211, ¶ 39-40.

Just like the voters of Malta and Oregon, it is understandable that an uninformed voter could have interpreted the Billings Public Safety Mill Levy to say that the mill levy was only for five years. However, the voters in Billings were given every opportunity to be informed on the cumulative and permanent nature of the phased-in mill levy increases. Furthermore, the publications and discussion about the mill levy indicated that the majority of the money from the levies would be used by the Fire and Police Departments to hire additional officers. These are not one-time costs. The ballot language, in conjunction with the language of the referenced Ordinance, media coverage, and public discussion, was sufficient to be accurately interpreted by the voters.

Thus it is my opinion that:

1. The form of the City of Billings' general election ballot, asking Billings voters to consider paying for a mill levy for police, fire, and other public safety costs, substantially complied with the requirements of the law.
2. The Billings Public Safety Mill levy is cumulative, permanent, and in addition to any other mill levies as articulated in the Ordinance passed by the Billings City Council on June 28th, 2004.

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This letter should not be construed as a formal opinion of the Attorney General.

Very truly yours,

MIKE McGRATH
Attorney General

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