Montana Legislative Services Division

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SENATE CCS
Exhibit No. 2
Date 4-25-07
Bill No. SB-550

April 18, 2007

Senator Liable,

You have requested my opinion on the legality of ballot language in Senate Bill No. 550 that provides for both funding and establishment of a local government study commission. The question of legality apparently arose from an Opinion of the Attorney General (50 A.G. Op. 5, 2004, attached), which ruled on proposed ballot language that combined the vote on establishing a study commission with a vote on funding the commission. Under current law, section 7-3-175, MCA, establishes the sample ballot language for establishing a study commission. To fund a study commission requires a vote to authorize a mill levy pursuant to section 15-10-425, MCA. The question to the Attorney General was whether the two ballot questions could be combined into one ballot question. The Attorney General answered that there had to be two separate votes. The reason was that the vote on establishing the study commission had to have a ballot question "substantially" as set out in the law. Adding extra funding language was not allowed.

Senate Bill No. 550 amends that law to add language relating to funding and removes the requirement that a levy to support a study commission must be held under 15-10-425, MCA. There is no reason Senate Bill No. 550 cannot establish the ballot language with both topics. The Attorney General even pointed out sections of law that allow funding to be combined with establishing a program, but two different vote laws cannot be combined on one vote. There is no constitutional requirement for separate funding and establishment votes.

I hope this answers your question.

Lee

Lee Heiman
Staff Attorney

VOLUME NO. 50 OPINION NO. 5

ELECTIONS - Statutory form of local government study commission ballot question precludes addition of mill levy question;
LOCAL GOVERNMENT STUDY COMMISSIONS - Optional local government funding of study commission cannot be provided by combining mill levy question with study commission question;
STATUTORY CONSTRUCTION - Provision that ballot question be in "substantially" the form required by statute precludes substantial additions to the statutory form;
MONTANA CODE ANNOTATED - Sections 7-3-171 to -193, -173(2), -175, -176, -177, -183, -184, (1), (2), (3), (4), 15-10-420, -425, (3), 20-9-426, 22-1-703;
MONTANA CONSTITUTION - Article XI, section 9; (2);
MONTANA LAWS OF 1983 - Chapter 697, section 16;
MONTANA LAWS OF 1999 - Chapter 584, sections 1, 7.

HELD: In an election on the question of establishing a local government study commission, a local government may not combine a mill levy question with the study commission question, because the combined questions do not "substantially" conform to the statutory form required by Mont. Code Ann. § 7-3-175.

March 19, 2004

Mr. Michael Grayson
Anaconda-Deer Lodge County Attorney
118 East 7th Street, Suite 1-B
Anaconda, MT 59711

Dear Mr. Grayson:

You have requested my opinion concerning the following question:

> May a question of conducting a local government review and establishing a study commission pursuant to Mont. Code Ann. § 7-3-175 also provide for a mill levy to support the study?

Article XI, section 9(2) of the Montana Constitution provides in part that "[t]he legislature shall require an election in each local government to determine whether a local government will undertake a review procedure once every ten years after the first election." Pursuant to Section 9(2), the legislature enacted sections 7-3-171 through -193 to provide procedures by which local electors can establish a local government study commission and vote on any recommendation submitted by the study commission.

By statute, a local (county or municipal) governing body "shall call for an election, to be held on the primary election date, on the question of conducting a local government review and establishing a study commission" beginning in 1984 and thereafter whenever ten years have elapsed since the last study commission election. Mont. Code Ann. § 7-3-173(2).

Section 7-3-175 provides that:

> "the question of conducting a local government review and establishing a study commission shall be submitted to the electors in substantially the following form:
>
> Vote for one:
>
> > [_] FOR the review of the government of (insert name of local government) and the establishment of a local government study commission consisting of (insert number of members) members to examine the government of (insert name of local government) and submit recommendations thereon.
> >
> > [_] AGAINST the review of the government of (insert name of local government) and the establishment of a study commission.

The local governing body may set membership of the proposed study commission at an odd number not less than three. See Mont. Code Ann. § 7-3-177.

If a majority of those voting on the question vote for the study commission, the members are elected at the next regularly scheduled election held more than ninety days after the election establishing the study commission; candidates must be local voters, but may not be elected officials of the local government. See Mont. Code

Ann. § 7-3-176. Once constituted, the commission has broad powers to employ and compensate consultants, or contract with other agencies, public or private, "as it considers necessary for assistance in carrying out the purposes for which the commission was established", and may "do any other act consistent with and reasonably required to perform its function." Mont. Code Ann. § 7-3-183.

The study commission shall prepare an annual budget and "may apply for and accept available private, state, and federal money and may accept donations from any source." Mont. Code Ann. § 7-3-184(3). The local government shall provide "office and meeting space", and may at its option (subject to the mill levy limitations of section 15-10-420) "appropriate an amount necessary to fund the study" or "provide additional funds and other assistance." Mont. Code Ann. § 7-3-184(2). Nothing in the statute requires a local government to finance the study commission, but the study commission shall submit its budget "to the local governing body for approval." Mont. Code Ann. 7-3-184(1). Furthermore, "[u]pon termination of the study commission, unexpended money reverts to the general fund of the local government." Mont. Code Ann. § 7-3-184(4).

Originally, section 7-3-184 provided that "each local government under study *shall* appropriate an amount necessary to fund the study", and allowed local governments a mill levy to do so. 1983 Mont. Laws, ch. 697, § 16 (emphasis added). In its enactment of Senate Bill No. 184, which limited the authority of local governments to impose mill levies, the 1999 Legislature eliminated the local government's power to levy for the study commission in favor of a generic mill levy election procedure, and changed the mandatory "shall appropriate" to a permissive "may appropriate". 1999 Mont. Laws, ch. 584, §§ 1, 7. An attempt in 2003 to again empower local governments to impose a mill levy for study commissions failed. See H.B. 535, 58th Leg., Reg. Sess. (2003). Thus, under current law, local governments may choose whether or not to fund study commissions, but if they choose to do so the appropriation is subject to the mill levy limitations of section 15-10-420.

The opinion request follows the circulation of draft language from the Montana Association of Counties ("MACo"), which would modify the statutory form of the ballot question provided by section 7-3-175 as follows:

> Statement of Impact, subject to 15-10-425, of the approval of the voter review of local government: residences valued at $100,000 and $200,000 would be assessed approximately $3.30 and $6.60, respectively, in additional property taxes in each tax year.

> [_] FOR the review of the government of (insert name of local government), the establishment of a local government study commission consisting of (insert the number of members) funded by a levy, for each fiscal year the study commission is in existence, of up to 1 mill in excess of all other mill levies authorized by law for the support of the study commission and it[]s examination of the government of (insert the name of the local government) and recommendations thereon.
>
> [_] AGAINST the review of the government of (insert name of local government), the establishment of a local government study commission consisting of (insert the number of members) funded by a levy, for each fiscal year the study commission is in existence, of up to 1 mill in excess of all other mill levies authorized by law for the support of the study commission and it[]s examination of the government of (insert the name of the local government) and recommendations thereon.

The proposed language would combine the question on the study commission with a question on a mill levy, pursuant to section 15-10-425, to fund the study commission.

Section 7-3-175 requires that the question be submitted in "substantially" the form provided by statute. Language "substantially" conforms to a statutory form when it meets the substance of the form, even if does not adopt the form literally, or if it only differs from the form technically. See State v. Wong Sun, 114 Mont. 185, 191, 133 P.2d 761 (1943) (holding that "substantial, but not literal, adoption [of the statutory form for an information] is all that is required."); cf. Evers v. Hudson, 36 Mont. 135, 155, 92 P. 462 (1907) (holding that the statutory form for a school establishment ballot "means that a substantial, as distinguished from a strictly technical, compliance with those provisions will be insisted upon."). The most recent application of this rarely visited statutory term came in the challenge to a school bond ballot which used the words "for" and "against" rather than the statutory form of "yes" and "no"; there the Supreme Court doubted that such a variation "would *substantially* deviate from the statutory recommendation." Elliot v. School Dist. No. 64-JT, 149 Mont. 299, 303, 425 P.2d 826 (1967).

The addition of a mill levy question to the study commission question is more than a literal or technical deviation from the statutory form. It alters the substance of the form from a single question on the establishment of a study commission to a

compound question, which conditions local electors' approval of a study commission on their acceptance of a mill levy. Elsewhere in the Montana Code, the legislature has made clear when a ballot question on a matter requiring funding should also provide for that funding. See, e.g., Mont. Code Ann. § 20-9-426 (form of ballot for school district bond election); § 22-1-703 (form of ballot for creation of public library district). The general-purpose mill levy election statute, on the other hand, does not set forth a statutory form of ballot, but instead requires that the ballot "reflect the content of the resolution" providing for the purpose, amount, number of mills, and duration of the levy, and include a "statement of impact" of the levy on homeowners. Mont. Code Ann. § 15-10-425(3). The question at issue, however, is not a generic local government purpose falling under section 15-10-425; it is a constitutionally mandated election for which the legislature has specifically provided a form of ballot in section 7-3-175, and that form of ballot controls.

Sections 7-3-175, 7-3-184, and their neighboring provisions create a statutory scheme that separates the questions of establishment and funding of study commissions, putting only the former before the electors while leaving the latter to the choice of the study commission (who may accept money from "any source") and the local government. Thus, the local government cannot combine a mill levy question with the study commission question.

I express no opinion on any constitutional questions raised by the ballot questions or statutes at issue.

THEREFORE, IT IS MY OPINION:

> In an election on the question of establishing a local government study commission, a local government may not combine a mill levy question with the study commission question, because the combined questions do not "substantially" conform to the statutory form required by Mont. Code Ann. § 7-3-175.

Very truly yours,

MIKE McGRATH
Attorney General

mm/acj/jym