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To: Members of the Local Government Interim Committee
From: Julie Johnson, Staff Attorney
Re: Overview of Laws to Address Delinquency in Duties
Date: November 11, 2021

I. INTRODUCTION

The Local Government Interim Committee (LGIC) has been assigned House Joint Resolution 30, which is the Study of County Water and Sewer Districts. This study includes the review and assessment of the current governance structure of county water and sewer districts. During the discussion of HJ 30 at the September LGIC meeting, committee members had questions about what options are available to address a situation in which a member of a special district, or the special district itself, is considered delinquent or neglectful in its duties. This memo provides an overview of existing options to address such a scenario.

II. OFFICIAL MISCONDUCT

One potential avenue to address delinquent actions by a public servant¹, which may include a member of a special district, is to charge that person with the offense of official misconduct². A public servant commits the offense of official misconduct when in an official capacity the public servant commits any of the following acts:

- purposely or negligently fails to perform a mandatory duty as required by law or by a court of competent jurisdiction;
- knowingly performs an act in an official capacity that the public servant knows is forbidden by law;
- 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;
- solicits or knowingly accepts for the performance of an act a fee or reward that the public servant knows is not authorized by law; or

¹ -Section 45-2-101(64), MCA, defines "public servant" as "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."

Section 45-2-101(26), MCA, defines "government" as "includ[ing] a branch, subdivision, or agency of the government of the state or a locality within it."

² Section 45-7-401, MCA, governs the offense of official misconduct. The remainder of the paragraph is citing to this statute.

- knowingly conducts a meeting of a public agency in violation of 2-3-203, MCA.³

A public servant convicted of the offense of official misconduct may be fined up to \$500 or be imprisoned up to 6 months, or both. A district court has exclusive jurisdiction in the prosecution of the offense of official misconduct. An 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.

Additionally, a public servant who has been charged with official misconduct may be suspended from office without pay pending final judgment. If the person is convicted, the public servant permanently forfeits their office. If the person is acquitted, however, he or she must be reinstated in office and receive all backpay.

Discretion to prosecute for official misconduct lies with the county attorney and the Attorney General. The law provides that if a county attorney receives a complaint concerning official misconduct of a local government public officer and the county attorney does not commence an action, the county attorney shall refer the complaint and any relevant evidence for the Attorney General's review within 90 days of the receipt of the complaint.⁴ The Attorney General shall review that complaint referred from a county attorney or an independent complaint made to the Attorney General concerning the alleged misconduct of a local government public officer as well and any evidence concerning the officer's alleged misconduct. After reviewing the complaint, the Attorney General may do any of the following:

- instruct the county attorney to diligently prosecute the officer;
- bring an action against the officer; or
- decline to prosecute the officer.

In the case of a county treasurer, if an action based on official misconduct is commenced against that officer, the board of county commissioners may suspend the treasurer from office and may appoint some person to fill the vacancy.⁵

III. ADDITIONAL LEGISLATION TO ADDRESS DELINQUENCY

In 2019, the Legislature did pass Senate Bill 302 to address certain delinquent acts by a local government entity related to budgeting. This bill created two specific causes of actions that could be brought against a local government entity by a party that had standing:

³ Section 2-3-203, MCA, requires meetings of public agencies and certain associations of public agencies to be open to public.

⁴ See § 2-15-504, MCA.

⁵ See § 7-6-2103, MCA.

1. Failure to file reports and audits or resolve [audit] findings (§ 2-7-523, MCA).
2. Failure to adopt or submit an annual operating budget (§ 7-6-4037, MCA).

Unlike a criminal offense, a cause of action may be brought by a person who has standing to bring a claim. Sections 2-7-523 and 7-6-4037, MCA, have identical language that restrict who has standing to bring either claim:

- (2) The following parties may bring a cause of action under the provisions of subsection (1):
- (a) any person who pays property taxes to the local government entity;
 - (b) any elected officer of any local taxing jurisdiction that collects revenue from or distributes revenue to the local government entity;
 - (c) any person residing within the jurisdictional boundaries of the local government entity who can demonstrate a specific personal and legal interest, as distinguished from a general interest, and has been or is likely to be specially and injuriously affected by the local government entity's failure to meet the requirements as set forth in subsection (1).

Subsection (2) is patterned off of Montana case law that requires a person who sues a government entity to have more than a general interest in the government action he or she wishes to challenge. For example, the Montana Supreme Court has observed the following with respect to standing involving challenges to government action:

In the context of challenges to government action, we have stated that the following criteria must be satisfied to establish standing: (1) The complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.

Armstrong v. State, 1999 MT 261, ¶6, 296 Mont. 361, ¶6, 989 P.2d 364, ¶6. Therefore, in order to bring a claim against an elected official, the claimant must have an alleged injury to a property or civil right that is distinguishable from the injury to the public generally. In certain cases, the Supreme Court has held that taxpayers have standing to bring a suit against a government entity, such as in *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257. However, the Supreme Court has also held that taxpayers in a local county did not have standing to sue either the state or county for the county's failure to comply with the Single Audit Act, as was the case in *Mitchell v. Glacier Cty.*, 2017 MT 258, 389 Mont. 122, 406 P.3d 427. Therefore, the determination of whether a taxpayer has standing to challenge a local government or the state will be based on the facts and circumstances of each case.

IV. RECALL PROVISIONS

Another avenue for addressing public officers who are delinquent in their duties is

through the recall process. Montana has enacted the Montana Recall Act, which is codified at Title 2, chapter 16. A person holding a public office⁶ of the state or any of its political subdivisions, either by election or appointment, is subject to recall from office "by the qualified electors entitled to vote for the elective officer's successor."⁷ The grounds for a recall are limited to the following:

- physical or mental lack of fitness;
- incompetence;
- violation of the oath of office;
- official misconduct; or
- conviction of a felony offense enumerated in Title 45 (Crimes)

A recall petition may only name one officer at a time and depending on the office at issue anywhere from 10% to 20% of the qualified electors must sign the petition in order to qualify for a recall.⁸ The content of a recall petition is prescribed in law and the officer is to remain in office until the results are declared.⁹

V. CONCLUSION

If the committee decides to pursue or consider additional measures related to the supervision of a special improvement district or how to address a delinquency by the district or member, additional research may be required to ensure the proposed measure complies with existing law.

⁶ -"Public office" means a position of duty, trust, or authority created by the constitution or by the legislature or by a political subdivision through authority conferred by the constitution or the legislature that meets the following criteria:

(a) the position must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public;
(b) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the constitution, the legislature, or by a political subdivision through legislative authority;
(c) the duties must be performed independently and without control of a superior power other than the law, unless the legislature has created the position and placed it under the general control of a superior office or body; and
(d) the position must have some permanency and continuity and not be only temporary or occasional.

⁷ -§ 2-16-603, MCA.

⁸ -§ 2-16-614, MCA.

⁹ -§ 2-16-635, MCA.