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MEMORANDUM

DATE: September 3, 2002

TO: Tammy Johnson, Campaign Manager, Taxpayer's Against I-145

FROM: Joseph P. Mazurek, Counsel to Committee

RE: Ethics Considerations for Local Officials Regarding Ballot Issues

We have prepared this memo in an attempt to address some of the ethical issues that a public official might face in educating his or her constituents about ballot issues that impact the official's community. Montana's ethics statutes attempt to strike a balance between public officials' duty to work in the best interests of those they serve, while preventing the improper use of public resources to further a political or personal agenda.

In 1995, the Montana Legislature enacted Senate Bill 136 which provided comprehensive ethics statutes for a variety of public officials and employees. SB 136 was codified at §§2-2-101, et seq., MCA. In 2001, the Legislature passed Senate Bill 205 which clarified the class of people covered by the ethics statutes and the activities prohibited. For purposes of the ethics statutes the definition of public officers and employees include elected officers and employees and any temporary or permanent employees of a local government. §2-2-102, MCA. A local government includes a "county, a consolidated government, an incorporated city or town, a school district, or a special district." §2-2-102, MCA. Currently §2-2-121, MCA prohibits public officers and employees from using:

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.

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§2-2-121(3)(a), MCA. The statute further defines the activities that are properly incidental to activities authorized by law relative to ballot issues as "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." §2-2-121(3)(b), MCA. A breach of the restrictions of this statute is "proof the public official has breached public duty." §2-2-121(1), MCA. Any complaints regarding a violation by an official or employee of a local government are handled by the county attorney of the county where the local government is located. §2-2-144, MCA. The county attorney can assess fines of \$50 to \$1,000 and can bring criminal charges if warranted. *Id.* If the county attorney does not bring any action, the complainant can file a civil suit in district court against the official or employee in which a prevailing complainant can recover a civil fine of \$50 to \$1,000. *Id.*

Senator Larry Baer (R-Bigfork) sponsored SB 136 in 1995. The records of the legislative hearings regarding SB 136 show that Senator Baer intended SB 136 to prevent public officials and employees from using public resources to influence elections. He cited as the primary example public school districts using school district resources to support school mill levies.¹ Further testimony and discussions during the legislature's consideration of SB 136 indicates that the proponents believed that public officials should not be allowed to use public resources to influence public elections in any way. In response to a questions by Senator Dorothy Eck, Representative Matt Denny testified to his belief that a public official cannot use public resources to influence a ballot issue even if he or she believes it will be beneficial for the community. However, even the proponents of SB 136 were clear to point out that nothing in SB 136 prohibited a public official from campaigning for a ballot issue on his or her own time.²

The statute expressly states that nothing in §2-2-121, MCA should be construed as denying public officers or employees their right of free speech. This simply means that public officers and employees are not prohibited from speaking out about ballot issues on their own time, or with their own resources. The prohibitions imposed by the statute just prevent the use of public resources.

The ultimate goal of the statute appears to be the elimination of the use of public funds from influencing campaigns. The rationale behind this policy seems to be that public officials should not be able to influence campaigns through the use of public resources that are not available to the opposition. Thus, even if a public officer believes a ballot issue will have a devastating effect on his or her government and constituents, public resources should not be used to oppose a ballot measure. However, in an effort to prevent abuse, the statute arguably has the potential to deny the public access to the public officers or employees who are likely to have the best information regarding the issue. In an attempt to mitigate this problem to some extent, the statute expressly permits public officers and employees to use public resources to determine the impact of a ballot measure on the local government which the officer or employee serves. While not expressly stated, the obligation to educate the public regarding the impacts is implicit in determining the impact. A public official who embarks on an investigation to determine the impacts of a ballot measure and who does not share the fruits of that investigation with his or her constituents has arguably breached an even higher duty to the public.

¹ i.e. Minutes of Senate Judiciary Committee, Feb. 6, 1995 p. 6.

² i.e. Minutes of Free Conference Committee on Senate Bill 136, April 11, 1995.

The issue that is not resolved by this statute is where determination of and education about the impacts of a ballot issue which are permissible become impermissible advocacy. Clearly, commissioning a study of the effects of I-145 on the local property tax base would fall under the former, while a county commission authorizing the expenditure of county resources to campaign against I-145 would fall under the latter. However, the area between those two extremes seems to be varying shades of gray. Further complicating the matter for public officers and employees is their own right of free speech. Obviously, a local official using his or her official telephone or claiming mileage or using a government vehicle to travel to a meeting to oppose a ballot measure would run afoul of the statute. However, an official giving a speech to a civic group on his or her own time would be exercising a personal right of free speech.

In evaluating what an officer or employee can and cannot do, the person must determine first if he or she is using public resources to carry out the action. If not, then the right of free speech permits almost any activity. If public resources are used, then the person must determine if the activity is advocacy or simply an effort to determine the impacts and educate the public. With these factors in mind, we believe there are activities that are clearly permissible and impermissible under §2-2-121, MCA.

First, virtually any efforts by a local official to determine the effects of I-145 on the local government would be properly incidental to the official duties. Making that information available to the public, to the extent it requires the use of public resources, would also be properly incidental. Thus, a local officer could request public employees to determine and report about the impact of I-145 on the local tax base and future revenue projections. Further, it is our belief that such a report could and should be shared with the public. This report must be impartial, and presented as facts rather than advocacy. We further believe that it falls within the duty of a local official or employee to respond in an impartial way to requests for information from members of the public and press. So long as the information is presented in a neutral way and available to opponents and proponents of I-145 alike, we believe that local governments can and must carry out their duty to keep their constituents informed.

Second, public officers have very broad freedoms to oppose I-145 on their own. Such opposition could include activities such as speaking to civic groups, signing petitions, providing testimonials to be used by private opponents in advertising campaigns, or otherwise actively participating in any opposition activity, so long as the participation is on the official's personal time.

As for prohibited activities, we believe the statute prohibits a local government from taking formal action, such as passing a resolution opposed to I-145. Similarly, the statute prohibits the use of public funds to campaign against I-145. Thus, a local government could not contribute funds, services, or other resources to the campaign against I-145.

Local government officers and employees who have questions about these issues may want to consult with their local county attorney.