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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

LYLE PHILLIPS, ANNE DEE RENO, TURNER ASKEW, and BEN WHITTEN, Plaintiffs, v. CITY OF WHITEFISH, Defendants/Third-Party Plaintiff, v. THE BOARD OF COMMISSIONERS OF FLATHEAD COUNTY, Third-Party Defendant, and DAN WEINBERG and ED McGREW, individually and on behalf of LET WHITEFISH VOTE, a ballot committee lawfully organized under the laws of Montana; and MARY PERSON and MARILYN R. NELSON, Intervenors.	Cause No. DV-11-1535D Judge David M. Ortley FLATHEAD COUNTY'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant Board of Commissioners of Flathead County ("Commissioners" or "County"), through counsel, files this Reply Brief in Support of Its Motion for Summary Judgment, responding to the City of Whitefish's Response Brief in Support of Its Motion for Summary Judgment, dated January 10, 2013 and Intervenors' Joint Response Brief Opposing County's & Plaintiffs' Motion for Summary Judgment, dated January 11, 2013. For the reasons stated herein, the undisputed material facts demonstrate the Commissioners are entitled to summary judgment as a matter of law.

I. INTRODUCTION

At this point in the briefing among the parties, the general issues presented are clear: 1. Was the referendum a proper action to repeal a legislative act, or an improper action to repeal an administrative act; and 2. If the referendum was proper, what is the resulting effect?

The parties agree *Town of Whitehall v. Preece* sets forth the applicable test for determining whether a referendum addresses a legislative versus administrative act. *Town of Whitehall v. Preece*, 1998 MT 53, ¶ 29, 288 Mont. 55, 956 P.2d 743. The County has fully set forth its position on these factors in its prior briefing and will not repeat the arguments here. Similarly, the County has fully set forth its position on its claims for breach of contract in its prior briefing. Therefore, this brief addresses three primary areas. First, the brief addresses specific points argued by the Intervenors with which the County disagrees. Second, the City submits an affidavit from Charles C. Stearns which includes speculation, personal opinion and legal argument which must be excluded from consideration. Finally, because the City and Intervenors claim the 2005

IA has been reinstated by the passage of the referendum, the County demonstrates why the 2005 IA violates Montana law and must be nullified or reformed should the Court agree with their claims.

A. Intervenors Misinterpret the County's Positions and Provide No Legal Argument for Reinstating the 2005 Interlocal Agreement.

Intervenors were permitted to intervene in this matter by virtue of their efforts in authoring the referendum language, collecting signatures and otherwise supporting its passage. One can understand, therefore, why Intervenors ask the Court to focus solely on the validity of the referendum, separate and distinct from any consideration of the broader context of this litigation. The other parties, however, cannot ignore that Resolution 10-46 was part and parcel of the City's and County's agreement to settle the 2008 litigation. It is not possible to ignore the link between Resolution 10-46, 10-47 and the prior legal settlement.

1. Characterizing Resolution No. 10-46 as part of a legal settlement is not an intentional distortion of the facts and issues presented.

Intervenors claim the County and Plaintiffs "intentionally distort" Referendum No. 1 as an act which addressed the City and County's settlement rather than an act addressing the 2010 IA. Intervenors' Joint Response Br. Opposing County's & Pls.' Mots. S.J. 2 (Jan. 11, 2013) ("Intervenors' Joint Response Br."). The County understands the referendum was written to repeal Resolution 10-46 which authorized the Mayor to execute the 2010 IA on the City's behalf. Yet, even the 2010 IA recognizes that it serves as consideration for the City and County's agreement to settle the 2008 litigation. Section I of the 2010 IA spells this out:

> I. In consideration for the dismissal of the lawsuit between the City and the County and in reliance of and anticipation for the dismissal, the parties enter into this Agreement to amend the Interlocal Agreement a third time, to provide a five year term for the Interlocal Agreement, subject to renewal by mutual agreement of the parties. Also the parties desire to provide the process for County oversight and withdrawal of a party at least one year from the date of notification, allowing for notice of the withdrawal, investigation of the cause for the withdrawal, resolution, and mandatory dispute resolution process prior to the withdrawal date.

See Foundational Aff. William T. Wagner, Ex. A (Oct. 29, 2012) ("Aff. Wagner").

The County acknowledges the settlement of the lawsuit was not specifically before the voters as part of the referendum, but the parties cannot ignore its effect. Resolution 10-46 and 10-47 were considered and approved by the City during the same meeting. The 2010 IA specifically served as consideration for the parties' agreement to settle the 2008 litigation and the City could only enact Resolution 10-47 upon the approval of 10-46 and vice versa. Thus, it is proper to consider the four *Whitehall* factors in the context in which the City and County considered the 2010 IA, Resolution 10-46 and Resolution 10-47: as the final procedural acts to complete the parties' agreement to settle the 2008 litigation.

2. As demonstrated by the City's and Intervenors' arguments, there is no "hypothetical rhetoric" in the idea that lawsuit settlements could be forever in jeopardy from the powers of referendum.

Intervenors state that "[h]ypothetical rhetoric by Plaintiffs about how lawsuit settlements would be forever and generally in jeopardy should have no place in this Court's analysis." Intervenors' Joint Response Br. 18. Indeed, the Court should not fill its time considering hypothetical rhetoric, but none of the parties is asking the Court to do so. There is nothing hypothetical or rhetorical about the concern that a referendum could

be used to overturn a settlement executed by a local government. The 2010 IA specifically acknowledges it serves as consideration for the dismissal of a lawsuit. Having passed Resolution No. 10-46, the City passed Resolution No. 10-47, authorizing the City to dismiss the 2008 litigation.

After the City's voters passed the referendum, the City did not seek to uphold the spirit and intent of the settlement agreement. Rather, the City took the position that the 2005 IA – the legality of which was the very subject of the 2008 litigation – was somehow reinstated. Thus, rather than reaching out to the County to honor the parties' agreement to settle the lawsuit, the City sought to return the parties to the position they were in back in 2008. This is no hypothetical or rhetorical argument. It is the direct argument presented by the City and the Intervenors.

3. Intervenors provide no legal argument or citation in support of their argument to reinstate the 2005 Interlocal Agreement.

In a conclusory statement, Intervenors claim that "[u]ltimately, the legal effect of a valid referendum that repealed the 2010 IA is reinstatement of the 2005 IA which the 2010 IA sought to amend." Intervenors' Joint Response Br. 19. This was the very purpose Intervenors sought when pursuing the referendum, yet they provide no argument, analysis or legal citation in support of this claim.

Even assuming the referendum was valid, it repealed the authorization for the City to enter into the 2010 IA, but did not repeal Resolution 10-47 or otherwise repeal the dismissal of the 2008 litigation. It did not, and could not, direct the parties to reinstate their prior interlocal agreement. It did not prevent the City from seeking alternatives to

honoring its agreement with the County to dismiss the lawsuit. The 2010 IA had no savings clause or other instruction regarding what would happen in the event it was terminated or invalidated via referendum. Further, having completed the terms of the settlement and dismissed the lawsuit, the County is entitled to choose the appropriate relief for the City's failure to carry out one of the terms of the settlement. Given more than one year has passed since the County gave the City notice of its decision to withdraw from the 2010 IA, the County received what it bargained for even in light of the referendum. Therefore, no additional action is necessary by either party. Assuming the 2010 IA was repealed, there is no interlocal agreement in effect between the parties and the County is entitled to proceed with its efforts to adopt planning regulations for the area as provided in Montana Code Annotated § 76-2-311.

B. The City supports its claims with improper legal argument and personal opinion set forth as "fact" in affidavit form.

In support of its argument that Resolution 10-46 is a legislative act, the City relies on an affidavit from Charles C. Stearns, it's City Manager. While certain paragraphs set forth facts within Mr. Stearns' personal knowledge (i.e. paragraphs 1, 2, 3, 6, 7, and 9), many paragraphs include improper personal opinion and legal argument which must be excluded (i.e. 4, 5, 8, 10, 11, 14, 16, 17 and 18).

Montana Rule of Civil Procedure 56(e) requires affidavits to be made on personal knowledge, to set out facts that would be admissible in evidence, and to show the affiant is competent to testify on the maters stated. In paragraphs 4 and 5 of his affidavit, for example, Mr. Stearns states he believed the provisions in the 2010 IA were significant,

(1997) (affidavits based on personal knowledge must be based on admissible facts and cannot be used to speculate or predict future actions of other people).

The City relies heavily upon these statements in support of its *Whitehall* factors analysis. Even the Intervenors rely upon them. *See* Intervenors' Joint Response Br. 14. Yet, Mr. Stearn's opinions are self-serving conclusory statements designed to support the City's arguments. The City's reliance upon them amount to little more than "it is legislative because we said it is legislative." *See*, in particular, City of Whitefish's Response Br. Support Mot. S.J. 11-12 (Jan. 10, 2013) ("City's Response Br.") ("By his affidavit testimony, City Manager Chuck Stearns explains that such policy change required legislative action."). As such, they must be excluded from consideration as facts by the Court.

Ironically, Mr. Stearns' opinion and legal arguments demonstrate the City and Intervenors ignore a contradiction set up by their arguments.

The City maintains Resolution 10-46 is legislative because changing the term from

permanent to five years and permitting a party to withdraw from the agreement with one-year prior notice is a substantive policy change in the City's exercise of planning and zoning jurisdiction. Mr. Sterns argues these new terms are changes to the City's land use and zoning authority which required the City to enact it using a resolution and public hearing process. Aff. Stearns ¶¶ 5, 8. He takes great pains to attempt to distinguish between the City's actions in 2010, which he claims are legislative, and the City's actions to previously amend the 2005 IA, which he claims were administrative. *See* Aff. Stearns ¶ 18.

Yet, when the City and County amended the 2005 IA in 2007 to change the City's exercise of planning and zoning jurisdiction, the City did so without using a resolution or making a similar claim that it was a legislative act. This amendment provided:

> C. The parties desire to amend the Interlocal Agreement a second time. The City desires to extend the Whitefish Lake and Lakeshore Protection Regulations to include the properties surrounding Blanchard Lake, and to have a new member appointed to the Whitefish Lake and Lakeshore Protection Committee, representing Blanchard Lake. Because Blanchard Lake is in the unincorporated area of the City's jurisdiction, the City desires that the County appoint the representative from the Blanchard Lake area.

See City's Third-Party Compl. at Ex. 5 (Jan. 5, 2012) (Amendment No. 2 to Interlocal Agreement, dated February 6, 2007). Thus, by executing this Amendment, parcels which had been subject to the County's jurisdiction for lakeshore protection were shifted to the City's jurisdiction and subjected to the City's Whitefish Lake and Lakeshore Protection Regulations.

The City speculates that all parties would agree this amendment was administrative

since it merely implemented the City's exclusive jurisdictional authority in the extraterritorial area, consistent with the policy and purpose established in the 2005 IA. Yet, this begs the question. If subjecting landowners around Blanchard Lake to the City's Whitefish Lake and Lakeshore Protection Regulations was already within the City's exclusive jurisdictional authority, why was any amendment to the 2005 IA necessary?

If, as the City claims, the changes to the duration and termination clause of the 2010 IA represent a significant, legislative change to the City's land use policy, it makes little sense to claim the Second Amendment to the 2005 IA was merely administrative. Subjecting numerous new parcels to the City's extraterritorial jurisdiction for lakeshore protection regulations actually changed the applicable regulations for those landowners. This is a legislative act. *See Greens at Fort Missoula, LLC v. City of Missoula*, 271 Mont. 398, 403, 897 P.2d 1078, 1080 (1995) (adopting zoning regulations and rezoning parcels to new zoning designations are legislative acts). Rather, changing the term and termination procedures of a contract between the parties does not involve the adoption or amendment of any set of land use regulations and is not a legislative act. In reality, it would appear the City has the arguments reversed.

C. The Court Cannot Reinstate the 2005 IA Because Its Terms Violate Montana Law.

Even assuming the Court accepts the City's argument that the referendum was valid, thereby invalidating the settlement of the lawsuit and returning the parties to where they were in 2008, the Court cannot reinstate the 2005 IA. The termination clause within

the 2005 IA violates Montana law. Therefore, the Court must invalidate the 2005 IA or reform its termination clause to comply with Montana law.

1. The history of the 2005 IA demonstrates the City intended to prevent the County from exercising its statutory rights.

On February 5, 2005, the City and County entered into an Interlocal Agreement setting forth the parties' agreement to allow the City to exercise extraterritorial planning, zoning and subdivision powers pursuant to Montana Code Annotated § 76-2-310. Montana Code Annotated § 76-2-310 permits cities and towns to extend zoning and subdivision regulations beyond their borders so long as the city or town has adopted a growth policy for the extraterritorial area and so long as the adjacent county has not adopted zoning or subdivision regulations for the same area.

Montana Code Annotated § 76-2-311 provides that a city's or town's jurisdiction to exercise extraterritorial planning, zoning and subdivision powers continues only until the adjacent county adopts its own growth policy for the area and accompanying zoning or subdivision regulations.

Paragraph 5 of the 2005 IA provided, pursuant to Montana Code Annotated § 76-2-310(1), the City would have the sole power to establish or alter zoning and planning regulations, approve subdivisions and administer subdivision regulations, consider and approve lakeshore permits and regulations, and consider and approve floodplain permits and regulations within the extraterritorial "doughnut" jurisdiction.

Paragraph 15 of the 2005 IA provided a mutual termination requirement as follows:

> Entire Agreement – Duration. This Agreement contains the entire agreement of the parties hereto, and supersedes any prior written or oral agreements between them concerning the subject matter contained herein. There are no representations, agreements, arrangements, or understandings, oral or written, between the parties hereto relating to the subject matter contained in this Agreement which are not fully expressed herein. The provisions of this Agreement may be waived, altered, amended or repealed in whole or in part, or terminated, ***only upon the written consent of all parties*** to this Agreement. The duration of this Agreement shall be until the parties ***mutually terminate it***. (Emphasis added.)

See City's Third-Party Compl. at Ex. 3 (emphasis added) The City has noted many times during the litigation since 2008 that it demanded the provisions set out in Paragraph 15 to ensure the IA would survive policy changes brought about by potential changes to the County's political climate. *See* City's Memo. Support Application Prelim. Inj. 6-7, Cause No. DV-08-367A (Apr. 7, 2008). The City now characterizes the issue as its right to have continuing, exclusive jurisdiction of the extraterritorial jurisdiction. City's Response Br. 8. Montana law does not permit such permanent regulatory control of an adjacent county's residents.

Interlocal agreements are authorized by Article XI, section 7 of the Montana Constitution:

> **Intergovernmental cooperation.** (1) Unless prohibited by law or charter, a local government unit may
> (a) cooperate in the exercise of any function, power, or responsibility with,
> (b) share the services of any officer or facilities with,
> (c) transfer or delegate any function, power, responsibility, or duty of any officer to one or more other local government units, school districts, the state, or the United States.
> (2) The qualified electors of a local government unit may, by initiative or referendum, require it to do so.

This Article XI, section 7 acts as a form of enabling authority. It grants local governments the general ability to cooperatively engage in a variety of functions, services and powers "***[u]nless prohibited by law or charter.***" (Emphasis added.)

The Legislature implemented Article XI, section 7 through the Interlocal Cooperation Act, Title 7, Chapter 11, Part 1:

> **Authorization to create interlocal agreements -- issuance of bonds for joint construction -- hiring of teacher, specialist, or superintendent.** One or more public agencies may contract with any one or more other public agencies to perform any administrative service, activity, or undertaking or to participate in the provision or maintenance of any public infrastructure facility, project, or service, including the issuance of bonds for the joint construction of a facility under 20-9-404, the hiring of a teacher or specialist under 20-4-201 or a superintendent under 20-4-401, or the hiring of or contracting with any other professional person licensed under Title 37, that any of the public agencies entering into the contract is authorized by law to perform. The contract must be authorized and approved by the governing body of each party to the contract. The contract must outline fully the purposes, powers, rights, obligations, and responsibilities of the contracting parties.

Mont. Code Ann. § 7-11-104 (2011). This statute permits interlocal agreements for "administrative" services, activities and undertaking. It makes no provision for the delegation of legislative powers which are reserved to each local government. The Montana Interlocal Cooperation Act does not contemplate the transfer of legislative authority from one entity to another. Further, a local government may not cede unfettered legislative authority to another entity. *See e.g. Belgrade Elementary & High Sch. Dist. No. 44 v. Morris*, 2000 MT 347, ¶ 8, 303 Mont. 245, 15 P.3d 482; *Shannon v. City of Forsyth*, 205 Mont. 111, 114-115, 666 P.2d 750, 752 (1983).

Further, the Montana Legislature has explicitly prohibited municipalities from exercising self-governing powers in the area of planning and zoning regulation as provided in Montana Code Annotated § 7-1-114(1)(e):

> **7-1-114. Mandatory provisions.** (1) A local government with self-government powers is subject to the following provisions:
> (e) all laws that require or regulate planning or zoning;

The Montana laws which regulate planning and zoning are extensive. The Montana Growth Policy Act, the Montana Subdivision and Platting Act and the Montana Zoning Enabling Act, specify which local governments have the authority to enact a growth policy, subdivision regulations and zoning regulations. These are all legislative acts. *N. 93 Neighbors, Inc. v. Bd. of County Commrs. of Flathead County*, 2006 MT 132, ¶ 18, 332 Mont. 327, 137 P.3d 557 (citing *Schanz v. City of Billings*, 182 Mont. 328, 335, 597 P.2d 67, 711 (1979)).

In order to have a growth policy, a local government must have a planning board. Mont. Code Ann. 76-1-106 (2011). The statutes specify how county planning boards may be formed by county commissioners. Mont. Code Ann. § 76-1-104 (2011). If a city wishes to create a planning board, the city must first notify the county of its intention and allow the county to choose whether the city planning board or a joint city-county planning board should be created. Mont. Code Ann. § 76-1-105 (2011). Montana Code Annotated § 76-1-201 specifies the manner in which the county commissioners and city council each appoint members to a joint planning board. These are mandatory provisions which the parties cannot ignore. *See e.g.* Mont. Code Ann. § 76-2-311(2) (2011) ("These representatives must be appointed by the board of county commissioners.").

In the case of zoning, the Legislature has enacted wholly separate enabling acts for municipal and county zoning. *See* Mont. Code Ann. Tit. 76, ch. 2, parts 1-3. There are vast differences between the municipal and county enabling acts in the procedural requirements, particularly with respect to notice and protest provisions. *E.g. cf.* Mont. Code Ann. § 76-2-205 *with* § 76-2-303.

Thus, Article XI, section 7 of the Montana Constitution ("unless prohibited by law or charter") which authorizes interlocal agreements, combined with Montana Code Annotated § 7-1-114(1)(e), which requires adherence to all laws which regulate planning and zoning, place significant limitations on a local government's authority to enter into interlocal agreements. Put directly, an interlocal agreement must comply with Montana's planning and zoning statutes and may not be used to contract around statutory requirements.

The City is only able to extend its regulatory powers into Flathead County because Montana's statutes authorize it to do so. Montana Code Annotated § 76-2-310 provides:

> **Extension of municipal zoning and subdivision regulations beyond municipal boundaries.** (1) Except as provided in 76-2-312 and except in locations where a county has adopted zoning or subdivision regulations, a city or town council or other legislative body that has adopted a growth policy pursuant to chapter 1 for the area to be affected by the regulations may extend the application of its zoning or subdivision regulations beyond its limits in any direction subject to the following limits:
>
> . . .
>
> (b) up to 2 miles beyond the limits of a city of the second class;
>
> . . . .

Mont. Code Ann. § 76-2-310(b) (2011). Montana Code Annotated § 76-2-311 specifies the City's rights of enforcement, but also the County's rights to enact its own regulations for the extraterritorial area:

> **Administration of regulations in extended area.** (1) A city or town council or other legislative body may enforce regulations adopted pursuant to 76-2-310, as if the property were situated within its corporate limits, until the county board adopts a growth policy pursuant to chapter 1 and accompanying zoning or subdivision resolutions that include the area.
> (2) As a prerequisite to the exercise of this power, a city-county planning board whose jurisdictional area includes the area to be regulated must be formed or an existing city planning board must be increased to include two representatives from the unincorporated area that is to be affected. These representatives must be appointed by the board of county commissioners. Representation must cease when the county board adopts a growth policy pursuant to chapter 1 and accompanying zoning or subdivision resolutions that include the area.

As provided in this section, once a county chooses to adopt its own growth policy and either zoning or subdivision regulations for the extraterritorial area, the City's jurisdiction immediately ceases. The City cannot refuse to accept the County's desire to adopt its own regulations.

No interlocal agreement is necessary for a city or town to exercise these powers. In fact, the City exercised such powers without an interlocal agreement for 38 years from 1967 until 2005.

The parties relied on this express enabling authority found in §§ 76-2-310 and -311 in creating the 2005 IA. Paragraph 5 of the 2005 IA specifically states the City's assumption of jurisdiction in the extraterritorial area is pursuant to § 76-2-310. Ordinarily, the City's choice to exercise zoning powers in the extraterritorial area would

not result in an unconstitutional delegation of legislative authority or otherwise violate Montana law when carried out pursuant to §§ 76-2-310 and -311.

Yet, here, the mutual termination clause of the 2005 IA violates Montana law in two ways: 1) It is an unconstitutional delegation of legislative power from the County to the City because it allows the City to determine if and when the County can adopt planning and zoning regulations; and 2) It violates Montana Code Annotated §§ 76-2-310 and -311 by preventing an important statutory provision from taking effect – the immediate cessation of the City's jurisdiction once the County adopts its own planning and zoning regulations for the extraterritorial area.

2. The mutual termination clause in the 2005 IA is an unconstitutional delegation of legislative authority.

The mutual termination clause in Paragraph 15 of the 2005 IA provided that the agreement could be terminated ***only upon the written consent of all parties***. This provision was demanded by the City to ensure continuing, exclusive jurisdiction of the extraterritorial area would remain in the City's hands. Such a clause prohibits the County from exercising its legislative authority to adopt its own growth policy, subdivision and zoning regulations unless the City agrees. Thus, it is an illegal delegation of legislative authority because it serves as an improper consent clause. *Shannon,* 205 Mont. 111, 114, 666 P.2d at 753.

Shannon involved a zoning ordinance which required signatures from all adjoining neighbors and 80% of landowners residing within 300 feet before the city council could approve a zoning variance to allow a mobile home to be placed upon a lot. *Shannon*, 666

P.2d at 751. Thus, one adjoining neighbor could prevent the landowner from obtaining a variance merely by refusing to sign a petition to allow the mobile home. *Shannon*, 666 P.2d at 752. This kind of a "consent" ordinance was arbitrary and capricious and represented an unconstitutional delegation of legislative authority from the City to adjacent landowners. *Shannon*, 666 P.2d at 752-753.

Because of the mutual termination clause in the 2005 IA, the Commissioners cannot exercise the planning, zoning and subdivision authority specifically reserved to them unless the City consents. Montana case law has never contemplated that one governmental entity could cede unfettered legislative authority to another governmental entity, as evidenced by the specific and intricate detail contained in the land use regulatory statutes. This delegation of "consent" violates the extraterritorial authority provided by §§ 76-2-310-311, as well as the statutory enabling provisions of the Growth Policy Act, the Zoning Enabling Act and the Subdivision and Platting Act, rendering the mutual termination clause void.

3. The mutual termination clause violates the express terms of Montana Code Annotated §§ 76-2-310 and -311.

Among other terms, Montana Code Annotated § 76-2-310 and -311 limit the City's extraterritorial authority to a maximum of 2 miles from the City limits. The City has never argued it could extend the 2 mile limitation by agreement with the County. Montana Code Annotated § 76-2-311 also provides that the City's regulatory authority immediately ceases once the County has adopted its own growth policy and zoning and subdivision regulations for the area. Yet, despite this express provision, the City

continues to argue it is entitled to permanent, continuing, exclusive control of the extraterritorial area by virtue of the 2005 IA. City's Response Br. 15.

This argument is impossible to reconcile. The City cannot pick and choose which provisions of the statute are mandatory. The mutual termination clause acts as a prohibition against future legislative action by the County unless the City agrees it may exercise such authority. This prohibition is directly counter to the intent and purpose of §§ 76-2-310-311 which authorize the City to exercise extraterritorial powers only until such time as the County decides to exercise its own powers. At that point, the City's jurisdiction automatically ceases. The mutual termination clause prevents this from occurring and is, therefore, directly contrary to the statutory requirements.

A contract provision that is "contrary to an express provision of law" is unlawful. Mont. Code Ann. § 28-2-701(1) (2011); *Mont. Petroleum Tank Release Compen. Bd. v. Crumleys, Inc.*, 2008 MT 2, ¶ 55, 341 Mont. 33, 174 P.3d 948. Contract provisions which violate express statutes are contrary to public policy and are void. *Mont. Petroleum*, ¶ 55 (citing *Belgrade Educ. Assn. v. Belgrade Sch. Dist.*, 2004 MT 318, ¶ 17, 324 Mont. 50, 102 P.3d 517). The mutual termination clause in the IA violates the express provisions of § 76-2-311 and is therefore contrary to public policy and void.

The City has repeatedly admitted this clause was essential to its agreement to entering the 2005 IA. Because it was an essential clause, the Court may declare the entire 2005 IA void given its failure. Alternatively, the Court may declare the mutual termination clause null and void or decline to enforce it. *Mont. Petroleum*, ¶ 56 (courts will not enforce an illegal contract or contract provision); *Benson v. Sch. Dist. No. 1 of*

Silver Bow County, 136 Mont. 77, 344 P.2d 117 (1959) (declaring a union security clause in school teacher contracts null and void as an illegal clause).

Montana Code Annotated § 76-2-311 specifically terminates the City's jurisdiction once the County has adopted its own planning and zoning regulations for the extraterritorial area. This clause is not permissive. It is mandatory. But the mutual termination clause in the 2005 IA prohibits the operation of § 76-2-311 because it prohibits the County from adopting planning and zoning regulations for the extraterritorial area (or at least refuses to give them any effect.)

Any doubt about this effect of the 2005 IA is easily laid to rest. The City claims the County has breached the 2005 IA by taking steps to adopt interim zoning after the referendum passed. City's Response Br. 4. Thus, the City continues to block the effect of § 76-2-311 or otherwise recognize its mandatory application. "A city or town council or other legislative body may enforce regulations adopted pursuant to 76-2-310, as if the property were situated within its corporate limits, until the county board adopts a growth policy pursuant to chapter 1 and accompanying zoning or subdivision resolutions that include the area." Mont. Code Ann. § 76-2-311 (2011). The mutual termination clause is directly contrary to the mandatory provisions of § 76-2-311. Since it is contrary to an express provision of law, it is unlawful and must be invalidated by the Court. *Mont. Petroleum*, ¶¶ 55-56.

No one argues the City and County could not enter into an interlocal agreement to specify how the jurisdictions would cooperate in the exercise of extraterritorial powers as provided by law. The authority to do so is provided by Article XI, section 7 and the

Interlocal Cooperation Act, Title 7, Chapter 11, Part 1, but this authority is not without limitation. Montana's statutory scheme grants the City authority for extraterritorial planning and zoning only in the event Flathead County has not adopted a growth policy and subdivision or zoning regulations for this area. However, the statutory scheme also makes it abundantly clear that once Flathead County chooses to adopt its own planning and regulatory documents for the area, the City's jurisdiction *immediately* ceases. To the extent the mutual termination clause of the 2005 IA prevents this from occurring, it is an unconstitutional delegation of legislative authority and contrary to an express provision of law. It is therefore unlawful.

In the event the Court determines the 2005 IA was reinstated via the referendum on Resolution 10-46, the Commissioners respectfully request the Court declare it invalid for the reasons stated herein. Alternatively, the Commissioners request the Court reform the mutual termination clause to comply with Montana law. That is precisely why the 2010 IA included a term and termination clause allowing either party to terminate the agreement upon giving proper notice. Unlike the 2005 IA, it was expressly written to comply with the law.

II. CONCLUSION

Resolutions 10-46 and 10-47 are inextricably linked as part of the City's agreement to settle the 2008 litigation between them and dismiss Cause No. DV-08-367A. The referendum cannot be viewed in a vacuum as suggested by Intervenors. Rather, it must be considered in context. The 2010 IA served as consideration for the City's and County's agreement to settle the litigation. If that consideration fails because City is

prevented from carrying out its terms due to the referendum, the County is entitled to choose the appropriate remedy. Given the passage of time, the County should be entitled to summary judgment and termination of the injunction.

Even if the Court finds the referendum effectively reinstated the 2005 IA, the net effect should be the same. The mutual termination clause in the 2005 IA effectively acts as an unconstitutional delegation of legislative authority and is contrary to an express provision of law. It is therefore unlawful and must be invalidated or reformed to permit the County to withdraw.

The County respectfully asks the Court to grant summary judgment in its favor and lift the injunction.

DATED this 22nd day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, a copy of the foregoing document was served on the following persons by the following means:

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