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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 and the BOARD OF COMMISSIONERS OF FLATHEAD COUNTY, Defendants, and CITY OF WHITEFISH, 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; MARY PERSON and MARILYN R. NELSON, Intervenors.	Cause No. DV-11-1535D Judge David M. Ortley **CITY OF WHITEFISH'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

The City of Whitefish (City) files this Reply Brief in support of the City's motion for summary judgment and in response to the County's and the Plaintiffs' initial and response briefs. For the grounds and reasons provided by the City and in the Court record, the City is entitled to summary judgment as a matter of law.

I. ARGUMENT

A. Summary Judgment is Now Appropriate.

The City of Whitefish (City) seeks summary judgment because under Mont.R.Civ.P. 56 summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must establish both the absence of any genuine issue of material fact and its entitlement to judgment as a matter of law. City's Brief in Support of Summary Judgment (City's Brief), Pp. 7-8. All parties seek summary judgment and represent in their first briefs that there are no material issues of fact. Plaintiffs' Br., P. 25; City's Br., P. 7; County's Br., P. 9; Intervenors' Br., P. 5.

Plaintiffs' by their responsive brief, dispute the City's statement of facts 1, 3, 6, 8 and 19 as "a characterization of underlying documents, legal argument and conclusions of law". Plaintiffs' Response Br., P 3. The County questions the City's statements of fact 3 and 19 as not correct and include significant legal argument and interpretation. County's Response Br., P. 5. Notwithstanding the parties' objections, no material issues of fact preclude this Court from granting City's motion for summary judgment.

Plaintiffs object to statement 1, "[T]he City of Whitefish is a fast growing community..." based on the affidavit testimony of David Taylor, the City's Director of Planning and Building, filed initially in support of the City's requested injunctive relief

and supplied again for the Court's convenience with the City's motion for summary judgment. Mr. Taylor's affidavit supports the City's public policy concerns in the ETA, the importance of area lakes, highway corridors, water sheds, and the preservation of the City's water supply. If Plaintiffs disagree with Mr. Taylors' statement, the Mont.R.C.P. 56(e) allows for opposing affidavits or as otherwise provided by the rule, to oppose his statement that the City is a fast growing community. In any event, Plaintiffs conclude that their objection does not concern a material fact. Plaintiffs' Response Br., P. 4.

Next, Plaintiffs object to statement 3 and the County questions whether the statement is correct:

> The County has attempted to unilaterally withdraw from the 2005 IA and "take back" the ETA on two occasions, but both efforts have met with strong resistance from the City.

The City relies on the public record which is before the Court.

Although the Plaintiffs dispute and the County argues that statement 3 is not correct, neither provides its factual basis for their opinion. Instead, by the County's own explanation, it admits as "true that the County withdrew from the 2005 IA without the City's mutual approval" and "moved forward with plans to adopt regulations for the doughnut in 2011 after the referendum passed." County's Response Br., P. 5. The City's statement that the County's attempt to unilaterally withdraw from the 2005 IA is admitted as true by the County.

The City's factual statement, that the County attempted *to take back the doughnut* on two occasions, is supported by the public record and should not be in dispute.

The first attempt *to take back the doughnut* was announced by the County in

2008 by Commissioner Jim Dupont which resulted in the City's initiation of the 2008 lawsuit seeking injunctive relief to prevent the County's plan.

The County's second announcement *to take back the doughnut* was made in June 2011, after the referendum was certified for the November election. Commissioner Jim Dupont is quoted in the June 23, 2011 *Daily Inter Lake* stating: "We'll dump it, pull out and we'll take over" control of the doughnut. In the October 15, 2011 issue of the *Daily Inter Lake*, Commissioner Jim Dupont is quoted as saying, "If [the repeal] happens, we'll take over zoning in the doughnut." In the later October 25, 2011 issue of the *Daily Inter Lake,* Jim Dupont is again quoted as saying "we'll take over zoning in the doughnut." Affidavit of Keni L. Hopkins (Aff. Hopkins).

After the referendum's passage in November 2011, the County initiated its planned implementation *to take back the doughnut* by rezoning the ETA and amending its growth policy to include the ETA within the one-year termination process. City's Br., P. 17-19; City's Response Br., P. 21; County's Response Br., Pp. 12-19; Aff. Hopkins.

The previously supplied minutes of the Board of County Commissioners' meetings of November 21 and November 28, 2011, and the December 14, 2011 Planning Board Minutes describe the methods planned for implementation by the County to take back jurisdiction through rezoning and amendments to the growth policy. *See*, City's Answer and Third Party Complaint, Ex. 12, for Minutes of the November 21, 2011 Board of County Commissioners' meeting; and Plaintiff's Br., Ex. H, for Minutes of November 28, 2011 Board of County Commissioners' meeting; December 14, 2011 Planning Board Minutes, admitted as evidence at the February 6, 2012 hearing on the City's application for preliminary injunction, and news articles from the area's newspapers for 2008, 2010 and 2011, attached to Aff. Hopkins.

The remaining balance of the statement, that the City has strongly resisted the County's efforts to "take back the doughnut", is also true as evidenced by the Court files of the 2008 litigation, the appeal to the Montana Supreme Court, the referendum effort and election, and the Court file in the instant matter. *See also,* Second Aff. Hildner, in 2008 litigation, dated April 20, 2011.

The Plaintiffs and County's objections to statement 3 lack merit.

Next, Plaintiffs object to the statements 6 and 8 which characterize the 2010 IA as the "third amendment" with the explanation that the first and second amendments were added to the 2010 IA as well as the third amendment, which is why the 2010 IA was called the *Restatement of Cooperation Interlocal Agreement*. Plaintiffs Response Br., Pp. 4-7.

In response to these objections, the City directs the Plaintiffs' attention to the four corners of the respective documents. As explained earlier, the 2010 IA provided the underlying terms of the 2005 IA, the first and second amendments and the third amendments, into one agreement, hence its name "Restatement". 2010 IA, ¶¶ G, H, I; City's Response Br., Pp. 12-13. The recitals to the 2010 IA explain that the first and second amendments to the 2005 IA were separate agreements but have been incorporated into the 2010 IA in paragraphs 4 and 6. 2010 IA, ¶¶G and H. The 2010 IA represents it is the third amendment to the 2005: "the parties enter into this Agreement to amend the Interlocal Agreement a third time". 2010 IA, ¶ I.

Plaintiffs' objections to statements 6 and 8 lack merit.

Plaintiffs and the County also object to City's statement 19:

> The referendum repealed the City's approval of the 2010 IA, and restored the parties to the time before the Council's approval of R 10-46.

This statement appears to be a mixture of fact and conclusion of law, which the Court in its discretion may give the weight it deserves. *See,* City's Response to Plaintiffs' Motion to Strike. The City believes there can be no question of fact that the voters approved Resolution No. 1 as certified by the County Elections Department. The plain meaning of the purpose for the referendum appeared on the ballot: the repeal of R 10-46, the City Council's approval of the 2010 IA, to reinstate the mutual withdrawal requirement of the 2005 IA. *See,* Referendum attached as Ex. 11 to City's Answer. The referendum's stated purpose should be given effect having been approved by the voters. The referendum's passage repeals the City Council's actions to approve 2010 IA, for the return to "a mutual withdrawal requirement between the City and County in the previous Interlocal Agreement." *See,* Referendum, attached to City's Answer, Exhibit 11.

None of the Plaintiffs or County's objections prevent this Court's granting the City's motion for summary judgment as a matter of law.

B. Referendum is valid and constitutional.

The City seeks summary judgment as a matter of law because the referendum is a valid exercise of the voters' reserved constitutional power to reject City of Whitefish Resolution No. 10-46 (R 10-46). City's Br., Pp. 8-15; City's Response Br., P. 5-15; Intervenors' Br., Pp. 7-13; Intervenors' Response Br., Pp. 2-3.

The County's and Plaintiffs' challenges to the referendum are limited to their arguments that the referendum was administrative in nature and therefore, not a valid ballot measure. County's Response Br., Pp. 7-12, Plaintiffs' Response Br., Pp. 7-12. The County and Plaintiffs argue that the 2010 IA was only a contract to settle a lawsuit, administrative in nature, so the referendum repealed only the approval of a legal settlement contract. County's Response Br., Pp. 9-12, 18. Plaintiffs' Response Br., Pp. 2,

7-8, 15. The City and the Intervenors disagree because the 2010 IA is a substantive policy change in the City's continuing ETA jurisdiction and the implementation of that change, all legislative in nature. City's Response Br., Pp. 5-15; Intervenors' Response Br., Pp. 15-18.

In response to the City's motion and its initial and responsive brief in support of summary judgment, the County argues the City's desire to retain permanent regulatory control over the extraterritorial area (ETA) "is so pervasive that it is willing to make legal arguments that ignore the action of its own governing body." County's Response Br., P. 2. Although the County acknowledges the "significant, substantive changes" made in the 2010 IA, the County questions the City's motivation to acknowledge the referendum outcome: "[W]hether due to a change in heart or change in administration, the City no longer wants the bargain it made". County's Response Br., Pp. 3-4.

The County further argues that the City "could have, and should have" aligned with the County's argument the referendum outcome eliminated all interlocal agreements to uphold the City's agreement with the County in the 2010 IA. County's Response Br., P. 7. While the County admits that the referendum "repealed the authorization for the City to enter into the 2010 IA," the County argues the referendum "did not repeal the dismissal of the lawsuit". Then the County concludes it "gets to choose the remedy, if any, for the City's failure to perform the conditions to dismissing the lawsuit", because the "County had nothing to do with the referendum". County's Response Br., Pp. 4-5.

The County's argument is not well taken on several grounds. Due to the referendum's repeal of the 2010 IA, no 2010 IA exists upon which the County can rely to accuse the City of a breach of contract or to question its motivation.

The City did not simply "choose" to abandon the 2010 IA "pretending" the parties had not reached an agreement. County's Response Br., P. 7. The City properly recognized the referendum outcome. The voters approved the referendum for the stated purpose: the repeal of the 2010 IA for the return to "a mutual withdrawal requirement between the City and County in the previous Interlocal Agreement." *See,* referendum ballot measure attached as Ex. 11 to City's Answer. As a result of the referendum's passage, no 2010 IA exists between the parties. Despite County's argument that it should be "receiving exactly what it bargained for" in the 2010 IA, the repeal of the 2010 IA prevented such outcome. *See,* County's Response Br., P. 7. City should be excused from further performance under the doctrines of impossibility and impracticality because as a matter of law, the City is prevented for two years from changing the referendum outcome. MCA § 7-5-139; City's Br., Pp. 21-22; City's Response Br., Pp. 21-23.

Like the governing body of the County having nothing to do with the referendum, the governing body of the City had nothing to do with the referendum either. Instead, referendum powers are exercised by the voters as a separate exercise of the voters' reserved constitutional power to reject by referendum any act of the governing body. City's Br., Pp. 8-9; City's Response Br., Pp. 5-6.

By its very nature, the referendum is separate and contrary to the action taken by the City Council. After all, the very purpose of the referendum was to reject the City Council's approval of the 2010 IA. Intervenors' Brief in Support of its Motion to Intervene; Intervenors' Response Br., Pp. 2-3; Second Aff. Hildner, ¶¶ 5-12. These differences were also recognized in the Court's February 10, 2012 Order on Motion to Intervene and Application for Preliminary Injunction (February 10, 2012 Order), "the

interests of the Intervenors was not entirely the same as that of the City". The February 10, 2012 Order also memorialized the City's candid acknowledgment "that the decisions of its council do not always reflect the will of some of the city residents." February 10, 2012 Order, P. 2.

Second, since the City's consent to the 2010 IA is repealed the County is not precluded from pursuing the 2008 lawsuit or a new action. The County can join in the Intervenors' Appeal of Judge Curtis' Order and Rationale on Various Pending Motions dated July 11, 2011 (July 11, 2011 Order), attached as Exhibit F to Plaintiffs' Complaint, which dismissed the 2008 lawsuit upon the joint request of the City and the County because the parties had settled their differences and approved the 2010 IA. Now that the referendum repealed the City's approval of the 2010 IA, the County may pursue its option to pursue its interests in the 2008 litigation, because the Court anticipating the continuation of these issues did not rule on the merits. July 11, 2011 Order, P. 6.

Intervenors in the 2008 lawsuit had objected to the parties' joint request to dismiss the lawsuit as settled because the 2010 IA looked like the 2005 IA. The provisions the Intervenors had claimed to be unconstitutional were not changed from the 2005 agreement to the 2010 agreement, so all the issues in the case were not moot. These Intervenors argued "clearly the City and County intended to retain the substance of the 2005 Interlocal Agreement that delegated to the City control of the Doughnut." July 22, 1011 Order, P. 3.

Despite the Intervenors' request, the Court did not believe it to be appropriate to rule on the correlation between the 2005 and 2010 agreements because no issues concerning the 2010 agreement were before the Court.

Absent this significant expansion of the pending issues herein, a ruling, as

> Intervenors request, as to the validity of the 2005 agreement would have no effect whatsoever on the 2010 agreement or the parties thereto. Such a ruling would be absolutely advisory and have no application to any outstanding controversy. July 11, 2011 Order, P. 4.

The Court granted the parties' joint motion reasoning that the parties' dispute over the 2005 IA had been resolved by the parties. The issues raised concerning the 2010 IA and upcoming referendum had no application to any outstanding controversy and were determined non-justiciable at the time of its Order. By its dismissal of the 2008 litigation, the Court left the possibility open for a resolution on the merits, if the resolution passed or if the Intervenors wished to challenge the interlocal agreement:

> In the instant case, the dispute between the City and the County as well as any dispute raised by Intervenors, all involve and arose solely from the 2005 Agreement. That Agreement is void and is clearly superseded by the 2010 agreement. Any dispute any party may have with the 2010 agreement must be brought in a separate proceeding. The same is true with regard to the claims the proposed intervenors wish to raise. The 2005 agreement, which they seek to have validated, is void and no longer has any effect in the City of Whitefish. *If the referendum passes, and if the City and the County decide to proceed in a manner that the proposed intervenors wish to challenge, those issues, which are not even justiciable at this time, must be brought in a separate proceeding.* Consequently, the joint motion for summary judgment by the City of Whitefish and Flathead County must be granted, and this case must be dismissed as moot. Given this determination, there is no need for an amicus brief. (Emphasis supplied.) July 11, 2011 Order, P. 5.

Furthermore, it is worth noting that the resulting August 26, 2011 Judgment was entered by the Court without prejudice on the substantive issues, allowing all parties to raise those issues which were not then justiciable in a separate proceeding. July 11, 2011 Order, P. 5; August 25, 2011 Judgment.

The Intervenors' appeal of the July 11, 2011 Order leaves the County free to pursue its interests in the 2008 lawsuit appeal as well. This appeal is still pending before the Montana Supreme Court, awaiting this Court's decision on the summary

judgment motions.

C. The referendum is legislative in nature because the 2010 IA provides the parties' agreement to shape policy jointly for the ETA which exceeds existing state law.

The City contends the referendum is legislative in nature and a proper ballot measure because it creates law, declares and implements public policy. City's Br., Pp. 10-15, City's Response Br., Pp. 6-10. Also, the legislative history of R 10-46 supports its legislative nature. City's Br., Pp. 8-15, City's Response Br., Pp. 10-13.

The City and the Intervenors maintain that a review of the undisputed facts in this case supports the legislative nature of the referendum. As explained in *Whitehall*, the application of its four guidelines is fact-driven. *Town of Whitehall v. Preece*, 288 Mont. 55, 65, 956 P.2d 743 (Mont. 1998) ("*Whitehall*").

The County and Plaintiffs examined the *Whitehall* guidelines and argued R 10-46 was administrative in nature. County's Br., Pp. 10-16; County's Response Br., Pp. 7-12; Plaintiffs' Br., Pp. 12-20; Plaintiffs' Response Br., Pp. 7-12. County argues the City's authority under 2010 IA to adopt land use and zoning regulations in the ETA are provided by statute. They argue the 2010 IA was not necessary because it simply set forth the administrative procedures for carrying out existing laws, namely the Interlocal Cooperation Act and MCA § 76-2-310, County Br., P. 12, County Response Br., P. 7.

1. The 2010 IA exceeds what existing state law provides.

The 2010 IA provides more than what the existing laws provide. The 2010 IA establishes legislative enactment of new policy as an interlocal agreement of the City and the County for the City to exercise ETA regulatory authority and the County's agreement not to interfere with the City's authority in the ETA. 2010 IA, ¶¶ 1, 5, 13. While the terms of the 2010 IA are consistent with the Interlocal Cooperation Act and the scope of

MCA §§ 76-2-310 and -311, no existing laws provide anything close to the specific terms of the 2010 IA.

The 2010 IA establishes its nature as an interlocal agreement in ¶¶ 1 and 10; City's Responsive Br., Pp. 10-13; Affidavit of Charles C. Stearns (Jan. 10, 2013) (Aff. Stearns), ¶¶ 4, 17-18. The 2010 IA also establishes its legislative nature by establishing a substantive yet consistent expansion of state law in new policy and the implementation of that policy which is not found under state law, with its stated purpose:

> Interlocal Agreement. This Agreement is established pursuant to the Interlocal Cooperation Act, § 7-11-101, et seq., MCA. The purpose of this Agreement, is among other things, to streamline the provision of government services by centralizing the functions of planning, zoning, subdivision review and lakeshore and floodplain permitting for the area surrounding Whitefish and the Whitefish Lake in one governmental agency that will, through such centralization, develop greater expertise and efficiency than if the same functions were handled by two governmental agencies. 2010 IA, ¶ 1.

Towards this end, the 2010 IA established the City's ETA jurisdictional boundary and authority to administer the planning, zoning, subdivision review and lakeshore and floodplain permitting for the ETA. To ensure predictability for the residents of the City and ETA, and the streamlining of government land use and zoning functions, the County could not implement County zoning, rezoning or amendment of its growth policy and thereby change the jurisdictional authority under MCA §§ 76-2-310 and -311,[1] while the agreement was in effect. As the sole governmental agency charged with these functions, the City agreed to bear the expense of its ETA's planning, zoning and permitting.

[1] MCA §§ 76-2-310 and -311 provide only for the authority for the City's extension of municipal zoning and subdivision regulations up to two miles beyond its boundaries as a city of the second class, until the County adopts a growth policy and its zoning and subdivision regulations for the area.

The 2010 IA provided the terms for the City's implementation of the streamlined, centralized functions not provided by existing state law:

- Continuation of the City-County Planning Board, ¶ 2;
- City-County Planning Board's jurisdiction, ¶ 3;
- Continuation of the Lakeshore Protection Committee, ¶ 4;
- Inclusion of Blanchard Lake within the Lakeshore Committee and membership of a Blanchard Lake resident as a member of the Committee, Second Amendment to the 2005 IA, ¶ 4;
- The City's sole authority in the ETA, ¶ 5;
- Inclusion of the first amendment to the 2005 IA providing the transition from County to City zoning, ¶ 6;
- Expansion of the highway corridors ¼ mile on either side of U.S. Highway #93 and Montana Highway #40 beyond the ETA jurisdictional area, ¶ 7;
- Application processing protocol when property lies within City and County jurisdiction, ¶ 8;
- Expansion of the City's ETA jurisdiction beyond the two mile boundary as the "New Jurisdictional Area" to include the City's watershed, when development results in density of one dwelling unit per 5.0 acres, ¶ 9;
- City bears expenses for its exercise of its jurisdictional authority in the ETA. Each party bears its own expenses in appointing members to the City-County Planning Board and the Lakeshore Protection Committee, ¶¶ 2, 4, 5, 11;
- Annual and five year review, ¶ 12;
- Term and termination procedure, ¶ 13;

- Incorporation of 2005 IA amendments of 2005 and 2007 and third amendment as the parties' entire agreement, ¶¶ I and 14;
- Agreement to jointly petition for the dismissal of the 2008 litigation, ¶ 18;
- No waiver, ¶ 19; and
- Partial invalidity, ¶ 20.

2. The 2010 IA expands the ETA with the possibility of further expansion of ETA boundaries.

The 2010 IA further expands the ETA jurisdictional boundary, beyond the two-mile boundary provided by MCA §76-2-310. The 2010 IA provides for the City's ETA jurisdiction 1/4 mile along the highway corridors of Highway #93 and Highway #40 *beyond* the two-mile ETA in response to the City's concerns for its highway approaches. 2010 IA, ¶ 7. Also, the 2010 IA provides the possibility for further expansion as development occurs in the City's watershed. The 2010 IA *expands* the City's ETA jurisdictional boundaries to include areas of the City's watershed outside of the two-mile ETA as "New Jurisdictional Area" to protect the City's source of water as development reaches the City's watershed areas in response to the City's concerns to protect its source of water. 2010 IA, ¶ 9.

The 2010 IA also provided for the City's ETA jurisdiction over three area lakes, Whitefish Lake, Lost Coon Lake, and Blanchard Lake, and their lakeshores as authorized in MCA § 75-7-201.[2] While MCA § 75-7-201 encourages cooperation between governing bodies to protect the natural lakes of Montana, it does not provide

[2] MCA § 75-7-201. Policy. The legislature further declares that local governments should play the primary public roles in establishing policies to conserve and protect lakes. Local governments do not have adequate statutory powers to protect their lake areas, and it is the purpose of this part to confer such powers on local governments, provided that such powers are exercised to maintain public health, welfare, and safety.

any statutory language or direction how to accomplish these goals. Only the 2010 IA provides the legislation for the operation of a Lakeshore Protection Committee, its joint membership and inclusion of all three lakes within the City's ETA, as provided in the 2010 IA. MCA §§ 75-7-201, et seq.; 2010 IA, ¶ 4-5.

Clearly, the County's argument that the 2010 IA is simply "setting forth the administrative procedures for carrying out existing laws" lacks merit. *See,* County's Response Br., P. 9. To the contrary, as explained above, the 2010 IA establishes new zoning and land use policies, which are legislative in nature. These zoning and land use policies are not found in existing state law and would not have been available to the parties absent the 2010 IA.

3. 2010 IA is not simply an agreement to settle a lawsuit.

The 2010 IA is not simply an agreement to settle a lawsuit as argued by the County. County's Response Br., P. 9. Plaintiffs' and the County's argument to the contrary is not supported by the terms of the 2010 IA. Plaintiffs' Response Br., Pp. 7-12; County's Response Br., P. 7. Similarly, R 10-46 is not simply "a specific, narrow action to enter into a contract" and "authorization for the Mayor to enter into a contract with the County in order to settle a lawsuit". County's Response Br., P. 9.

Settlement of the lawsuit provided only partial consideration for the third amendment and its method of implementation provided in ¶ 18 of the 2010 IA calling for parties to petition the Court jointly to dismiss the 2008 lawsuit. Although settlement of the 2008 lawsuit was a part of the 2010 IA, the ways and means to accomplish the settlement of the lawsuit in ¶ 18 was only a minor component of the 2010 IA. If the purpose of R 10-46 and 2010 IA was solely to provide the agreement to settle the lawsuit, no resolution and changes to City policy and its expansion of

jurisdictional ETA authority was required to settle the 2008 lawsuit. Aff. Stearns, ¶¶ 17-18.

Instead, the very terms of R 10-46 and the 2010 IA support the basis to conclude the establishment and amendment of land use policy and zoning of major significance and interest to the public to "generate the degree of controversy necessary to place the issue before the voters". *The Greens at Fort Missoula, LLC, v. The City of Missoula*, 271 Mont. 398, 404-05, 897 P.2d 1078, 1081-1082 (1995) (*The Greens).* As a result, the referendum is entitled to the presumption of validity and reasonableness. Like the district court's reasoning approved by the Montana Supreme Court in *The Greens,* the City Council's decision to approve the new and amended 2010 IA policy and its resulting change from the City's exclusive and continuing ETA jurisdiction created a new land use policy and generated broad public interest, which subjected the Council's action to referendum by the voters as a legislative matter. *The Greens*, 897 P.2d at 1080-1081.

As explained above, the terms of the 2010 IA were not negotiated only "to comply with state statutes" as argued by the County. County's Response Br., P. 9. The 2010 IA created new land use policies that were an expansion of statutory authority, an expansion of the ETA to include County property beyond the two-mile ETA, along the City's highway corridors, watershed and covering three lakes, and a limitation on the City's policy to exercise exclusive, continuing jurisdiction in its ETA. The changes to the City's exclusive and continuing ETA jurisdiction were considered by the City voters to be a dramatic and unacceptable change, which was rejected by their referendum vote. City's Br., Pp. 4-6, 14; City's Response Br., Pp. 15, 19-21; Aff. Stearns, ¶¶ 14-16; Aff. Hildner ¶¶3, 5, 11-13.

The County argues that "exercising significant judgment in rendering a decision

that may dramatically affect the development of land and an entire community does not automatically make such decision a legislative one." County's Response Br., P. 10. The City responds that although not automatic, such a new land use policy and expansion of state law, when approved by an entity's legislative body as a legislative item with a change from continuing and exclusive jurisdiction and having a dramatic impact to the community and the development of land in the ETA, highway corridors and the water supplies, would be more likely legislative than administrative. Thus, a dramatic impact to the community and the development of land is one of the appropriate factors indicating legislative nature as reasoned by *The Greens* Court in applying the *Whitehall* guidelines. Further, the City must disagree with the County's likening the dramatic land use policy and impact caused by the 2010 amendment to the City's exclusive, continuing ETA jurisdiction to a routine approval of a subdivision application, and therefore administrative. County's Response Br., P. 10.

As explained earlier, the 2010 IA expanded statutory law and the jurisdictional boundaries of the ETA and anticipated further expansion as a New Jurisdictional Area. While the settlement of the lawsuit and the City and the County's exchanged promises to work together in a cooperative process were consideration to make the changes to the City's ETA jurisdictional authority by the terms of the 2010 IA, the parties agreed to amend the 2005 IA for the third time to make substantive changes to the City's land use policy and exclusive and continuing ETA authority. By its amendment, the 2010 IA permitted the County's unilateral withdrawal after a one year's process, a substantive and dramatic change from the 2005 IA. 2010 IA, ¶¶ I and 13.

D. The referendum should be given its stated effect and purpose.

Next, the City seeks this Court's determination that the referendum should be

given its stated effect and purpose - the repeal of the 2010 IA and return to the 2005 IA. City's Br., Pp., 15-16; City's Response Br., Pp. 15-16. In addition, the voters should be entitled to rely on the plain meaning of the referendum (the repeal of R 10-46 which approved the 2010 IA) and its stated purpose (to restore the mutual withdrawal requirement between the parties in the previous Interlocal Agreement). Referendum No. 1 and ballot, Ex. 13 and 14 to City's Brief; City's Br., Pp. 15-16; City's Response Br., Pp. 15-16.

The nature of the referendum and its purpose can be determined from the plain meaning of the referendum and within its four corners. *Ravalli County v. Erickson*, 320 Mont. 31, 36, 85 P.2d 772 (Mont. 2008).

Rather than giving effect to the referendum's stated intent and purpose, the County argues that even if this Court determines the referendum valid, the County should receive what it bargained for in the 2010 IA - the dismissal of the 2008 lawsuit and "the possibility that either party could terminate the agreement with prior notice of one year". County's Response Br., P. 7. The County mistakenly concludes because the City failed to perform the conditions to dismissing the lawsuit", the County "gets to choose the remedy". County's Response Br., Pp. 4-5.

The City reminds the County that neither party can be entitled to receive the benefits of the repealed 2010 IA. The referendum's passage negated the 2010 IA and the parties are restored back to their earlier interlocal agreement.

E. County is in breach of contract due to its failure to comply with the terms of the 2010 IA and is therefore not entitled to its requested relief.

The City seeks a determination from the Court that the County is not entitled to specific performance by the City of a repealed 2010 IA. City's Br., P. 23; City's Response

Br., Pp. 17. Further, due to the County's prior and material breach of the 2010 IA and its breach of the covenant of good faith and fair dealing, the County should be precluded from seeking any recovery from the City. City's Br., Pp. 17-19; City's Response Br., Pp. 21-22.

Nonetheless the County argues it fully complied with the terms of the 2010 IA and should be entitled to its requested relief—full land use and zoning authority in the ETA. County's Response Br., P. 12. This bold assertion that only the County complied with the 2010 IA is contrary to the public record which establishes conduct to the contrary. As set forth earlier, the County breached its contract with the City upon making its announcement *to take back the doughnut* in June 2011, and when the referendum was certified for the election, and its implementation of steps to adopt a growth policy and rezone the ETA, following the election but within the one-year termination process. In fact, the 2010 IA did not allow the County to take any such action within the one-year termination notice period. City's Br., P. 17-19; City's Response Br., P. 21; County's Response Br., Pp. 12-19.

City contends the County was in breach of contract during its one-year withdrawal period due to its breach of the covenant of good faith and fair dealing and failure to follow the terms of the 2010 IA, which constitutes a breach of contract.

In response the County argues it fully complied with the terms of the 2010 IA and denies its announcement *to take back the doughnut* in June 2011 and implement steps to adopt a growth policy and rezone the ETA during the one-year termination process were contrary to the 2010 IA. County's Response Br., Pp. 12-19. The County accuses the City of playing the game of "gotcha". County's Response Br., Pp. 15 and 17.

Again, the City respectfully disagrees that this is a game of any sort and relies

upon the public record, which does not support the County's argument.

By way of explanation for its breach of contract, County attempts to justify its conduct by arguing the City had made it very clear that the referendum repealed the 2010 IA. County's Response Br., Pp. 14-15. Relying on its argument that existing Montana law is the City's only authority in the ETA, the County rationalizes its steps during the one-year withdrawal period arguing nothing in the 2010 IA prohibits the County from taking such steps. County further argues its steps to complete rezoning and amendment of the growth policy were only "ready to go" once the one-year period expired. County's Response Br., P. 15.

Despite the County's rationalization, the public record is to the contrary. The County's planned rezoning was represented to the public as the planned step *to take back the doughnut*, which "would go into effect immediately". *See,* December 14, 2011 Planning Board Minutes, and the November 21, and 28, 2011 Minutes of the Board of County Commissioners, the County's published notice of hearing on the rezoning, and Aff. Hopkins.

The County's argument that it has not yet adopted any zoning or land use regulation for the ETA should be disregarded. *See,* County's Response Br., P. 15. The County's planned steps to rezone and amend the growth policy were prevented by City's third party complaint and City's application for injunctive relief with the resulting stipulation and injunctive order to stop the County's plans from going forward to rezone and amend the growth policy to maintain the status quo of City's ETA jurisdiction. *See,* February 10, 2011 Order. Had the County complied with the 2010 IA by remaining inactive during the one-year notice period, the City would have had no need to immediately seek a preliminary injunction.

The County's failure to comply with the terms of the 2010 IA constitutes a material breach of contract, including breach of the implied covenant of good faith and fair dealing. The County's breach prevents the County's requested relief and excuses the City from the County's breach of contract claims.

The County argues that each party received adequate consideration and received the benefit to bargain so the County should be given the jurisdictional authority in the ETA. County's Br., Pp. 19-21. Since more than one year has passed from the County's June 22, 2011 Notice of Termination the County argues the City received everything it bargained for and more under the 2010 IA, so ETA jurisdiction should return to the County. County's Response Br., Pp. 20-21. The County's argument and conclusion is not logical or correct.

Quite simply, the City has not received the benefit of the bargain it sought by agreeing to the 2010 IA. One key consideration for the City for the adoption of the 2010 IA was the parties promised cooperative relationship with one another, not a one-year term of ETA jurisdiction as argued by the County. Consistent with the City's expectations, the City continued its pledge to work with the County within the bounds of Montana law should the referendum pass. Aff. Hildner dated October 29, 2012, Exhibits 2-6. Upon the referendum's passage, even though the 2010 IA no longer existed, the City continued working towards a cooperative outcome and extended its offer to explore other possible options relying on the expressed interests of both parties to continue the City's ETA jurisdiction.

The County's requested relief to set aside the voters' repeal of the 2010 IA is not an available remedy to parties in a contract action. The only relief available for a breach of contract are contract damages proximately caused by the breach. The County's

requested negation of the referendum vote is not an available contract remedy. MCA § 27-1-311; City's Response Br., Pp. 18-19.

Because the referendum is valid as a legislative matter, the 2010 IA is repealed. Once repealed by the voters, neither party is entitled to the benefit of the 2010 IA bargain. Accordingly, the County cannot recover the benefit of the bargain caused by the referendum based on the 2010 IA.

F. City fully performed the 2010 IA until the referendum repealed the 2010 IA.

Unlike the County, the City fully performed its obligations under the terms of the 2010 IA. The County apparently agrees and takes no issue with the City's performance until the referendum's passage. Upon the passage of the referendum the City was bound to follow the voters' wishes, which it did. Following the referendum, the City should be excused from further performance under the 2010 IA because it was repealed by the voters. Montana law excuses a party's performance and extinguishes a contract whenever circumstances justify relief. Such extraordinary circumstances exist in this case and the City should be excused from further performance due to the doctrines of impracticality and impossibility. The City cannot be compelled to do what the law prevents. City's Br., P. 21-23; City's Response Br., P. 21-22.

Conclusion

The City has established that no material issue would preclude summary judgment and the City is entitled to summary judgment as a matter of law.

The referendum was an effective and valid exercise of the voters' constitutional authority. The plain meaning of the referendum established the voters sought a repeal of the 2010 IA and the reinstatement of the 2005 IA, which would restore the parties to

the time prior to the City Council's approval of the resolution. Therefore, the referendum should be given its stated effect and purpose as the voters overwhelmingly approved the repeal of the resolution and reinstatement of the prior agreement. Due to the County's breach of the 2010 IA, the County is not entitled to its requested relief and the City is excused from performance of the 2010 IA, caused by the referendum breach. The voters' approval of the referendum excuses the City from County's claimed breach of contract.

For the above-stated reasons, the City's motion for summary judgment should be granted and the Court should enter a declaratory judgment on the issues that the referendum repealed the City's approval of the 2010 IA and as a result the 2005 IA is the effective agreement between the City and the County, that a permanent injunction should issue to the same effect as the preliminary injunction ordered in the Order, and that the Court grant such other and further relief as it deems equitable and just.

DATED this 22nd day of January, 2013.

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CERTIFICATE OF MAILING

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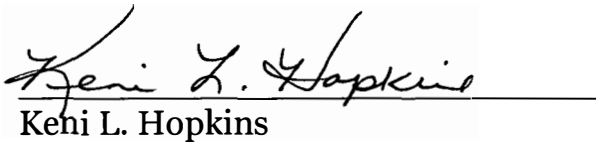

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