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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 COMBINED RESPONSE BRIEF IN OPPOSITION TO CITY OF WHITEFISH'S AND INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT

Defendant Board of County Commissioners of Flathead County ("Commissioners" or "County"), through counsel, files this Combined Response Brief in Opposition to City of Whitefish's and Intervenors' Motions for Summary Judgment, both of which were filed on October 29, 2012. For the reasons stated herein, the undisputed material facts demonstrate the Commissioners are entitled to summary judgment as a matter of law.

I. INTRODUCTION

This much is clear: The City of Whitefish wants permanent regulatory control over the lands within the "doughnut" outside the City limits. Its desire for such control is so pervasive that it is willing to make legal arguments that ignore the actions of its own governing body.

How is this so? After extensive negotiations, the City and County reached an agreement to settle Cause No. DV-08-367A pertaining to legal challenges to the 2005 IA. There were two conditions to the settlement. Each party was required to approve the 2010 IA through a public process and the parties were required to move the Court to dismiss the litigation. Each party did this. The City and County willingly agreed to enter into the 2010 IA. Further, they jointly moved the court to dismiss the lawsuit over the objections of the intervenors.

In their joint motion to dismiss the lawsuit, the City and County made it clear to the Court that they had moved forward from their dispute:

> The City of Whitefish filed this action on March 18, 2008, seeking to enforce an Interlocal Agreement between the City and County dated February 1, 2005. . . .
>
> The County Commissioners and the City of Whitefish resolved their

> differences by entering into a new Restatement of Cooperative Interlocal Agreement dated December 6, 2010, attached as Exhibit A, and directed their respective counsel to dismiss the lawsuit. . . . Intervenors argue there are "many issues" in the case which remain unresolved by the new Interlocal Agreement adopted by the County and City. Whether such issues remain is now irrelevant because the issues presented in the Complaint and Cross Claims are now moot. The 2005 Interlocal Agreement which formed the basis of the lawsuit is no longer in effect.

Bd. County Commrs. & City Whitefish's Br. Support Jt. Mot. S.J. 2, *City of Whitefish v. Bd. of County Commrs. of Flathead County*, No. DV-08-367A (Mont. 11th Jud. Dist. Ct., Dec. 23, 2010). Further, the City and County explained the effect of the 2010 IA and its characterization:

> Despite Intervenors' attempt to minimize the 2010 Interlocal Agreement as a mere "refinement" of the 2005 Interlocal Agreement, the 2010 Interlocal Agreement includes significant, substantive changes that allow the City and County to dismiss this lawsuit and move forward. While all of Intervenor's questions may not have been answered, any controversy over the 2005 Interlocal Agreement is now moot and any ruling on that Agreement is merely academic.

Bd. County Commrs. & City of Whitefish's Reply Br. Support Jt. Mot. S.J. 2, *City of Whitefish v. Bd. of County Commrs. of Flathead County*, No. DV-08-367A (Mont. 11th Jud. Dist. Ct. Jan. 27, 2011).

It could not be clearer that the City negotiated and bargained for the 2010 IA which included a definite term and a one-year termination clause (among other significant changes from the prior versions). It could not be clearer that the City induced the County to settle and dismiss the lawsuit on the basis of the parties' agreement to enter into the 2010 IA. It could not be clearer that the City willingly entered into an agreement that allowed the County to terminate the arrangement upon written notice and a one-year

waiting period.

In fact, the City puts it best in its own words in the City's brief in support of its motion for summary judgment:

> The City Council determined the best method to handle the ongoing dispute with the County was to enact amendments to the 2005 IA providing for a definite term and unilateral withdrawal process and settle the 2008 lawsuit.

Br. Support City's Mot. S.J. 12 (Oct. 29, 2012) ("City's Br."). Why, then, is the City arguing so strongly to reinstate the 2005 IA? Was the City hedging its bets that the County would never invoke the withdrawal process? As it turns out, the City has received more than the 2010 IA provided. Its authority to regulate the area within the doughnut has extended well past the one-year waiting period following the County's notice of termination.

Whether due to a change in heart or change in administration, the City no longer wants the bargain it made.[1] That decision has nothing to do with the referendum other than the opportunity it provides to ignore the bargain.

The County had nothing to do with the referendum. Even assuming it was valid, it only did one thing: it repealed the authorization for the City to enter into the 2010 IA. It did not repeal the dismissal of the lawsuit. 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. Yet, the

[1] Ironically, this is the general argument the City made against the County in Cause No. DV-08-367A. However, unlike Cause No. DV-08-367A, no one here is arguing the 2010 IA is illegal.

City ultimately ignores the most overriding principle of all: it is the County who gets to choose the remedy, if any, for the City's failure to perform the conditions to dismissing the lawsuit.

A. Several of the City's Asserted Facts Are Not Facts

The material facts of this case are relatively few and are entirely identifiable via the actual public records and related documents submitted by the parties. However, the City's Brief contains assertions of fact which are not correct and include significant legal argument and interpretation. Although a number of these are not material to determining 1) whether the referendum is valid and 2) if so, what effect did it have, at least two bear refuting.

1. In paragraph 3 of the City's Statement of Facts, the City claims "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." City's Br. 3. While it is true that the County withdrew from the 2005 IA without the City's mutual approval, no other attempt to withdraw from the 2005 IA has been made by either party. The County moved forward with plans to adopt regulations for the doughnut in 2011 after the referendum passed. At that point, the City had informed the County that the referendum repealed the 2010 IA, but asked the County to "maintain the status quo" in favor of a cooperative solution. *See* Foundational Aff. William T. Wagner, Ex. I (Oct. 29, 2012) ("Aff. Wagner").

2. In paragraph 19 of the City's Statement of Facts, the City claims "[t]he referendum repealed the City's approval of the 2010 IA, and restored the parties to the

time before the election." City's Br. 6. This is a conclusory statement reflecting a legal outcome for which the City is advocating, not a statement of fact. In reality, it appears the City meant to state that the effect of the referendum was to restore the parties to the time before entering into the 2010 IA, not before the election. In any event, it is not a statement of fact and the effect of the referendum, even if valid, is obviously vigorously disputed.

B. The County's Challenge to the Validity of the Referendum Is Timely and Permitted

The City argues the County's challenge to the validity of the referendum is untimely on the basis that such challenges "interfere with the people's right to direct government . . . ." City's Br. 16. Further, the City makes a passing reference to the idea that the County could have challenged the validity of the ordinance when the City determined it met the form and compliance requirements of Montana Code Annotated §§ 7-5-131-132.

Pursuant to Montana Code Annotated § 7-5-135, it is the ***City*** which is statutorily authorized to file suit to determine the validity and constitutionality of the proposed referendum:

> § 7-5-135. **Suit to determine validity and constitutionality of petition and proposed action.** (1) The governing body may direct that a suit be brought in district court by the local government to determine whether the proposed action would be valid and constitutional. The suit must be initiated within 14 days of the date a petition has been approved as to form under 7-5-134.

As the governing body with the power and obligation to file suit to determine the validity of the referendum, the City chose not to do so. The County was not authorized to file

such a suit.

Rather, having been sued by the City, the County is certainly entitled to point out that the referendum was not valid. Doing so is a defense to the City's claims. The County had no need for such a defense until the City took the position that the referendum invalidated the parties' dismissal of the lawsuit and somehow revived the 2005 IA. The City could have, and should have, taken the position that the passage of the referendum merely eliminated any interlocal agreement at all. Such an interpretation would have upheld the City and County's agreement to dismiss the lawsuit, with each party receiving exactly what it bargained for – the possibility that either party could terminate the agreement with prior notice of one-year.

Instead, the City chose to abandon the carefully negotiated solution to the original litigation, pretending the parties had reached no agreement at all. In so doing, the City cannot now complain that the County's defense to the City's claim is untimely.

C. Resolution 10-46 Did Not Adopt New Zoning, Subdivision, or Other Land Use Policies and Is Not a Legislative Act

No one can dispute that the City's authority to adopt a growth policy and zoning and subdivision regulations for the doughnut area are explicitly set forth in Montana Code Annotated §§ 76-2-310-311. Similarly, there is no dispute that the acts of adopting a growth policy, zoning regulations, and subdivision regulations are legislative acts. Resolution 10-46 does none of these.

The parties agree that the Montana Supreme Court adopted four guidelines for determining whether an act of a local government is legislative and, therefore, subject to

referendum, or administrative and, therefore, not subject to referendum. *Town of Whitehall v. Preece*, 1998 MT 53, ¶ 29, 288 Mont. 55, 956 P.2d 743.

The City refers to Montana Code Annotated § 7-1-4121(22) to suggest resolutions are automatically legislative because they are defined as a "statement of policy." City's Br. 10-11. The Montana Supreme Court has squarely rejected this argument. The denomination of an act of local government as a resolution or as an ordinance is not dispositive of whether the act is legislative or administrative. *Town of Whitehall*, ¶ 27. Rather, that determination is fact-driven. *Town of Whitehall*, ¶ 27. The Court must apply the facts to the four guidelines in order to make the determination.

1. An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.

Rather than looking at Resolution 10-46 as a whole and its function as part of the lawsuit settlement, the City points to one provision of the 2010 IA to point out that the term of the interlocal agreement switched from permanent to a definite term. That is not what the first guideline is intended to address and ignores the generality component.

Adopting subdivision regulations, for example, is a legislative act that sets a new law which generally applies to the City's entire jurisdiction. Such a law becomes something of a "permanent" set of rules and regulations for all applicants to meet. Conversely, adopting Resolution 10-46 was a highly specific action to settle Cause No. DV-08-376A. It is specific to how the County and City agree to cooperate to carry out the authority granted in Montana Code Annotated §§ 76-2-310-311. It does not require or provide for any specific ordinances, subdivision regulations, zoning regulations, or

growth policies. Those are all actions which were left to later consideration by the City. For these reasons, Resolution No. 46-10 fails the first prong of the *Town of Whitehall* guidelines.

> 2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.

The City asserts the public purpose to enact Resolution 10-46 was "to establish the City's pledge to work together 'in an on-going cooperative process between the City and County' to heal the schism between the parties through substantive changes to term and duration in the 2005 IA." City's Br. 11-12. Indeed, the 2010 IA reflects an agreement between the parties to settle an ongoing lawsuit, but that does not convert the action into a legislative one. The public policy in this area is set forth in §§ 76-2-310-311, not the 2010 IA. Those statutes permit extraterritorial planning and zoning in limited circumstances where the adjacent county has chosen not to do so.

Resolution 10-46 authorized the Mayor to enter into a contract with the County in order to settle a lawsuit. That contract is authorized pursuant to the Interlocal Cooperation Act and seeks only to carry out the provisions of §§ 76-2-310-311 with respect to the parties' jurisdiction. It is a specific, narrow action to enter into a contract and not a broad, declaration of public policy which is subject to the powers of referendum. As the City points out in its Statement of Facts, the City has exercised some form of extraterritorial control for 40 years. Changing the term and termination provisions of a contract to comply with state statutes and settle a lawsuit was an administrative, not a legislative act. It certainly did not declare a new law, public

purpose, or the ways and means to regulate land use.

> 3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy.

Given the volume of briefing, the duration of litigation, and the extent of negotiations and public process, it is rather surprising to read that the City finds that no specialized training and experience or intimate knowledge of the fiscal and other affairs of a city were required for decision making in this process.

Still, the City points to *The Greens at Fort Missoula, LLC v. City of Missoula*, 271 Mont. 398, 897 P.2d 1078 (1995), for support for its argument, but *Greens* shows why the situations are distinguishable. *Greens* involved a decision by the City of Missoula to rezone property, an act which everyone agrees is legislative. Resolution 10-46 and the 2010 IA did not zone or rezone anything.

Contrary to the City's arguments under this and the previous guideline, 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. While enacting subdivision regulations is a legislative act, approving a subdivision application is an administrative one that is not subject to referendum. *Kiely Constr., L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 82, 312 Mont. 52, 57 P.3d 836. This is true whether the subdivision application has a minor effect from two new lots, or a major effect with five hundred. It is still an administrative act:

> Although approving or denying plat applications are official duties of the

> City Council, such actions do not "result in the creation of law or declaration of public policy," but rather are the execution of the policies as set forth in the Montana Subdivision and Platting Act.

Kiely Constr., ¶ 85.

The policies with respect to extraterritorial planning and zoning are set forth in the Zoning Enabling Act, Title 76, Chapter 2. Those policies allow a local government like the City to regulate planning and zoning activities beyond its municipal limits only in accordance with §§ 76-2-310-311. An interlocal agreement is not necessary for a local government to exercise this authority. Conversely, local governments with self-governing powers like the City are bound to follow these statutory requirements. Mont. Code Ann. § 7-1-114(1)(e) (2011).

Deciding how and when to settle a lawsuit and under what terms is no simple matter and reflects an administrative decision by the governing body which should not be subject to challenge by referendum. Perhaps that's why the referendum only repealed Resolution 10-46, while leaving the dismissal of the lawsuit in place. Certainly, the citizens of Whitefish do not have the power to erase court rulings.

> 4. No one act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures which are quite clearly and fully legislative and not principally executive or administrative.

The City characterizes Resolution 10-46 as something it is not in order to convert it from an administrative function to a legislative one. As stated by the City, its basis for the claim is that Resolution 10-46 made "legislative changes to the City's exclusive and continuing" jurisdiction over the doughnut. City's Br. 15.

Indeed, Resolution 10-46 resulted in a new 2010 IA with new term and withdrawal provisions compared to previous interlocal agreements, but the overall action was administrative, not legislative.

The 2010 IA is a contract under the Interlocal Cooperation Act specifying how the City and County will administer their respective rights granted pursuant to §§ 76-2-310-311. So long as the terms of the interlocal agreement are not contrary to these statutory provisions, it may be a valid contract between the parties. It is not a new law or a declaration of a land use policy.

There is one thing that demonstrates this more than anything else. Terminating the 2010 IA does not end the City's jurisdiction within the doughnut. Such jurisdiction ends only in accordance with §§ 76-2-310-311 when the County has adopted a Growth Policy for the doughnut along with subdivision or zoning regulations.

While there may inevitably be some amount of legislative thought incorporated into Resolution 10-46, it is not "clearly and fully legislative," particularly when considered in context.

D. The County Fully Complied With the Terms of the 2010 IA and Is Entitled to the Requested Relief

In Section E of the City's Brief, the City argues the County breached the terms of the 2010 IA in two principal ways. First, the City argues the County jumped the gun, so to speak, and began adopting zoning regulations before the 2010 IA allowed. City's Br. 17-18. Second, the City argues the County violated the implied covenant of good faith and fair dealing by refusing to meet with the City to discuss issues prior the point where

the County gave its notice of termination. City's Br. 19. The City's arguments are incorrect and should be rejected.

As noted, the City's power to regulate planning and zoning matters in the doughnut are exclusively derived from Montana's statutes. Montana Code Annotated § 76-2-310 authorizes the City to "extend the application of its zoning or subdivision regulations beyond its limits in any direction" subject to certain limitations. One of those limitations is "except in locations where a county has adopted zoning or subdivision regulations." Mont. Code Ann. § 76-2-310(1) (2011). Once the City has extended its zoning and subdivision regulations, the City "may enforce regulations . . . as if the property were situated within its corporate limits, until the county board adopts a growth policy . . . and accompanying zoning or subdivision resolutions that include the area." Mont. Code Ann. § 76-3-311(1) (2011). Thus, the City's jurisdiction to enforce its regulations continues until the County has adopted a growth policy and zoning and/or subdivision regulations for the doughnut area.

The term and termination clause included in Paragraph 13 of the 2010 IA sets forth the process for withdrawing, as well as the one-year "waiting period" before such a termination would become effective:

> 13. Term. After approval and appropriate filing, this Agreement shall become effective and shall endure five (5) years from the date of its approval by the parties, or until terminated by law, by mutual agreement of the parties or withdrawal of a party as provided by this part, whichever shall first occur.
>
> A party may withdraw from this Agreement upon lawful resolution passed by the governing body of that party and service of written notice thereof on the remaining party at least one (1) year prior to the requested

> date of termination. During the one-year period of time from notice of the requested withdrawal and termination of the Interlocal Agreement, the party providing notice shall specify the nature and grounds for withdrawal within ten (10) days of the date of the notice, allowing the remaining party ninety (90) days to investigate and propose a resolution.
>
> After ninety (90) days from the date of the notice for withdrawal, if the parties are unable to reach a mutually agreeable resolution, the parties shall attempt to resolve the stated grounds for the withdrawal and termination of the Interlocal Agreement through non-binding mediation, and, the parties shall jointly select a mediator. In the event the parties do not voluntarily and timely select a mediator within fifteen (15) days from the mediation request, the eleventh judicial district court on application of a party shall appoint a mediator. The mediator so appointed by the parties or the district court shall assist the parties to attempt to resolve their differences as provided by § 26-1-813, MCA.
>
> This Agreement will remain in full force and effect for the parties throughout the full one (1) year period of time following service of notice of the withdrawal of a party.

The City claims the County breached this clause because it "began its steps to rezone by an interim zoning ordinance and amendment of the growth policy to include the ETA, during the year of withdrawal." City's Br. 17-18. In support the City cites to the County Planning Board's meeting minutes from December 14, 2011, noting the County's plan to proceed with interim zoning.

The City's argument is a spurious one which must be rejected. By December 14, 2011, the City had made it very clear that the referendum repealed the 2010 IA. In a letter to Commissioner Dupont dated December 5, 2011, the City specifically stated that the referendum had repealed the 2010 IA and asked the County to enter into a stipulation to agree not to move forward with interim zoning while the parties could discuss the issues and seek an alternative solution. Aff. Wagner, Ex. I.

How could the County breach a contract which the City explicitly argued had been repealed?

Further, nothing in the 2010 IA prohibits the County from taking steps to adopt a growth policy and zoning and subdivision regulations for the doughnut area prior to the end of the one-year waiting period. Paragraph 13 of the 2010 IA merely provided that the City would retain jurisdiction "throughout the full one (1) year period of time following service of notice of the withdrawal of a party." Had the City not repudiated the contract (in writing, no less) the County could nevertheless have taken all steps necessary to prepare draft ordinances, conduct public hearings and complete other legal requirements to have such regulations ready to go once the waiting period expired. To hold otherwise would automatically extend the one-year waiting period for many months by requiring the County to begin the public process only after the one-year waiting period expired.

In essence, the City's argument is nothing more than a game of "gotcha." Having told the Commissioners the 2010 IA was no longer in effect, the City certainly cannot now insist the County was bound to follow its terms to the end.

Regardless, as should be obvious at this point, the County has not adopted ***any*** growth policy, interim zoning, permanent zoning, or subdivision regulations for the doughnut. The one-year waiting period ended June 21, 2012 and the City remains in control of the area. Thus, the County has committed no breach and the City received exactly what it bargained for – and more.

Next, the City argues the County breached the implied covenant of good faith and

fair dealing by refusing to meet with the City to "work in good faith to resolve the issues which led to the notice of termination." City's Br. 18. It is an argument which fails on all levels.

First, the City does not allege breach of the implied covenant of good faith and fair dealing in its Complaint against the County. No such cause of action exists in the City's Complaint and there are no alleged facts cited in support. This argument is a complete surprise.

Second, the City cites two letters in support of its allegations. The first is a letter from the City Council to the County Commissioners dated March 6, 2012 (erroneously cited as 2011 in the City's Brief). *See* Aff. Richard Hildner, Ex. 6 (Oct. 29, 2012) ("Aff. Hildner"). The second is the County's response letter dated March 26, 2012 (also erroneously cited as 2011 in the City's Brief). *See* Aff. Hildner, Ex. 7.

The City's March 6, 2012, letter does not mention the 2010 IA or cite to any clause or portion of it. The reason why is obvious. The City did not believe the 2010 IA remained in effect. Rather, the City's letter makes a reference to "the current predicament" and expresses interest in setting up quarterly or semi-annual meetings with the Commissioners to discuss unspecified topics related to "current and anticipated future issues." Aff. of Hildner, Ex. 6 ("If you concur, we could jointly develop an agenda or list of topics we would like to discuss.").

By March 6, 2012, the City had already sent a letter to the County stating its explicit belief that the 2010 IA had been repealed by the voters. Aff. Wagner, Ex. I. Many months earlier, and well before the referendum, the County provided the City with

its notice of termination pursuant to Paragraph 13 of the 2010 IA, triggering the 90-day resolution period. The City responded by letter dated September 19, 2011, stating

> [d]espite our best efforts, we have not been successful in putting together meetings for the members of the Planning Jurisdiction Interlocal Agreement Committee due to conflicting schedules among the committee members. Considering the time constraints in the 2010 Restatement, we request an extension of time until December 15, 2011, which would allow sufficient time for the committee members to meet and propose a resolution.

Aff. Wagner, Ex. G. The County granted the City's request for an extension of time. Aff. Wagner, Ex. H.

The City did not propose a resolution prior to December 15, 2011. Rather, once the referendum passed, the City informed the County that the 2010 IA was no longer in effect. Aff. Wagner, Ex. I.

Thus, by the time the City sent its March 6, 2012, letter seeking quarterly or semi-annual meetings with yet-to-be-determined agendas and topics, the City had: 1. Requested and received an extension of time to propose a resolution to the County's notice of withdrawal pursuant to Paragraph 13 of the 2010 IA; 2. Failed to propose a resolution within the time provided by the extension of time; 3. Informed the County that the 2010 IA had been repealed and was no longer in effect; and 4. Sued the County on a Third-Party Complaint dated January 5, 2012, asserting, among other things, that the 2010 IA was no longer in effect.

How could the county violate the implied covenant of good faith and fair dealing in a contract the City expressly believed was no longer valid and in effect? Again, the City's claim is nothing more than a game of "gotcha." Its sole evidence in support of its

claim is a letter which does not even mention the contract the County allegedly breached. Further, the City's claim entirely ignores the fact the City failed to comply with the 2010 IA requirement to respond to the County's notice of termination and propose a resolution within the extension of time granted by the County.

The County is the only party which complied with the terms of the 2010 IA. The 2010 IA exists as a settlement between the County and City for the prior lawsuit and explicitly provides that either party may withdraw by following the provisions of Paragraph 13. The Commissioners passed Resolution No. 2297 on June 22, 2011, opting to withdraw from the 2010 IA. The same day, the Commissioners sent a letter to the City providing notice of its decision to withdraw from the 2010 IA and stating the grounds therefore in accordance with Paragraph 13. The City subsequently requested an extension of the 90-day period for proposing a resolution. The County granted the City's request. Thereafter, the City failed to propose a resolution within the time permitted in the extension. The County breached none of the provisions of the 2010 IA.

In a final argument in this realm, the City claims it should be excused from paying any damages to the County or otherwise performing because the County's alleged breach of the implied covenant of good faith and fair dealing leaves the County with unclean hands. City's Br. 19. Montana Code Annotated § 28-1-406, which the City cites in support, provides that a party who seeks to enforce a contract must first fulfill all conditions imposed upon that party.

However, the City ignores the exception to Montana Code Annotated § 28-1-406. As provided in Montana Code Annotated § 28-1-407 (2011):

> If a party to an obligation gives notice to another, before the latter is in default, that the party will not perform the obligation and does not retract the notice before the time at which performance upon that party's part is due, the other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon the other party's part in favor of the party giving notice.

As has previously been demonstrated, upon the passage of the referendum, the City immediately took the position that the 2010 IA was no longer in effect. By letter dated December 5, 2011, the City sought to discuss the issues with the County in light of the fact that the City's participation in the 2010 IA had been repealed by the voters. The City's representation was a notice to the County that the City did not intend to perform its obligations under the 2010 IA, thus excusing any performance by the County pursuant to § 28-1-407. Regardless, as has also been demonstrated, the County fully complied with the terms of the 2010 IA and is entitled to all available remedies from the City's breach.

E. Both Parties Received Adequate Consideration and Received What They Bargained For Regardless of the Status of the Contract

In its collection of remaining arguments, the City argues the 2010 IA should be rendered void due to failure of consideration, impracticality, or impossibility. None of these arguments is meritorious because, ultimately, each party received exactly what it bargained for.

It is well understood by now that the City and County agreed to drop all claims against each other in the 2008 litigation in exchange for executing the 2010 IA. The City acknowledges this. City's Br. 20 ("In the present case, the City entered into the 2010 IA in consideration for and in reliance on the dismissal of the lawsuit between the City and the County."). Further, the City and County Resolutions approving the 2010 IA, as well

as the 2010 IA itself, include the same passage:

> 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.

Aff. Wagner, Ex. B at Ex. A:2:¶ I. Thus, the consideration for entering into the 2010 IA was the dismissal of all claims in the 2008 litigation. Each party received this. The suit was dismissed.

Plus, regardless of the referendum, each party ultimately received exactly what was provided in the 2010 IA. Paragraph 13 of the 2010 IA provided for a five year term unless the agreement was terminated earlier by one of the stated provisions. There was never a guarantee that the 2010 IA would last indefinitely or that its termination would be left exclusively in the City's hands. This was a fundamental change from the 2005 IA and was an essential and bargained for provision for the County's willingness to enter into the 2010 IA.

The City approved a contract which permitted either party to withdraw by providing notice and completing the resolution and mediation process. The contract specifically provided that the withdraw would be complete one-year after the notice was given, during which time the City would retain exclusive jurisdiction over the doughnut area. After the one-year waiting period, the County could regain jurisdiction.

We are now more than five months past the one-year period following the County's

notice of withdraw, which ended June 21, 2012. The City retained exclusive control over the doughnut area during the entire one-year waiting period and beyond, even though the City specifically asserted in both letters and its Third-Party Complaint that the 2010 IA had been repealed by its voters. Thus, the City has received everything it bargained for and more when it executed the 2010 IA.

Although further performance by the County under the contract was excused by the City's notice that it would not be fulfilling its obligations (pursuant to § 28-1-407), all obligations have nevertheless been performed despite the referendum and resulting litigation.

The City next argues it should be excused from further performance based on the doctrine of impracticality. City's Br. 21-23. Such an argument is essentially the same as the City's final argument that it is entitled to rescind the contract based on impossibility. Montana Code Annotated § 28-2-603 (2011) provides:

> Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

Whether the 2010 IA has but a single object is certainly debatable (and likely not correct). Yet, it is certainly not debatable that the 2010 IA itself was possible to perform when executed and not so vaguely expressed as to be wholly unascertainable.

Whether the City can rely upon the doctrine of impossibility or impracticality depends largely on whether the City correctly concluded the referendum was legislative in nature. If the City incorrectly certified the referendum for the ballot, as is argued by

the County and Plaintiffs, there is certainly no impossibility or impracticality to carrying out the terms of the 2010 IA. If the referendum was valid, thus repealing the City's consent to the 2010 IA, it matters little whether the contract became impossible to perform. While an impossibility or impracticality may excuse a party's further performance, it certainly does not revive prior versions of a contract or negate the settlement of a lawsuit. It merely means the City is not required to perform its obligations under the contract.

The one-year waiting period has passed and the County complied with the terms of the 2010 IA. If the City cannot perform its obligations under the settlement and subsequent 2010 IA, it is up to the County to decide whether to push the matter further and seek damages for the City's failure to perform. This is true no matter what caused the City's inability to perform. At this point, whether the City fully performs any of its remaining obligations under the contact is, due to the passage of time, no longer of any consequence.

An interlocal agreement has never been necessary for a city or town to exercise extraterritorial powers to regulate planning and zoning for a prescribed distance beyond its borders. The statutory scheme grants such authority only in the event the neighboring county has not adopted a growth policy and subdivision or zoning regulations for the extraterritorial area. However, the statutory scheme also makes it abundantly clear that once the neighboring county chooses to adopt its own planning and regulatory documents for the area, the city's jurisdiction *immediately* ceases. In this way, the Legislature has expressed its policy that it is ultimately a county's decision whether to regulate the lands

within its territory. Similarly, the Legislature has provided various mechanisms to allow cities and towns to annex properties into its borders by following the prescribed procedures.

The City's Third-Party Complaint against the County is an attempt to obtain that which the statutes expressly prohibit: ***permanent***, regulatory control over lands outside the City's municipal boundaries. Whether couched in breach of contract, failure of consideration, impossibility, impracticality, or any number of contract or other claims, this is a remedy the Court cannot grant.

III. CONCLUSION

As the City states, "The City Council determined the best method to handle the ongoing dispute with the County was to enact amendments to the 2005 IA providing for a definite term and unilateral withdrawal process and settle the 2008 lawsuit." The referendum, even if valid did not change the bargain both parties received when they agreed to dismiss the original lawsuit. While the citizens of Whitefish may or may not be able to withdraw the City Council's consent to enter into a contract, they cannot avoid the consequences of doing so. If, as demonstrated herein, the referendum was invalid, the City breached the terms of the 2010 IA and the County is entitled to Summary Judgment. If the referendum was invalid, it merely repealed the City Council's consent to enter into the 2010 IA. It did not reinstate prior versions of the interlocal agreement. Rather, it means the City cannot perform one of the two conditions to dismissing the lawsuit. As the non-breaching party, the County is entitled to choose the appropriate remedy. Given the passage of time, the parties received all of the benefits of the bargain they made and

the County, therefore, is entitled to summary judgment in its favor and asks the Court to remove the injunction.

DATED this 11th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2013, a copy of the foregoing document was served on the following persons by the following means:

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