

SPECIAL MEETING OF THE BILLINGS CITY COUNCIL

May 11, 2006

The Billings City Council met in a special session in the City Hall Conference Room located at 210 North 27th Street, Billings, Montana. Mayor Ron Tussing called the meeting to order at 5:30 p.m. and served as the meeting's presiding officer.

ROLL CALL – Councilmembers present on roll call were: Ronquillo, Gaghen, Stevens, Veis, Ruegamer, Boyer, Ulledalen, and Clark. Councilmember Brewster arrived shortly after the meeting began. Councilmember Jones was excused.

ADMINISTRATOR REPORTS – Tina Volek

- Interim City Administrator Tina Volek notified the Council that at last Monday's meeting on the item regarding the CDBG & HOME funds, the Council adopted the spending plan, but failed to adopt the annual action plan, which is required by HUD. She noted that document is due at HUD tomorrow. Ms. Volek proposed to sign that document so that it can be submitted, unless the Council directs her not to do so tonight. She noted the affirmation of the annual plan would be added to the May 22nd agenda.
- Ms. Volek also informed the Council of an inquiry she received from TV2 regarding the payments to the Cloverleaf residents regarding the settlement of their lawsuit. The City's share of the settlement was \$133,500.00. The City does not have information on the remaining pieces of the multi-part settlement, nor is it compelled to disclose that information.

PUBLIC COMMENT:

There was no public comment.

SPECIAL AGENDA:

1. DISCUSSION AND REVIEW of the Axilon Law Group report on the validity of the Towe Initiative, an initiative to amend the powers of the Mayor and Council under the City Charter and the options available to the Council regarding the Initiative. (Action: direction to Staff and Axilon Law Group.)

Attorney Tom Singer said the question he was asked to research was "what is the likely outcome if the Council were to bring a declaratory judgment action questioning the validity and constitutionality of the initiative presented by Tom Towe". He noted they looked at a number of different possible grounds for that challenge, including:

- is an unauthorized form of government being created that is not mentioned in the statute;
- will this constitute violation of the wrongful discharge act;
- will this create a federal civil rights claim under Section 1983;
- will this create a problem of separation of powers because of the City Attorney's role? Some effort appears to be made to adhere to a division of the supervision of the City Attorney. The question revolves

- around whether this will affect his duties as an attorney and violate professional ethics; and
- finally, the primary issue of an administrative versus legislative issue.

Mr. Singer said the only one of these grounds that seems likely in any sense to generate a ruling from the district court that the initiative is either invalid or unconstitutional is the question of whether the initiative is an administrative or legislative act. He said the answer to this question is "it is hard to say; it's a 50/50 call on what the court will decide." The bulk of the initiative is pretty clearly "legislative", i.e. it is modifying the City Charter in particular ways. The initiative is an appropriate way to do that, since the Charter is a legislative enactment. The question of who supervises the City Administrator or City Attorney is a question that is dictated in the City Charter and can clearly be changed through an appropriate process such as an initiative.

The only part of the initiative that is arguably administrative is the last clause – the effective date clause. This clause says the two individuals holding the positions of city administrator and city attorney as of the end of the year will "go". Mr. Singer said there is case law from other states that says an initiative to "fire" someone is invalid because that is an administrative act, not something people get to vote on. While this is case law from another state, Mr. Singer said it is consistent with what Montana would say about that. He noted also there is a statute in Montana that allows for initiatives that provide for changes in the terms of office or form of government. In these cases, the initiative must provide for "transition provisions". Mr. Singer said this could be one of those types of initiatives. He said the argument Mr. Towe would make is "that you have to have a transition from the old form of management to the new one and this is the way that you effect that, is by giving the mayor and the council 'a new shot'.

Mr. Singer noted that on the other side of this argument, the City would be "firing" these two individuals, which is an administrative act. He said he didn't know how that would be decided. Councilmember Clark asked if the "terms of office" referred to in this statute refer to elected terms of office. Mr. Singer said he thought it did, so the only part of that statute that might apply is the "forms of government" portion. He explained that the proposed initiative does not change the form of government from a charter form to a council/manager form, but it does alter the form in the charter. How a court would rule on this question is unknown at this time.

The next step reviewed was what would happen if the Council chooses not to file a lawsuit and what the risk was to the City. Mr. Singer said the primary risk to the City if the Council does challenge the initiative is that the City will pay attorney fees for the other side, in addition to the City's own fees, if the City loses the case. Not filing a lawsuit will bar the Council from ever raising the question about the validity or constitutionality of the initiative. He said it does not prevent someone else from making that challenge, but it is hard to determine who that someone else might be, other than the two people who are in the two positions at the time. The only way they would have a challenge is if they were actually affected by the initiative, i.e. the provision took effect and they lost their jobs. If they lost their jobs, but were immediately reappointed, there "is no big deal" stated Mr. Singer. However, if they were not reappointed and there was not some good cause for letting them go, these individuals have a potential wrongful discharge claim as well as a potential Section 1983 claim.

Councilmember Clark asked if this scenario applied to both the city administrator and city attorney, adding that the city administrator has a contract that basically says at any council meeting, the Council could vote to dismiss him/her. Mr. Singer said he was not aware that the city administrator had a contract with that provision; he assumed that these employees were both under "oral" contracts at this time. He explained that if the employee works under an "oral" contract, the wrongful discharge act would apply. If the employee is working under a written contract, the written contract will govern.

Mayor Tussing said it was his understanding that the wrongful discharge act did not apply to political appointees – which would be the city administrator. Mr. Singer said that was not true, noting there was recent case law from Butte that pertains to this situation. Mr. Singer noted that the city administrator is not a political appointee. Whether the wrongful discharge act applies to the city administrator depends on whether a written contract is signed with the city administrator; it does not apply if there is a written contract. If the wrongful discharge act applies, the good cause requirement will always apply.

Councilmember Veis asked if there is a difference between an interim city administrator and a permanent city administrator. He said essentially at this time, that "seat" of city administrator is not filled. Mr. Singer replied that years ago the court held that the wrongful discharge act only applied to terminations of employment, not to demotions. If the decision was made that the acting administrator is no longer the temporary administrator and is now deputy administrator, this constitutes a "demotion" and assuming that the salary is not reduced to some "ridiculous level" or there is some other constructive wrongful discharge is created, there would not be a claim. Mr. Singer noted however in a later case, that a "severe" enough demotion did constitute a discharge.

Councilmember Veis asked if the initiative went into effect and the Council had not yet hired a city administrator, would the mayor have the ability to fire the interim administrator at year end or would the mayor have to wait until an administrator was hired to be able to fire that person. Mr. Singer said he didn't have a "solid" answer for that, but his sense was that the initiative would be interpreted to say that "the powers the mayor has with respect to the city administrator would apply whether that administrator is permanent or acting", but added that was "his guess" only.

Interim City Administrator Tina Volek said she has a letter signed by former Mayor Tooley that says once her term as interim city administrator is concluded, she can return to the position of assistant city administrator. Councilmember Stevens noted however if Ms. Volek is named city administrator, the letter signed by the former mayor would not apply. Councilmember Clark noted however that if Ms. Volek were hired as city administrator, the City would have a contract with her and the city would have to go by the contract. Councilmember Stevens said if Ms. Volek had a contract with the City, according to the initiative, the mayor could fire her and then she would have a breach of contract claim. Councilmember Clark said it would depend on the language of the contract whether that would be the case.

Mr. Singer said the city administrator could potentially have a Section 1983 claim as well because there is a "property" interest at that point of the job. Councilmember Ulledalen asked for additional information on Section 1983. Mr. Singer said Section 1983 is important because in the Butte case, that is how the plaintiffs claimed attorneys'

fees. Section 1983 is a federal statute that protects property rights from being abridged through state action. It dates back to shortly after the Civil War, but has been interpreted more aggressively over the past 30 years. In the Butte case, the newly hired county executive terminated two staff people. These two employees were found to have a claim under Section 1983 because they had a "property interest" in their jobs – i.e. their jobs were well enough established, they had held them long enough and Montana law forbids wrongful termination, so that gave these individuals a property interest in their positions. By denying these individuals their property interests, the court held this to be a deprivation of their constitutional right to property. The individuals did not have a due process procedure before the property was taken from them. Mr. Singer said the settlement was a global one that included the Section 1983 claim and the wrongful discharge claim and totaled about \$1 Million.

Councilmember Ruegamer said he sees the council's situation as: "we don't know if we can win or lose if we go to court; if we do go to court and lose, we pay the lawyer fees; if we win, do they pay ours?" Mr. Singer replied, "no; the statute only works one way." Councilmember Ruegamer continued by saying, "if we don't go to court and it passes, we could face more lawsuits, without doing anything wrong or even doing anything. I don't get that part." He asked where in the law was the protection for the City. Mr. Singer said the protection is that "there is no liability or potential liability that is significant – i.e. anyone can file a lawsuit at any time." The risk of liability of small here and the risk of being sued is also very small here, regardless of whether the initiative passes, so long as "who ever is in the position of city administrator or city attorney at the beginning of the year is immediately rehired. That's the way you protect yourself. They are the only two that may have a claim," he stated.

Mayor Tussing asked if a citizen could sue the City because it enacted an unconstitutional initiative – they don't have standing for a claim. Mr. Singer confirmed that was basically true. Councilmember Veis asked for confirmation that none of the other issues are a reason to move forward with a challenge, other than changing an administrative function through a legislative process via the effective date clause. The councilmember asked if the effective date could be removed. Mr. Singer said removing the effective date clause is not an option the Council has; Tom Towe drafted the initiative – it is in the form it is in and the Council gets to "take it or leave it as is". Mr. Singer noted also that the court has the same choice – accept it as it or invalidate it in its entirety. Councilmember Veis asked if the "50/50" proposition of the court is that it might say, "yes, you are changing an administrative function." Mr. Singer confirmed that is the issue that he is not sure how the court would decide.

Councilmember Stevens said if the ballot proceeds and the initiative is approved by the citizens, "how can you have something unconstitutional with nobody to be a plaintiff?" Mr. Singer said the only piece of the initiative that may be unconstitutional is the piece that concerns the two individuals – which is "the effective date. Once that date passes, there isn't anything unconstitutional on the books. What's on the books is a new relationship between the mayor and council and city administrator and city attorney. There is nothing questionable about that; it's only the effective date provision that says these two people will lose their jobs, which occurs once at the end of the year." Mr. Singer's associate Michael Johnson said the effective date and the resignations are in the same clause and represent the "administrative" function because

it is a personnel decision. Mr. Johnson said once the date passes, the event is over and there is simply a new relationship between the mayor, council, administrator and attorney.

Councilmember Ulledalen said there is also the practical issue of the initiative and what is does for city government. "It seems to me that it creates a very difficult situation. Does that have any merit? Does anybody analyze that or is it just that if you are stupid enough to pass this thing, you get what you deserve? My sense is that you really have put the mayor and council at extreme odds in that case. The other question is that who would want these jobs? Who would want to me city administrator and city attorney under this form of government," asked Councilmember Ulledalen. Mr. Singer said these are legitimate questions, but not "legal" issues however.

Councilmember Clark asked if the "new form of government" that may be created "fits in all right?" Mr. Johnson said there are six alternative forms of government under state law and the charter form of government is one of them. The statutes that describe the charter form of government are vague and do not spell out anything like they do for the other forms of government. "It is pretty well implied that you can take from the others as you like. The only thing you have to do is come up with a legislative body, which in this case is the Council," he stated. There are provisions that allow for some administrative duties to be granted to all or one member of the Council.

Mayor Tussing said he did not think this initiative will get enough signatures and does not pass. He also said he would be willing to bet that the mayor is not going to fire the city administrator or city attorney. "I'm not sure we aren't just spinning our wheels here – just from a practical standpoint," he stated. Councilmember Ulledalen said to assume that Ms. Volek is hired as the city administrator and the initiative passes. "If the mayor chose to terminate her, would that rise to disparagement under his separation agreement," asked Councilmember Ulledalen. Mr. Singer said the risk is there – actually there are several different risks there. Mayor Tussing said the contract says that the disparagement would be about the matter to which the contract pertains. "I could say right now that Tina Volek is doing a terrible job as city administrator and I don't think that would be disparagement. She would have to prove that the only reason I said that was because of what happened previously. The burden of proof would be on her," he stated. Councilmember Brewster said this sounds like a little thing for which the Council might not prevail and will cost a lot of money. Mr. Singer said the significant cost would become a factor if other bad decisions are made later. "Doing nothing tonight will not cost anybody any money. Proceeding with litigation clearly will cost you some money and may cost you more. If you don't do anything tonight, the only way that anything should cost you some money ... is there are decisions made later that ... are not particularly wise. Then there is some exposure," he stated.

Councilmember Boyer asked for clarification on the Towe Initiative, asking if it placed the council with equal power with the mayor. Mr. Singer said the council could fire the administrator or city attorney, but the council alone could not hire. The hiring would have to be initiated by the mayor. "If the mayor chose not to initiate that, the council would have its hands tied," explained Mr. Singer. Councilmember Stevens said this item is "hanging out there" until November, while the Council is attempting to do a city administrator search. Councilmember Veis asked what happens in this scenario: the initiative passes and the administrator is terminated at the end of the year, not

because of firing by the mayor, but merely by the clause of the initiative. Then the mayor simply chooses not to rehire the administrator. Mr. Singer said there is potential liability for the City in that instance. "The voters do not have the right to terminate someone without good cause either. The Council cannot fire someone without good cause; the mayor cannot fire someone without good cause; the citizens can't do it; no employer can terminate an employee without good cause," stated Mr. Singer. Councilmember Clark asked if this was indeed the "constitutional" part of the issue. Mr. Singer confirmed that it was.

Councilmember Ruegamer asked for an estimate of legal costs. Mr. Singer estimated that the legal costs for the City to challenge this initiative in district court would be approximately \$20,000 - \$30,000, not including other attorney costs.

Councilmember Brewster moved to take no action and move to the public comment item, seconded by Councilmember Stevens. On a voice vote, the motion was unanimously approved.

**2. PUBLIC COMMENT on Non-Agenda Items -- Speaker sign-in required.
(Restricted to ONLY items not on the printed agenda; comments limited to 3
minutes per speaker. Please sign up on the clipboard located at the back of the
Council Chambers.)**

There were no speakers for public comment.

COUNCIL INITIATIVES

Councilmember Veis noted that Deputy City Administrator Bruce McCandless has updated the city administrator recruitment brochure. He handed the Council two documents – one version has the comments and changes requested by Councilmembers Veis and Boyer. The second document does not have the notes and is a clean copy. The purpose of the one with the changes is to show the Council where the changes have been made. Mr. McCandless noted these copies do not have the photographs in them yet. He noted that an item will be on the May 15th work session agenda and the May 22nd regular meeting agenda to discuss setting the city administrator salary for the brochure.

Councilmember Veis said the Council needs to have the salary discussion now, so it does not find itself in the position of discussing salary when in the middle of hiring a new administrator. "If we don't want to pay \$125,000 as recommended by the Citizens Committee, then we need to discuss it. If you do, then we need to discuss it. But we need to know what that amount is before we start trying to recruit people," he stated. Councilmember Veis said a range can be selected, but it needs to be done before recruitment commences. Councilmember Boyer added that the Council should have an idea of amount in mind, so that when they are negotiating with a candidate, they know what the boundaries are.

ADJOURN – With all business for the special meeting complete, the Mayor adjourned the meeting at 6:20 P.M.

THE CITY OF BILLINGS:

By: _____
Ron Tussing, MAYOR

ATTEST:

BY: _____
Marita Herold, CMC/AAE City Clerk