

SHARING GENERAL MISCELLANEOUS MONTANA LAW

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I. 1972 MONTANA CONSTITUTION PROVISIONS RELEVANT TO MUNICIPAL GOVERNMENT

A. Mont. Const. Preamble.

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and **desiring to improve the quality of life, equality of opportunity**, and to secure the blessings of liberty for this and future generations do ordain and establish this constitution. (Emphasis added).

B. Mont. Const. art. II, Section 3. Inalienable Rights.

All persons are born free and have certain inalienable rights. They include the **right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways**. In enjoying these rights, all persons recognize corresponding responsibilities." (Emphasis added).

1. *Montana Environmental Center v. Department of Environmental Quality*, 1999 MT 248, 296 MT 207, 988 P.2d 1236.

Right to a clean and healthful environment is fundamental.

2. State law effort to better ensure safety for small children.

§ 45-8-113 MCA Creating a Hazard.

45-8-113. Creating hazard. (1) A person commits the offense of creating a hazard if the person knowingly:

(a) discards in any place where it might attract children a container having a compartment of more than 1 1/2 cubic feet capacity and a door or lid that locks or fastens automatically when closed and cannot easily be opened from the inside and fails to remove the door, lid, or locking or fastening device;

3. *Wadsworth v. State of Montana* (1996) 275 MT 287, 911 P.2d 1165.

Opportunity to pursue employment, while not specifically enumerated as a fundamental constitutional right under this section is necessarily encompassed within it and is itself a fundamental right because it is a right without which other constitutionally guaranteed rights would have little meaning.

4. *Yurczyk v. Yellowstone County*, 2004 MT 3, 319 Mont. 169, 83 P.3d 266.

Property owners' substantive due process and equal protection rights were violated because a zoning regulation provision stating dwelling units were limited to on-site construction did not have a substantial bearing on public health, safety, morals or general welfare of the community. Therefore, zoning regulations providing for on-site construction were unenforceable.

5. *City of Missoula v. Mountain Water Co.*, 2016 MT 183, 384 Mont. 193, 378 P.3d 1113.

Substantial, credible evidence was presented supporting a determination that public ownership of the water system was more necessary than private ownership, consistent with constitutional protections afforded to private property owners in the event of a taking of property.

6. *State v. Skurdal* (1988) 235 MT 201, 767 P.2d 304.

Defendant Skurdal refused to procure and carry a driver's license on various constitutional grounds. Skurdal's right to liberty was not infringed when stopped for speeding. Further, Skurdahl's contention that his liberty interest was infringed because he was not engaged in commercial travel when stopped for speeding is baseless in law.

7. *Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC*, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134.

Montana Legislature explicitly exempted shooting ranges from civil nuisance liability.

Note: pursuant to § 27-30-101 (4) MCA "Noises resulting from the shooting activities at a shooting range during established hours of operation **are not considered a public nuisance.**" (Emphasis added).

In addition, with respect to land use regulations and shooting ranges see: Title 76 LAND RESOURCES AND USE, Chapter 9. SHOOTING RANGES, Part 1. Protection of Shooting Range Location and Investments.

8. Title 49 HUMAN RIGHTS, Chapter 1. BASIC RIGHTS, Part 1. Basic Personal Rights.

- a. § 49-1-101 MCA Right of protection from personal injury.

Besides the personal rights mentioned or recognized in other statutes and subject to the qualifications and restrictions provided by law, **every person has the right of protection from bodily restraint or harm, personal insult, defamation, and injury to the person's personal relations.** (Emphasis added).

- b. § 49-1-102 MCA Freedom from discrimination.

(1) The right to be free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin is recognized as and declared to be a civil right....

- c. § 49-1-103 MCA Right to use force.

Any necessary force may be used to protect from wrongful injury the person or property of one's self, of a wife, husband, child, parent, or other relative or member of one's family, or a ward, servant, master, or guest. (Emphasis added).

9. Title 49 HUMAN RIGHTS, Chapter 2. ILLEGAL DISCRIMINATION, Part 3. Prohibited Discriminatory Practices.

- a. § 49-2-301 MCA Retaliation prohibited.

- b. Note: §§ 49-2-303 Discrimination in employment; 49-2-304 Discrimination in public accommodations; 49-2-305 Discrimination in housing – exemptions; 49-2-306 Discrimination in financing and credit transactions; and 49-2-307 Discrimination in

education MCA all expressly insert discrimination based on “marital status” as an unlawful discriminatory practice.

- c. § 49-2-308 MCA Discrimination by the state, inserts both “marital status” as well as employment based on a person’s political beliefs as unlawful discriminatory practices.
 - d. § 49-2-310 MCA Maternity leave – unlawful acts of employers and § 49-2-311 MCA Reinstatement to job following pregnancy-related leave of absence.
10. Title 49 HUMAN RIGHTS, Chapter 3. GOVERNMENTAL CODE OF FAIR PRACTICES, Part 2. Duties of Governmental Agencies and Officials also inserts “political ideas” and “marital status” into sections set forth therein.
11. Title 39 LABOR, Chapter 2. THE EMPLOYMENT RELATIONSHIP, Part 2. General Obligations of Employers
- a. § 39-2-215 MCA Public employer policy on support of women and breastfeeding – unlawful discrimination.
 - (1) All ... municipalities ... must have a **WRITTEN** policy supporting women who want to continue breastfeeding after returning from maternity leave.... (Emphasis added).
 - (2) It is an unlawful discriminatory practice for any public employer to (a) refuse to hire or employ or to bar or to discharge from employment an employee who expresses milk in the workplace; or (b) to discriminate against an employee who expresses milk in the workplace in compensation or in terms, conditions or privileges of employment unless based on a bona fide occupational qualification.
 - b. § 39-2-216 MCA Private place for nursing mothers.
 - (1) All ... municipalities ... shall make reasonable efforts to provide a room or other location in close proximity to the work area, other than a toilet stall, where an employee can express the employee’s breast milk as provided in 39-2-215. (2) All public employers are encouraged to establish policies to allow mothers who wish to continue to breastfeed after returning to work to have privacy in order to express milk and to provide facilities for milk storage.
 - c. § 39-2-217 MCA Break time for nursing mothers.
 - d. § 3-15-313 MCA Who may be excused -- affidavit to claim excuse -- permanent exclusion for chronically incapacitated.

Prospective jurors who are breast feeding mothers may be excused from jury duty.

12. Title 7 LOCAL GOVERNMENT, Chapter 32. LAW ENFORCEMENT, Part 3. Qualifications of Law Enforcement Officers.
- Requires law enforcement officers be of good moral character. Pursuant to § 7-32-303(2)(e) MCA a City mayor, board, commission or other person may not appoint a person who does not meet the qualification to “(e) be of good moral character, as determined by a thorough background investigation.”
13. *Lee v. City of Missoula Police Department*, 2008 MT 186, 343 MT 487, 187 P.3d 609.
- Waiver of an inalienable right. An applicant to be a municipal peace officer could legally waive and in fact did validly waive his constitutional right to know the information obtained

pursuant to the background investigation. In *Lee*, the peace officer applicant signed a release that provided any background information provided to the City of Missoula police department (MPD) during the background investigation would be confidential. As a result of the background investigation, the applicant was denied employment. Lee sued MPD for disclosure of the results of the background investigation on the grounds that he had a constitutional right to know the results. District Court reviewed police investigation materials in camera and ruled in favor of MPD denying Plaintiff access to the police investigation materials.

Note: In addition to MPD moral character concerns another significant concern was potential plaintiff retaliation against persons interviewed and a need to protect persons interviewed from retaliation by plaintiff. The Montana Supreme Court affirmed holding that Lee had validly waived his constitutional right to know by signing the release and denied Lee access to the background investigation information. The court indicated that for a waiver of the right to know to be effective, the waiver must be voluntary, intelligent and knowing and when evaluating a waiver of the right to know, courts should inquire simply as to whether the language of the waiver fully and effectively apprised a person in practical terms that the person is giving up any right or ability to examine certain information held by a government body. The court held that the MPD waiver informed Lee in practical terms that he was waiving any such right to know by agreeing to the terms of the release.

C. Mont. Const. art. II, Section 4. Individual dignity.

The dignity of the human being is inviolable. **No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.** (Emphasis added).

1. *Obergefell v. Hodges* (2015) 756 US __, 135 S. Ct. 2584.

Prohibition on same sex marriage unconstitutional. Pursuant to United States Constitution 14th amendment due process and equal protection clauses, same sex couples have a fundamental right to marry. A state is required to license a marriage between same-sex couples and to recognize a same-sex marriage validly performed out of state. Any state law providing otherwise is unconstitutional.

2. *State v. Blue*, 2009 MT 304, 352 MT 382, 217 P.3d 82.

DUI statutes allowing different punishments for first through third offenses and felony sentencing for fourth DUI do not violate constitutional guarantee of equal protection. The Montana Constitution does not include a right to be sentenced without regard to prior convictions. The assumption that a prior offender is a greater danger to the public is reasonable.

3. *Roe v. City of Missoula*, 2009 MT 417, 354 MT 1, 221 P.3d 1200.

Montana Supreme Court held that denial of proposed subdivision exemption was not a taking because Plaintiffs never possessed a right to obtain a subdivision exemption, but instead only lost an opportunity to obtain a subdivision exemption. No violation of constitutional equal protection because Plaintiffs failed to demonstrate a discriminatory purpose had occurred. Missoula City Council had discretion as to whether to grant or deny a subdivision exemption. Missoula City Council properly exercised its discretion.

Also, see *Gudmundsen v. State ex. re. Montana State Hospital Warm Springs*, 2009 MT 56, 349 MT 297, 203 P.3d 813.

4. *Associated Students University of Montana v. City of Missoula* (1993) 261 MT 231, 862 P.2d 380.

A municipal ordinance limiting university student parking rights in residential neighborhoods near the university to residents of the area was not a violation of equal protection. Montana Supreme Court held that resident and nonresident classifications did not result in invidious discrimination and that the municipal ordinance had valid objectives, such as limiting congestion and meeting safety concerns and was therefore legal.

D. Mont. Const. art. II, Section 5. Freedom of Religion.

The state shall make no law respecting an establishment of religion or prohibiting free exercise thereof.

E. Mont. Const. art. II, Section 6. Freedom of Assembly.

The people shall have the right peaceably to assemble, petition for redress or peaceably protest governmental action. (Emphasis added).

1. *Gehring v. Members of 1993 Legislature* (1995) 269 MT 373, 889 P.2d 1164.

The right to petition for redress contains no corresponding right that the petition be acted upon.

F. Mont. Const. art. II, Section 7. Freedom of Speech, Expression, and Press.

No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty. In all suits and prosecutions for libel and slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts. (Emphasis added)

1. *Denke v. Shoemaker*, 2008 MT 418, 347 MT 322, 198 P.3d 284.

Thompson Falls city clerk and finance officer filed human rights commission allegations against Thompson Falls and city council member Shoemaker, alleging that they had retaliated against her for previously filing sexual harassment charges. City council held a meeting in which city council member Shoemaker was allowed, with virtually no limitation, to severely criticize Denke's conduct as city clerk and finance officer. While the human rights commission and district court concluded legislative act immunity applied, the Montana Supreme Court disagreed, noting that it was not the fact that it occurred during a city council meeting that was controlling; but the manner in which the meeting was conducted and that the conduct of the meeting did not fall within the definition of a legislative act and remanded the case for further legal proceedings. Pursuant to the definition of "legislative act" in the legislative immunity law, § 2-9-111 MCA, a legislative act is defined with respect to municipal legislative bodies as meaning "actions by a legislative body that result in creation of law or declaration of public policy."

The Montana Supreme Court also indicated that § 27-1-804 (2) MCA identifying a privileged publication in any legislative proceeding and free speech court decisions such as *New York Times Co. v. Sullivan* (1984) 376 U.S. 254, and *Skinner v. Pistoria* (1981) 194 MT 257, 633 P.2d 672 did not limit the Thompson Falls city council's ability to regulate the time, place,

and manner of city council member Shoemaker’s criticism of city clerk and finance officer Denke.

2. Pursuant to §§ 7-5-4103 and 7-5-4121 MCA, a city or town council is empowered with authority to “determine the rules of its proceedings” as well as prescribe penalties for violations of its rules.

G. Mont. Const. art. II, Section 8. Right of Participation.

The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision, as may be provided by law. (Emphasis added).

1. Title 2. GOVERNMENT STRUCTURE AND ADMINISTRATION, Chapter 3. PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS.

People must be afforded reasonable advance notice and opportunity to participate prior to final decisions being made. See §§ 2-3-101 and 2-3-103 MCA and §§ 7-1-4141 to 7-1-4143 MCA.

2. Title 2, Chapter 3, Part 1. Notice and Opportunity to Be Heard.

§ 2-3-103(1) MCA requires that the agenda for public meetings “must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed in that matter.”

3. Title 2, Chapter 3, Part 2. Open Meetings. Requires all meetings of public governmental bodies, boards, bureaus, commissions, agencies of government or organizations or agencies “supported in whole or part by public funds or expending public funds” are required to comply with Montana’s open meetings law. In addition, any committee or subcommittee of a public body or association described in § 2-3-203(2) MCA are also subject to Montana’s open meeting law requirements.

4. Pursuant to Montana’s Official Misconduct criminal law, § 45-7-401(1)(e) MCA, a public servant commits the criminal offense of official misconduct if the public servant knowingly conducts a meeting of a public agency in violation of § 2-3-203 MCA Meetings of public agencies and certain associations of public agencies to be open to public – exceptions.

While a public officer holding an elective office may be recalled by the qualified electors for “official misconduct” pursuant to the Montana Recall Act § 2-16-601 MCA et. seq., the Montana Supreme Court has indicated in *Foster v. Kovich* (1983) 207 MT 139, 673 P.2d 1239, that the only conduct that may constitute “official misconduct” is the conduct set forth in § 45-7-401(1) MCA as constituting “official misconduct” which is set forth as:

(a) purposely or negligently failing to perform any mandatory duty as required by law or by a court of competent jurisdiction:

(b) knowingly performing an act in an official capacity that the public servant knows is forbidden by law;

(c) with the purpose to obtain a personal advantage or an advantage for another performs an act in excess of the public servant’s lawful authority;

(d) solicits or knowingly accepts for the performance of any act a fee or reward that the public servant knows is not authorized by law; or

(e) knowingly conducts a meeting of a public agency in violation of 2-3-203 MCA.

Pursuant to the provisions of the Montana Recall Act, § 2-16-601 MCA et. seq., § 2-16-603 MCA the only grounds for public officer holding an elective office to be recalled by the qualified electors are:

- (a) physical or mental lack of fitness;
- (b) incompetence;
- (c) violation of oath of office;
- (d) official misconduct;
- (e) conviction of a felony offense enumerated in Title 45 MCA.

5. Note: § 45-7-104 MCA Gifts to public servants by persons subject to their jurisdiction.

(1) A public servant ... **exercising regulatory function, conducting inspections or investigations**, carrying on a civil or criminal litigation on behalf of government, or having custody of prisoners **may not** solicit, accept, or agree to accept any pecuniary benefit from a person known to be subject to the regulation, inspection, investigation or custody or against whom litigation is known to be pending or contemplated. (Emphasis added)

§ 45-2-101(56) MCA defines “pecuniary benefit” as “benefit in any form of money, property, commercial interests, or anything else the primary significance of which is economic gain.”

H. Mont. Const. art. II, Section 9. Right to know.

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. (Emphasis added).

1. *Nelson v. City of Billings*, 2018 MT 36 ¶13, 390 Mont. 290.

As a right expressly enumerated in the Montana Constitution, the right to know is a fundamental right subject to the highest degree of protection. (citations omitted) Like other constitutional rights, however, **the right to know is not absolute**. (citations omitted) (Emphasis added).

Later, after noting in ¶22 of its decision that the Framers of the 1972 Montana Constitution had a “manifest intent” that Article II, Section 9 would not affect preexisting privileges against public disclosure, the Court concluded in ¶30:

The Framers’ intent is manifest that the preexisting attorney-client and work-product privileges would carry forward inviolate as essential components of the preexisting legal system regardless of the broad, clear, and unambiguous language of Article II, Section 9.3 Therefore, we hold that documents protected by the attorney-client or attorney-work-product privileges are not subject to disclosure under Article II, Section 9.

In ¶25 the Court stated “[e]videntiary privileges-like the attorney-client and attorney-work-product privileges protect governmental agencies and employees like any other party to civil litigation ... [G]overnmental agencies and employees enjoy the same privilege as nongovernmental counterparts.

2. *SJL of Montana Associates Ltd Partnership v. City of Billings* (1993) 263 MT 142, 867 P.2d 1084.

A TV station desired to have a TV reporter attend a meeting involving some City of Billings staff with a private construction company. Meeting of city engineer, city public works director and representatives of a private construction company is not subject to Montana's open meeting laws. The law requires "agencies" to have public open meetings. "Agencies" does not include individual employees of the public agency. The city engineer and city public works director did not constitute a public agency.

3. *Billings Gazette v. City of Billings*, 2011 MT 293, 362 Mont. 522, 267 P.3d 11, following *Bozeman Daily Chronicle v. City of Bozeman Police Dept.* (1993) 260 Mont. 218, P.2d 435.

Public's right to know exceeds a government employee's right to privacy with respect to investigation of public employee for alleged misuse of public funds using a city credit card for personal purchases; therefore results of police investigation of employee's breach of her public trust was a proper matter for public scrutiny. City of Billings was not allowed to rely on defense that the matter was the subject of a criminal case.

4. *Great Falls Tribune Co. Inc. v. Sheriff* (1989) 238 MT 193, 775 P.2d 1267.

Disciplined law enforcement officers only had a minimal right of privacy that was easily outweighed by people's right to know with respect to release of names of disciplined law enforcement officers' actions during a chase and apprehension of a suspect.

5. *Billings Gazette v. City of Billings*, 2013 MT 334, 372 Mont. 409, 313 P.3d 129.

Five City of Billings public employees who were not in positions of public trust and who did not violate a duty requiring a high level of public trust did have an actual or subjective expectation of privacy regarding their identities for internal disciplinary action disciplined for viewing pornography on their work computers. Their expectation of privacy in the disciplinary action outweighed the limited merits of public disclosure.

6. *Lee v. City of Missoula Police Department*, 2008 MT 186, 343 MT 487, 187 P.3d 609.

Waiver of right to examine results of police employment background investigation is not a violation of Constitutional right to know if waiver is voluntary, intelligent and knowing and informed applicant in practical terms that he was waiving any such rights by agreeing to the terms of the release he signed.

7. The Constitutional right to know language explicitly states that the public has a constitutional right "**to observe the deliberations of all public bodies or agencies.**"
8. The open meetings law requires that all public body meetings, including committee and subcommittees of the public body "**shall be conducted openly**" and the provisions of open meetings law shall be liberally construed in favor of the people. See §§ 2-3-201 and 2-3-203 MCA. In addition, a 2015 rewrite by Montana State Legislature of the public records law is set forth in §§ 2-6-1001 2-6-1020 MCA.

I. Mont. Const. art. II, Section 10. Right of Privacy.

The right of privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

Individual privacy may be outweighed by public's right to know with respect to personnel files of government employee positions of public trust. *In re Petition of Missoula County v. Bitterroot Star*, 2015 MT 95, 378 Mont. 451, 345 P.3d 1035.

J. Mont. Const. art. II, Section 12. Right to Bear Arms.

The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

§ 45-8-351 MCA Restriction on local government regulation of firearms.

K. Mont. Const. art. II, Section 14. Adult Rights.

A person 18 years of age or older is an adult for all purposes, except that the legislature or the people by initiative may establish the legal age for purchasing, consuming, or possessing alcoholic beverages.

1. §§ 16-3-301, 16-3-314, and 45-5-524 MCA.

Unlawful possession of alcoholic beverages by persons under 21 years of age.

2. §§ 16-3-301 and 45-5-623 MCA.

Unlawful to sell or give alcoholic beverages to person under 21 years of age.

3. § 16-6-305 MCA Age limit for sale or provision of alcoholic beverages -- liability of provider.

Unlawful to sell to a person under 21 years of age.

4. § 16-11-305 MCA Sale or distribution of tobacco products, alternative nicotine products, or vapor products to persons under 18 years of age prohibited.

5. § 41-5-203 MCA Jurisdiction of Court.

District Court exclusive original jurisdiction does not apply to traffic or fish and game law violations prior to age 18.

(2) ... municipal and city courts have concurrent jurisdiction with youth court over all alcoholic beverage, tobacco products, and gambling violations alleged to have been committed by youth. (Emphasis added).

6. § 50-37-103 MCA.

(2) It is unlawful for an individual under the age of 18 to possess for sale, sell, or offer for sale within the state permissible fireworks enumerated in § 50-37-105.

7. §§ 23-5-158, 23-5-603 and 41-5-203 MCA.

Minors (under 18 years of age) participation in gambling unlawful.

8. § 45-8-344 MCA.

Use of Firearms by children under 14 years of age prohibited.

L. Mont. Const. art. II, Section 15. Rights of persons not adults.

The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.”

1. § 40-6-237 MCA Destruction of property by minor---liability of parents.

A municipal corporation, county, city, town, school district, or department of the state of Montana, a person, or a religious organization whether incorporated or

unincorporated is entitled to recover damages in a civil action in an amount not to exceed \$6,900 in a court of competent jurisdiction from the parents of a person under 18 years of age, living with the parents, who maliciously or willfully destroy property, real, personal, or mixed, belonging to the municipal corporation, county, city, town, school district, department of the state of Montana, person, or religious organization.

2. § 40-6-238 MCA Limitation on amount of recovery.

The recovery of damages under 40-6-237 is limited to the actual damages in an amount not to exceed \$6,900 in addition to taxable court costs and reasonable attorney fees to be set by the court not to exceed \$1,800. The right to recover attorney fees as provided by this Section is limited to a person bringing an action under 40-6-237.

3. § 41-5-1521 MCA. Restitution.

(1) In determining whether restitution, as authorized by 41-5-1304, 41-5-1512, or 41-5-1513, is appropriate in a particular case, the following factors may be considered in addition to any other evidence:

(a) age of youth;

(b) the ability of the youth to pay;

(c) the ability of the parents, guardian, or those that contributed to the youth's delinquency or need for intervention to pay;

(d) the amount of damage to the victim; and

(e) legal remedies of the victim. However, the ability of the victim or the victim's insurer to stand any loss may not be considered.

(2) Restitution paid by a youth is subject to subrogation as provided in 46-18-248.

M. Mont. Const. art. II, Section 17. Due process of law.

No person shall be deprived of life, liberty, or property without the due process of law.

N. Mont. Const. art. II, Section 24. Rights of the accused.

In all criminal prosecutions **the accused shall have the right to** appear and defend in person and by counsel; **to demand the nature and cause of the accusation; to meet the witnesses against him face to face;** to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes of which the defendant may obtain the same. (Emphasis added).

1. *City of Missoula v. Duane*, 2015 MT 232, 380 Mont. 290, 355 P.3d 729.

Constitutional right to confrontation of witness was not violated by the admission of SKYPE (internet based two-way video/audio conferencing and communication program) testimony. Municipal court allowed a witness residing in California to testify via SKYPE, the defendant's constitutional right to confrontation of witness was not violated because the technology allowed the court and jury to observe and hear testimony of the witness in real time. Factual circumstances involved an animal cruelty case involving living conditions for

dogs living in RV, where a key witness veterinarian had moved to California. There were three separate defendants and three separate trials.

In *Duane* ¶15 the Court provided the legal elements of confrontation generally include physical presence of the witness, witness testimony under oath, opportunity to cross examine the witness and being able to observe the demeanor of the witness by the trier of fact, jury/judge. The Court later concluded in ¶25 that:

The preferred method of introducing the testimony of a witness at trial is by way of the personal presence of the witness in the courtroom. However, where a moving party makes an adequate showing on the record that the personal presence of the witness is impossible or impracticable to secure due to considerations of distance or expense, a court may permit the testimony of the witness to be introduced via Skype or a substantially similar live 2-way video/audio conferencing program that satisfies the hallmarks of confrontation as herein set forth.

O. Mont. Const. art. II, Section 29. Eminent domain.

Private property shall not be taken **or damaged for public use without just compensation to the full extent of the loss** having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails. (Emphasis added).

1. *City Missoula v. Mountain Water Company and Carlyle Infrastructure Partners*, 2016 MT 183.

City of Missoula's eminent domain acquisition of water system serving the Missoula community.

[C]ondemnation proceedings occur in two phases, a necessity phase and a valuation phase. *Id.* ¶17

[T]he question of which use is more necessary is a question of fact that can only be answered by reference to many circumstances that change over time. Whether public or private use is more necessary depends upon factors like the owner's profit motives, public opinion, efficiency and quality of services, and administrative costs, none of which are static. *Id.* ¶47

[W]e hold that the District Court's factual finding that public ownership of the water system is more necessary than private ownership was not clearly erroneous. *Id.* ¶79

Our case law establishes that the term "[n]ecessary," in the context of eminent domain, does not mean absolute or indispensable, but reasonable, requisite and proper for the accomplishment of the intended objective." *Id.* ¶85

[T]he District Court found that municipal ownership was more necessary than private ownership. Our review of the record satisfies us that this finding was based upon substantial credible evidence. *Id.* ¶95

Furthermore, our exhaustive review of the record confirms that the court's detailed factual findings summarized above are supported by substantial credible evidence and are not the product of bias in favor of public ownership. We therefore are satisfied that the District Court's conclusion that the City carried its

burden to prove by a preponderance of the evidence that “its contemplated use of the Water System as a municipally owned water system is more necessary than the current use as a privately owned for-profit enterprise” is not clearly erroneous. *Id.* ¶102

P. Mont. Const. art. III, Section 3. Oath of Office.

Members of the legislature and all executive, ministerial and judicial officers, shall take and subscribe the following oath or affirmation, before they enter upon the duties of their offices: “I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States, and the constitution of Montana and that I will discharge the duties of my office with fidelity (so help me God)” No other oath, declaration, or test shall be required as a qualification for any office or public trust.

1. § 7-1-4137 MCA Oath of Office.

Every elected and appointed municipal officer shall take the oath of office prescribed in Mont. Const. art. III, Section 3.

2. § 7-1-4137(1) MCA.

Requires the oath be taken before a municipal officer may perform any duties. Elected municipal officials file their oath with county election administrator. Appointed municipal officials file their oath with the city clerk.

3. *State v. Vickers*, 1998 MT 201, 290 MT 356, 964 P.2d 756.

Substitute justice of the peace took the judicial oath of office, but not in the form required by Mont. Const. art. II, Section 3. Montana Supreme Court held that substitute justice of the peace was not duly authorized, thus search warrants issued by substitute justice of the peace were void ab initio and invalid.

Q. Mont. Const. art. IV. Section 2. Qualified elector.

Any citizen of the united states 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector unless he is serving a sentence for a felony in a penal institution or is of unsound mind, as determined by a court. (Emphasis added).

1. § 13-1-111 MCA Qualifications of voter.

(1) A person may not vote at elections unless the person is:

- (a) registered as required by law;
- (b) 18 years of age or older;
- (c) a resident of the state of Montana and of the county in which the person offers to vote for at least 30 days, except as provided in 13-2-514; and
- (d) a citizen of the United States.

(2) A person convicted of a felony does not have the right to vote while the person is serving a sentence in a penal institution.

(3) A person adjudicated to be of unsound mind does not have the right to vote unless the person has been restored to capacity as provided by law.

2. § 7-1-4121 (3) MCA.

"Elector" means a resident of the municipality qualified and registered to vote under state law.

Note “citizen” is defined in § 1-1-402 MCA.

3. § 7-7-4103 MCA General qualifications to vote on questions of municipal indebtedness.

Registered electors of the city, town, or other municipal corporation may vote upon any proposal to create or increase any indebtedness of the city, town, or other municipal corporation required by law to be submitted to a vote of the electors.

R. Mont. Const. art. IV. Section 3. Elections.

The legislature shall provide by law the requirements for residence, registration, absentee voting, and ADMINISTRATION OF ELECTIONS. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process.” (Emphasis added).

1. Montana state election laws are primarily set forth in Title 13 MCA; but some statutory qualifications for a specific municipal public office may be located elsewhere in Montana state law. For examples see §§ 7-4-4104, 7-4-4301, and 7-4-4401 MCA.

2. § 13-1-104 MCA.

Montana municipal elections are held in odd numbered years. Montana county elections are held in even numbered years.

3. § 13-1-107(2) MCA and § 13-1-405(2) MCA.

Municipal primary elections are required to be held on the Tuesday following the second Monday in September preceding a general election held in odd numbered year.

4. §13-1-107(3) MCA.

The municipality must pay the cost of a municipal election. A municipal governing body could call a municipal special election to be held in conjunction with the national, state and county elections occurring in even numbered years and the municipality still must pay the county for its municipal election even if held in conjunction with the national, state and county election.

5. § 13-1-405(2) MCA.

If a municipality desires to have a special election and/or a ballot issue at a municipal election, the municipal governing body must not hold the municipal ballot issue election any sooner than 85 days after the date of the order or resolution calling for the election.

6. Title 13, Chapter 14, Part 1. Nonpartisan elections.

If a municipality has nonpartisan elected officers, whether or not a primary election is required with respect to nonpartisan elections is determined pursuant to § 13-14-115 MCA. A municipal governing body may call for a nonpartisan primary election, even if a primary election might not be necessary pursuant to the provisions of § 13-14-115(3) MCA.

7. With respect to municipal court judges, the commission on courts of limited jurisdiction must determine if the municipal court judge meets the statutory qualifications to be a municipal court judge, such as education, years admitted to the practice of law in Montana, residency in the county, etc. The commission on courts of limited jurisdiction must issue a certificate of compliance prior to the municipal court judge assuming office. The certificate must be conditioned upon continued compliance with the minimum education requirements.
8. § 1-1-215 MCA Residence—rules for determining and § 13-1-112 MCA Rules for determining residence.

S. Mont. Const. art. IV, Section 4. Eligibility for public office.

Any qualified elector is eligible to any public office except as otherwise provided in this constitution. The legislature may provide additional qualifications but no person convicted of a felony shall be eligible to hold office until his final discharge from state supervision.

T. Mont. Const. art. VIII, Section 1. Tax purposes.

Taxes shall be levied by general laws **for public purposes**. (Emphasis added).

1. § 15-10-202 MCA Certification of taxable values.

Generally, the Montana Department of Revenue by the first Monday in August shall certify to each taxing authority the total taxable value within the jurisdiction of the taxing authority.

2. Title 7. LOCAL GOVERNMENT, Chapter 6, FINANCIAL ADMINISTRATION AND TAXATION, Part 40. Local Government Budget Act.

3. § 7-6-4036 MCA Fixing tax levy.

The governing body shall fix the tax levy for each taxing jurisdiction within the county or municipality:

(a) **by the later of the first Thursday after the first Tuesday in September or within 30 calendar days after receiving certified taxable values;**

(b) after the approval and adoption of the final budget. (Emphasis added).

4. § 7-6-4003 MCA Budget and levies supplied to department of administration.

Montana local governments shall submit a complete copy of their final budget together with a statement of tax levies to the Montana Department of Administration by the later of October 1 or 60 days after receipt of taxable value from the Montana Department of Revenue.

5. § 7-6-4030 MCA.

A Montana local government budget is to be adopted after public hearing by resolution that is effective July 1 even if adopted after July 1 of the fiscal year for which the final budget is adopted.

6. § 7-6-4031 MCA Budget amendment procedures.

Generally requires a public hearing for an overall increase in appropriation authority.

7. § 7-6-4032 MCA Emergency expenditures.

Emergency budget appropriations must be adopted by two-thirds of the members of a governing body who are present at the meeting.

8. § 7-6-4005 MCA Expenditures limited to appropriations.

Provides that Montana local government officials may not make a disbursement or an expenditure or incur an obligation in excess of the total appropriations for a fund.

A local government official who violates this state law is liable for the amount of the excess disbursement, expenditure, or obligation **personally**. (Emphasis added).

9. § 15-10-420 MCA Procedure for establishing levy.

[A] governmental entity that is authorized to impose mills **may impose a mill levy sufficient to generate the amount of property taxes actually assessed in the prior year plus one-half of the average rate of inflation for the prior 3 years.** The maximum number of mills that a governmental entity may impose is established by calculating the number of mills required to generate the amount of property tax actually assessed in the governmental unit in the prior year based on the current taxable value, less the current year's newly taxable value, plus one-half of the average rate of inflation for the prior 3 years. (Emphasis added)

10. § 15-10-425 MCA Mill levy election.

(1) A county, consolidated government, incorporated **city**, incorporated town, school district, or other taxing entity **may impose a new mill levy, increase a mill levy that is required to be submitted to the electors, or exceed the mill levy limit provided for in 15-10-420 by conducting an election.** (Emphasis added).

Also see, § 15-10-420(2) MCA including voter approved mill levies in the mill levy to be assessed calculation authorization.

U. Mont. Const. art. VIII, Section 2. Tax power inalienable.

The power to tax shall never be surrendered, suspended, or contracted away.

V. Mont. Const. art. VIII, Section 11. Use of loan proceeds.

All money borrowed on behalf of the state or any county, city, town or other local governmental entity shall be used only for purposes specified in the authorizing law. (Emphasis added).

1. § 7-1-4124 MCA Powers.

Pursuant to subsection (6) a municipality may borrow money.

2. Title 7, Chapter 7, Part 42. Municipal General Obligation Bonds.

W. § 7-7-4235 MCA Percentage of electors required to authorize issuing of bonds.

Elector municipal bond issuance votes are determined by a majority of the votes cast on the specific ballot issue.

X. Mont. Const. art. VIII, Section 12. Strict accountability.

The legislature shall by law insure strict accountability of all revenue received and money spent by the counties, cities, towns, and all other local governmental entities." (Emphasis added).

Y. Mont. Const. art. VIII, Section 17. Prohibition on real property transfer taxes.

The state or **any local government unit may not impose any tax, including a sales tax on the sale or transfer of real property.** (Emphasis added).

1. Title 2, Chapter 7, Part 5. Audits of Political Subdivisions.

Sets forth the **State of Montana Single Audit Act.**

2. § 2-7-503 MCA Financial reports and audits of local government entities.

A financial report shall be made every year pursuant to § 2-7-503 MCA

Z. Mont. Const. art. XI, Section 4. General powers.

(2) **The powers of incorporated cities and towns and counties shall be liberally construed.** (Emphasis added).

1. § 7-1-106 MCA Construction of self-government powers.

Powers and authority of local government units with self-government powers shall be liberally construed.

2. *Tipco Corp. Inc. v. City of Billings* (1982) 197 Mont. 339, 642 P.2d 1074.
Stevens v. City of Missoula (1983) 205 Mont. 271, 280; 667 P.2d 440, 443.
Town of Ennis v. Stewart (1991) 2447 Mont. 355, 807 P.2d 179.
Associated Students University of Montana v. City of Missoula (1993) 862 P.2d 380, 382.

Montana Supreme Court has held that this Montana Constitutional provision constitutes a Montana Constitutional mandate.

3. § 7-1-4124 MCA Powers.

A municipality with general powers has the power, subject to the provisions of state law to... (includes subsections 1-24)

4. § 61-12-101 MCA Powers of local authorities to regulate traffic.

(1) The provisions of Chapters 8 and 9 (Title 61 traffic regulations/vehicle equipment) do not prevent local authorities with respect to sidewalks, streets, and highways under their jurisdiction and within the reasonable exercise of the police power from:... (includes subsections a-p)

AA. Mont. Const. art. XI, Section 6. Self-government powers.

A local government unit adopting a self-government charter **may exercise any power not prohibited by this constitution, law, or charter.** This grant of self-government powers may be extended to other local government units through optional forms of government provided for in Section 3.” (Emphasis added).

1. § 7-1-101 MCA Self-government powers.

A self-government power local government may exercise any power not prohibited by constitution, law or charter.

Self-government powers include but are not limited to the powers granted to general power governments.

2. § 7-1-102 MCA Authorization for self-government services and functions.

A local government with self-government powers **may provide any services or perform any functions not expressly prohibited by the Montana constitution, state law, or its charter.** (Emphasis added).

BB. Mont. Const. art. XIII, Section 4. Code of ethics.

The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature **and all state and local officers and employees.** (Emphasis added).

See also Title 2, Chapter 2. STANDARDS OF CONDUCT, Part 1. Code of Ethics; Part 2. Proscribed Acts Related to Contracts and Claims; and Part 3. Nepotism.

CC. Mont. Const. art. XIII, Section 5. Exemption laws.

The legislature shall enact liberal homestead and exemption laws.

1. § 2-9-318 MCA

No levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim or judgment against any government entity.

2. Title 70. PROPERTY, Chapter 32. HOMESTEADS.

Homestead exemption not to exceed \$250,000 in value.

II. PUBLIC CONTRACT PROVISIONS OF MONTANA STATE LAW THAT MAY IMPACT MUNICIPAL GOVERNMENT OPERATIONS

A. § 7-5-4302 MCA Competitive advertised bidding required for certain purchase and construction contracts.

Applies to purchase of any automobile, truck, other vehicle, road machinery, other machinery, apparatus, appliances, equipment, or materials or supplies for construction, repair or maintenance in excess of \$80,000 must be let to the lowest responsible bidder after advertisement for bids.

1. Primary purposes of public government competitive bidding are to obtain competitive bidding pricing for benefit of both the public government and its respective taxpayers as well as to guard against favoritism, improvidence, extravagance, fraud and corruption.

Competitive bidding is not for the benefit of bidders. See *Ford v. Great Falls* (1921) 46 MT 292, 127 P 1004. The law is designed to prevent favoritism and to secure to the public the best possible return for the expenditure of the funds which the property owners are required to furnish through the payment of taxes and assessments. Also see *Debcon Inc. v. City of Glasgow*, 2001 MT 124, 305 MT 391, 28 P.3d 478.

In 1941, in a fairly lengthy discussion, the Court again emphasized that the public works statute requiring that contracts be let to the lowest responsible bidder was enacted for the protection of public interests and must be complied with by municipal authorities for the benefit of the public. Also, see *Handbook of Construction Law & Claims* by Irv Richter and Roy S. Mitchell, pp. 6 and 7. *McQuillin, Municipal Corporations*, 3rd ed. rev. vol. 10 §§ 29.34, and 29.81.

2. Generally, primary criteria for reviewing competitive bids is to determine both responsiveness to the bid specifications as well as ensuring the bidder must be a responsible bidder in addition to lowest responsible bidder.

3. Failure to be a responsive bidder constitutes grounds to reject the bid. Examples of nonresponsive bids include, but are not limited to factual circumstances such as:

- (1) failure to respond to each material element of the invitation to bid;
- (2) failure to return any section of forms and/or pages that are to be completed as part of the response to the invitation to bid;
- (3) failure to include a required bid bond;
- (4) bid price must be firm and understandable, not ambiguous;
- (5) failure to acknowledge amendments that the government project owner issued with respect to the original invitation to bid;
- (6) failure to identify/list subcontractors when the invitation to bid specifies that subcontractors are to be identified;

- (7) failure of a bidder to sign a bid;
- (8) irregularities in prices might cause a bid to be disqualified or declared nonresponsive;
- (9) incomplete bids that do not fully respond to the invitation to bid instructions; and
- (10) bidder attempts to impose a time for acceptance of the bid that is shorter than the time period specified in the invitation for bids.

Handbook of Construction Law & Claims by Irv Richter and Roy S. Mitchell, pp. 76-81

- 4. The competitive bid process is for the benefit of the government and the government as project owner does have the ability to waive minor irregularities in competitive bids as reasonably determined by the government agency. For example:

- (1) failure to submit bid in sealed envelope;
- (2) failure to print bidder's name on each page of bid submittal;
- (3) failure to initial changes in bid submittals;
- (4) failure to acknowledge an invitation to bid amendment that does not affect price; or failure to acknowledge receipt of the bid amendment;
- (5) failure to sign bid;
- (6) failure to return the required number of signed copies of the bid submittal;
- (7) signature irregularities;
- (8) failure to submit some information, such as the number of employees that are employed by the bidder.

Handbook of Construction Law & Claims by Irv Richter and Roy S. Mitchell, pp. 76-77.

- 5. *Handbook of Construction Law & Claims* sets forth the test of responsibility:

RESPONSIBILITY. The test of responsibility is whether the contractor can and will perform as promised in the bid, that is whether he has the experience, financial resources, facilities, equipment, manpower and material necessary to do the job. The term 'lowest responsible bidder' is held to imply skill, judgment and integrity necessary to the faithful performance of the contract as well as sufficient financial resources and ability. (citations omitted).

- 6. *Koich v. Cvar* (1941) 111 Mont. 463, 110 P.2d 964.

Lowest responsible bidder does not necessarily mean lowest pecuniary bidder. In *Koich*, a City of East Helena fire equipment purchase case, the Montana Supreme Court stated:

It is settled law that the phrase 'lowest responsible bidder' does not merely mean the lowest bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is most likely in regard to skill, ability, integrity to do faithful conscientious work and promptly fulfill the contract according to its letter and spirit.

- 7. Montana court cases in addition to *Debcon*, supra, have cited *Koich* for the legal principle that lowest responsible bidder does not mean lowest pecuniary ability to perform the contract. See *MK Weeden Construction Inc. v. Montana Department of Transportation*, 2013 Dist. LEXIS 126286, ¶14.

Montana law requires that an award of a public contract for construction repair or public works must be made to the lowest responsible bidder. Montana Code Annotated 18-1-102 (1) (a). 'Lowest responsible bidder' does not merely mean

the lowest bidder whose pecuniary ability to perform the contract is deemed the lowest, but the bidder who is most likely in regard to skill, ability and integrity to do faithful, conscientious work and promptly fulfill the contract according to the letter and spirit.

8. Generally, governing body decision to award contract is a discretionary decision not subject to judicial review under normal circumstances. See *Baker v. State* (1985) 218 Mont. 235, 707 P.2d 20.

In addition, we have held that the discretion of the agency to award public work contracts to the lowest bidder is not subject to judicial review under normal circumstances. *Sletten Constuction v. City of Great Falls* (1973), 163 Mont. 307, 516 P.2d 1149; *Koich v. Cvar* (1941) 111 Mont. 463, 110 P.2d 964 In the absence of any showing of bad faith, fraud, or corruption of the Department, the exercise of discretion will not be disturbed. See *Koich supra*.

Also see, *County of Chouteau v. Fort Benton* (1979) 181 Mont. 123, 592 P.2d 504.

In other cases where the exercise of discretionary power by a city council has been questioned this court has said: The action is usually conclusive ‘unless palpably unjust . . . except in cases of fraud or manifest mistake (citation omitted). The discretion will not be controlled ‘in the absence of a clearly arbitrary abuse (citation omitted). A determination of the council will not be set side unless ‘arbitrary, oppressive or fraudulent.’ *Koich v. Cvar* (1941) 111 Mont. 463, 110 P.2d 964.

B. § 7-5-4303 MCA Exemptions from bidding or advertising requirements.

1. Exceptions to § 7-5-4302 MCA exist for emergency caused by fire, flood, explosion, storm, earthquake, riot, insurrection or other similar emergency in the judgment of $\frac{3}{4}$ of the members of the city council present at the meeting.
2. Sheltered workshop supervised work program employees. See §§ 53-7-201, 53-7-202(4) (defining supervised work program), 53-7-202 (purchase of services) MCA. In addition, § 18-5-103 MCA Procurement requirements. Authorizes purchase of services from a certified sheltered workshop without requirement of competitive bidding. Certified sheltered workshop is defined in § 18-5-101(1) MCA.
3. § 18-2-403 (5) MCA. Nonprofits employing individuals with vocational rehabilitation performing public works contract for non-construction services may be paid less than prevailing wage; but at least minimum wage or above.
4. Title 18, Chapter 4, Part 4. Cooperative Purchasing. §§ Sections 18-4-401 through 18-4-407 MCA.
5. Title 18, Chapter 8, Part 2. Agricultural, Engineering and Land Surveying Services. §§ 18-8-201 through 18-8-212 MCA.
6. § 7-5-4305 MCA Prohibition on division of contracts to circumvent bidding requirements.

With respect to competitive bidding requirements, for any public work or construction project a city shall not circumvent the competitive bidding requirements by div such public work or construction project into several contracts or separate work orders or by any similar device.

III. TITLE 18 MCA “PUBLIC CONTRACTS”, CHAPTER 2 “CONSTRUCTION CONTRACTS”

- A. Title 18. PUBLIC CONTRACTS, Chapter 2. CONSTRUCTION CONTRACTS, Part 2, Performance, Labor and Material Bonds.

Reminder: § 2-9-318 MCA provides that no levy of attachment or writ of execution shall accrue against any property of a governmental entity for the security or collection of any claim or judgment against any governmental entity. Therefore, Montana state law provides for both performance and payment bonds for public construction contracts. The payment bond is intended to provide a source of money for payment of contractors and subcontractors for labor and materials provided to the construction project.

Note: Generally, statutory security requirements for governments requires a sufficient bond or other security in an amount at least equal to the contract sum to guarantee the faithful performance of the contract and the payment of all laborers, suppliers, material suppliers, mechanics and subcontractors. See § 18-2-201 MCA.

A government may elect to waive the performance and payment bond requirements for building construction projects that cost less than \$50,000.00.

Pursuant to § 18-2-202 MCA if a government entity waives or fails to take the security required or authorized by § 18-2-201 MCA the government entity “is liable to the persons mentioned in 18-2-201 MCA to the full extent and for the full amount of all the contracted debts by any subcontractor as well as the contractor.”

- B. Title 18. PUBLIC CONTRACTS, Chapter 2. CONSTRUCTION CONTRACTS, Part 3 Contract Requirements and Restrictions.

1. § 18-2-302 MCA Bid security-waiver-authority to submit.

Each bid must be accompanied by bid security in the amount of 10% of the bid, but requirement may be waived on building and construction projects that cost less than \$25,000.

2. § 18-2-312 MCA Excusable delays.

A public contractor shall not be considered to be working beyond contract time if the delay is caused by an accident or casualty produced by physical cause which is not preventable by human foresight, i.e. any of the misadventures termed an ‘act of God’...

3. § 18-2-314 MCA Cost-plus system invalid.

Any contracts made by, on behalf of, or for the state of Montana which shall directly or indirectly recognize the cost-plus system or principle shall be void and of no effect and this section shall stand as a notice of the invalidity of any such contract.

4. § 18-2-316 MCA Limit on retainage for public contracts.

The maximum retainage applied to municipal contracts administered by a municipality may not exceed 5%.

5. § 18-2-317 MCA.

State agency performance contracts are exempt if entered into pursuant to Title 90, Chapter 4, Part 1 MCA.

Also, see definition of “construction” in § 18-2-101(2)(b) MCA.

C. Title 18. PUBLIC CONTRACTS, Chapter 2. CONSTRUCTION CONTRACTS, Part 4, Special Conditions - Standard Prevailing Rate of Wages. Known as Montana’s Little Davis-Bacon Act.

1. § 18-2-101(3) MCA defines “costs” as those expenses defined in § 17-5-801 MCA.

2. § 17-5-801(5) MCA Definitions.

(5) "Costs" includes those expenses related to acquiring land; planning, design, and construction of capital projects and of buildings as defined in 18-2-101; or any other administrative expenses of the department, including legal fees, incurred in the performance of its duties under Title 18, chapter 2.

3. § 18-2-401(3) MCA.

"Construction services" means work performed by an individual in building construction, heavy construction, highway construction, and remodeling work.

4. § 18-2-401(9) MCA.

"Nonconstruction services" means work performed by an individual, not including management, office, or clerical work

5. § 18-2-401(11) MCA The phrase includes contracts for construction services for which the total cost of the contract is in excess of \$25,000.

"Public works contract" means a **contract for construction services** let by the state, county, municipality, school district, or political subdivision or for nonconstruction services let by the state, county, municipality, or political subdivision **in which the total cost of the contract is in excess of \$25,000.** (Emphasis added).

a. *Hunter v. City of Bozeman* (1985), 216 MT 251, 700 P.2d 184.

Pollard Finance, Inc. arranged to have a building built on land owned by the City of Bozeman and leased the building to the City of Bozeman. In a lawsuit by the Montana Commissioner of Labor for unpaid wages mandated by prevailing wage law, the Montana Supreme Court held that the lease agreement constituted a public works contract subject to Montana’s prevailing wage laws. The trial court had determined that the lease was in fact a sale of the building to the City of Bozeman and was in effect a public works project. The Montana Supreme Court found that penalties against the City of Bozeman were properly imposed for the city’s failure to include a prevailing wage rate provision in the public works contract (the purported lease).

b. Volunteer work: What about municipal local governments utilization of volunteer labor, such as for construction of sports recreation play fields or installation of playground and playground equipment at an all abilities public park in the community. Key language in definition of “public works contract” should focus on “the total cost of the contract is in excess of \$25,000.” Arguably, in order for there to be a cost to municipal local government there must be actual expenses that are paid as costs by the local government. Volunteer labor is not paid labor. There generally are no labor costs or expenses associated with volunteer labor.

- c. Volunteer defined and regulated with respect to city employees: Code of Federal Regulations (CFR) definition of “volunteer” set forth in 29 CFR 553.101:

VOLUNTEER’ DEFINED. (a) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. Individuals performing hours of service for such a public agency will be considered volunteers for the time spent and not subject to Sections 6, 7 and 11 of the FLSA when such hours of service are performed in accord with Sections 3 (e) (4) (a) and (B) of the FLSA and the guidelines in this subpart. (b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation of abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to ‘volunteer’ their services. (c) **individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.** (d) **an individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.** (Emphasis added).

6. § 18-2-401(13) MCA defines “standard prevailing rate of wages.”
7. § 18-2-403 MCA Preference of Montana labor in public works – wages - tax-exempt project - federal exception.

(9) Failure to include the provisions required by § 18-2-422 in a public works contract relieves the contractor from the contractor’s obligation to pay the standard prevailing wage **and places the obligation on the public contracting agency.** (Emphasis added).

Note 18-2-422 MCA REQUIRES THAT BOTH THE BID SPECIFICATIONS FOR THE CONTRACT AS WELL AS THE CONTRACT ITSELF MUST CONTAIN THE STANDARD PREVAILING WAGES AND PAYROLL NOTIFICATION.” (Emphasis added).

8. § 18-2-404 MCA Approval of public works contract - bond.

Requires the legal adviser for the municipal corporation must approve all public works contracts in writing. Further, it requires that at least \$1,000 of the contract price must be withheld at all times until the termination of the public works contract.

Sample checklist for municipal attorney review and approval of public construction contracts

- Is there an insurance certificate issued to the contractor providing the minimum amounts of insurance coverages required by the contract?
- If the contract requires that the public municipality be named as an additional insured, is the municipality in fact identified as being an additional insured on the insurance certificate?
- What is the actual monetary amount of the construction contract being awarded?

- Is there a performance bond issued to the contractor in the monetary amount of the contract?
- Is there a payment bond issued to the contractor in the monetary amount of the contract?
- If the contract monetary amount is in excess of \$25,000 were the applicable standard prevailing wages contained in the bid specifications as required by § 18-2-422 MCA?
- If the contract monetary amount is in excess of \$25,000, are the applicable standard prevailing wages contained in the contract documents that are being reviewed for approval?
- Is the statutorily required nondiscrimination provision required in all public contracts pursuant to § 49-3-207 MCA with respect to hiring as well as performance of the public contract included?
- Is the contract signed by the contractor at each location that the contractor is required to sign the contract?

9. § 18-2-406 MCA Posting wage scale and fringe benefits.
10. § 18-2-407 MCA Forfeiture for failure to pay standard prevailing rate of wages.
11. § 18-2-409 MCA Montana residents to be employed on state construction contracts.
12. § 18-2-413 MCA Standard prevailing rate of wages for building construction services.
13. § 18-2-414 MCA Standard prevailing rate of wages for heavy construction services and for highway construction services-definition.
14. § 18-2-415 MCA Standard prevailing rate of wages for nonconstruction services-survey.
 - a. Non-profit organizations employing individuals whose earning capacity is impaired by a mental, emotional or physical disability. § 18-2-403(5) MCA:

An employer who, as a nonprofit organization providing individuals with vocational rehabilitation, performs a public works contract for nonconstruction services and who employs an individual whose earning capacity is impaired by a mental, emotional, or physical disability may pay the individual wages that are less than the standard prevailing wage if the employer complies with the provisions of Section 214 (c) of the Fair Labor Standards Act of 1938, 29 U.S.C. 214 and 29 CFR, Part 525, and the wages paid are equal to or above the minimum wage required in 39-3-409.
 - b. Sheltered workshop supervised work programs. See §§ 53-7-201(2) and 53-7-202(4) MCA. Also see §§ 18-5-101 to 18-5-103 MCA for potential products and services available from certified sheltered workshops or activity centers.
15. § 18-2-422 MCA Bid specification and public works contract to contain standard prevailing wage rate and payroll record notification. In part this section requires:

All public works contracts and the bid specifications for those contracts must contain: (1) a provision stating for each classification the standard prevailing wage rate, including fringe benefits that the contractors and employers shall pay during construction of the project; (2) a provision requiring each contractor and employer to maintain payroll records in a manner readily capable of being certified for submission under

18-2-423, for not less than 3 years after the contractor's or employer's completion of work on the project; and (3) a provision requiring each contractor to post a statement of all wages and fringe benefits in compliance with 18-2-423.

16. § 18-2-423 MCA Submission of payroll records.

D. Title 18. PUBLIC CONTRACTS, Chapter 2. CONSTRUCTION CONTRACTS, Part 5
Alternative project delivery contracts.

1. § 18-2-501 MCA. 2017 temporary state law establishing temporary definitions until December 31, 2024, then January 1, 2015 replacement definitions commence.

2. § 18-2-502 MCA Alternative project delivery contract -authority-criteria.

3. § 18-2-503 MCA Alternative project delivery contract-award criteria.

E. Title 49. HUMAN RIGHTS, Chapter 3. GOVERNMENTAL CODE OF FAIR PRACTICES.

49-3-207. Nondiscrimination provision in all public contracts. **Every state or local contract, or subcontract for construction of public buildings or for other public work or for goods or services must contain a provision that all hiring must be on the basis of merit and qualifications and a provision that there may not be discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin** by the persons performing the contract. (Emphasis added).

IV. ADOPTION OF MAJORITY RULE “NATURE OF THE CRIME” APPROACH TO COUNTY FINANCIAL RESPONSIBILITY FOR INCARCERATION OF PRISONERS CHARGED WITH VIOLATIONS OF MONTANA STATE LAWS

A. *Montana Deaconess Medical Center v. Johnson, City of Great Falls, and Cascade County* (1988) 232 MT 474, 758 P.2d 756.

Adopts majority rule “Nature of Crime” legal principal for paying of financial costs of incarcerated persons charged with a violation of state laws. Montana county local governments are extensions of Montana state government operating at the local level. City property owners pay county property taxes for operation of both the county detention center/jail; as well as for the county sheriff department. County property taxes collected from urban city properties generate a significant amount of the county property tax revenue that is utilized for operation of both detention centers and sheriff departments.

B. § 7-32-2224(3)(c) MCA Payment of medical costs by entities other than inmate.

Adopts majority rule “Nature of Crime” legal principal for payment of prisoner medical bills charged with violations of Montana state laws.

C. § 7-32-2242(2)(b) MCA Use of detention center - payment of costs.

Adopts majority rule “Nature of Crime” legal principal for payment of incarceration of prisoners charged with violations of Montana state laws.

D. Fourth Judicial District Court, Cause No. 45858, *Missoula County v. City of Missoula*.

Parties recognized Montana Attorney General holding 3/25/1977 that county may not charge city for incarceration of prisoners charged with violations of Montana state law. However, dispute as to whether county had to accept city prisoners for violations of city ordinances; but charge per day for their incarceration as well as what constituted a “day” for jail prisoner billing purposes. County was charging for two days for prisoners arrested the evening before and arraigned the

next morning. November 15, 1977, Order by District Court Judge E. Garner Brownlee held that county could charge for city prisoners charged with violating a city ordinance and held that a “day” was a twenty-four hour time period; so county could not charge city for two days of prisoner incarceration for prisoners arrested in the evening and arraigned the next morning.

E. Pursuant to 37 A.G. Op. 10 (3/25/1977) Montana Attorney General Mike Greely stated:

In the course of enforcing State laws, local police departments are authorized to use county jails and **the cost must be paid by the county.** (Emphasis added).

Attorney General Greely then held:

2. A county may charge a city or town for maintaining prisoners committed to county jail at the request of a city or town police department in the course of enforcing city or town ordinances.

3. A county **may not charge a city or town for maintaining prisoners committed to county jail at the request of a city or town police department in the course of enforcing state laws.** (Emphasis added).

V. CITY COUNCIL VOTES REQUIRING EITHER AN EXTRAORDINARY MAJORITY VOTE OF APPROVAL OR A MAJORITY OF THE TOTAL NUMBER OF CITY COUNCIL MEMBERS IN ORDER FOR A PROPOSED ACTION TO BE ADOPTED

A. § 3-6-101 MCA Establishment of court.

(2) A city may have a municipal court **only if the governing body of the city elects by a two-thirds majority vote to adopt the provisions of this chapter by ordinance.** (Emphasis added).

B. § 7-2-4902 MCA Disincorporation by election.

An election to disincorporate a municipality if 15% of the registered voters petition for any election or “if the city governing body by a two-thirds vote of all its members resolves to disincorporate”

C. § 7-4-4105 MCA Authority to abolish appointive municipal offices.

The city or town may abolish, by a majority vote of the council, any office, except that of city judge, the appointment to which is made by the mayor with the advice and consent of the council and may discharge any officer so appointed.

D. § 7-4-4112 MCA Filling of vacancy.

(1) When a vacancy occurs in any elective office, this position is considered open and subject to nomination and election at the next general municipal election in the same manner as the selection of any other person holding the same office, except the term of office is limited to the unexpired term of the person who originally created the vacancy. **Pending an election and qualification, the council shall by a majority vote of the members, appoint a person within 30 days of the vacancy to hold the office until a successor is elected and qualified.** (Emphasis added).

Note: If the vacancy is in the governing body itself or any other municipal elective office, the majority vote requirement to fill any elective office vacancy becomes a majority of those constituting the actual membership of the governing body at the time a vacancy in the elective office is being filled. *State ex. rel. Wilson v. Willis* (1913) 47 MT 548, 133 P 962.

E. § 7-4-4113 MCA Removal of appointed officer.

The council upon written charges to be entered upon their journal, after notice to the party, and after trial by the council, may remove any nonelected officer **by vote of two-thirds of all the members-elect.** (Emphasis added).

F. § 7-5-104 MCA Emergency ordinance.

Requires a two thirds vote of the whole governing body for passage. (Emphasis added).

G. § 7-5-4103 MCA Council rules and discipline.

The council may determine the rules of its proceedings, punish its members for improper conduct, and expel any member for the same **by a two-thirds vote of the members elected.** (Emphasis added)

H. § 7-5-4121 MCA Conduct of council business.

(2) ... A majority of the whole number of the members elected is requisite to appoint or elect an officer, and such vote must be recorded.

Note: § 7-3-4121 (2) MCA does not apply to an election by a city council to fill a vacancy in its own body, caused by resignation or death. The provisions governing such election are found in § 7-4-4112 MCA. *State ex. rel. Wilson v. Willis* (1913) 47 MT 548, 133 P 962.

I. § 7-5-4204 MCA Details relating to emergency measures.

In the case of emergency measures, the emergency must be expressed in the preamble or in the body of the measure and the measure **must receive a two-thirds vote of all the members elected.** In emergency ordinances, the resolutions shall include only such measures as are immediately necessary for the preservation of peace, health, and safety and shall not include:

- (1) a franchise or license to a corporation or individual;
 - (2) any provisions for the sale of real estate;
 - (3) any lease or letting of any property for a period exceeding 1 year; or
 - (4) the purchase or sale of personal property exceeding \$5,000 in value.
- (Emphasis added).

J. § 7-5-4206 MCA Procedure to veto ordinance or resolution.

(1) ... No ordinance or resolution so vetoed by the mayor must go into effect **unless the same be afterwards passed by a two-thirds vote of the whole number of members of the council.** (Emphasis added).

Also see § 7-3-214 MCA.

K. § 7-5-4303 MCA Exemptions from bidding or advertising requirements for certain contracts.

(1) The provisions of 7-5-4302 as to advertisement for bids shall not apply upon the **happening of any emergency caused by fire, flood, explosion, storm, earthquake, riot, insurrection, or other similar emergency, but in such case the council may proceed in any manner which, in the judgment of three-fourths of the members of the council present at the meeting, duly recorded in the minutes of the proceedings of the council by aye and nay vote, will best meet the emergency and serve the public interest.** Such emergency shall be declared and recorded at length in the minutes of the proceedings of the council at the time of the vote thereon is taken and recorded.” (Emphasis added).

L. Title 7, Chapter 6, Part 16. Impact Fees to Fund Capital Improvements.

§ 7-6-1601(7) MCA Definitions.

“Public facilities” means:

...

(f) other facilities for which documentation is prepared as provided in 7-6-1602 that have been approved as part of an impact fee ordinance or resolution by:

(i) a two-thirds majority of the governing body of an incorporated city, town, or consolidated local government; or

(ii) a unanimous vote of the board of county commissioners of a county government.

M. § 7-6-4032 MCA Emergency expenditures.

(1) Emergency budget appropriations must be adopted by two-thirds of the members of the governing body who are present at a meeting. (Emphasis added).

N. § 7-8-4201 MCA Disposal or lease of municipal property-election.

State law requires an ordinance or resolution passed by a two-thirds vote of all the members of the council in order to sell, dispose of, donate, or lease any property belonging to the city or town.

O. Title 7, Chapter 12, Part 41. Special Improvement Districts.

§ 7-12-4113 MCA Sufficient protest to bar proceedings - exceptions.

(3) In case the improvement is the construction of a sanitary sewer , such protest may be overruled by an affirmative vote of a majority of the members of the council or commission unless such protest is made by the owners of property in the district to be assessed for more than 75% of the cost of the district, in accordance with the methods of assessment described in the resolution of intention, in which event the protest must be sustained as to the construction of such sanitary sewer. (Emphasis added).

P. § 7-14-4623 MCA Transfer of parking commission property to municipality.

The legislative body of a city, at any time after the activation of a parking commission, **may adopt by a two-thirds vote thereof a resolution transferring the property of the commission to the city.** (Emphasis added).

Q. § 10-3-405 MCA Levying emergency tax - disposition of surplus.

(4) All levies under this section may be passed only by a unanimous vote of the appropriate governing body. (Emphasis added).

R. Title 19, Chapter 3. PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Part 2. Extension of Coverage By Local Government Employers.

§ 19-3-201 MCA Contracts with political subdivisions.

(2)(a) Approval of the contract must be by the affirmative vote of two-thirds of the members of the governing body within 40 days after the adoption of the resolution.

S. § 76-2-305 MCA Alteration of zoning regulations - protest.

(2) An amendment may not become effective except upon a favorable vote of two-thirds pf the present and voting members of the city or town council or legislative

body of the municipality if a protest against a change pursuant to subsection (1) is signed by the owners of 25% or more of: (a) the area of the lots included in any proposed change; or (b) those lots or units as defined in 70-23-102, 150 feet from a lot included in a proposed change.

T. Title 76, Chapter 8. BUILDINGS FOR LEASE OR RENT, Part 1. Lease or rent - general provisions.

§ 76-8-101(6) MCA.

(6) "Supermajority" means:

(a) an affirmative vote of at least two-thirds of the present and voting members of a city or town council;

(b) a unanimous affirmative vote of the present and voting county commissioners in counties with three county commissioners;...

VI. MONTANA LAW RELATED TO MUNICIPAL LIABILITY EXPOSURE.

A. § 2-9-105 MCA State or other governmental entity immune from exemplary and punitive damages.

The state and other governmental entities are immune from exemplary and punitive damages.

Note: § 2-9-105 MCA immunizes state and other governmental entities from exemplary and punitive damages. § 2-9-105 MCA is not unconstitutional. Plaintiff did not have constitutional right to punitive damages against a government. *White v. State* (1983) 203 MT 363, 661 P.2d 1272. See also *Birkenbuel v. Montana State Comp. Ins. Fund* (1984) 212 MT 139, 687 P.2d 700.

Additional Note: § 2-9-105 MCA does not provide immunity for individuals. *Dvorak v. Huntley Project Irrigation District* (1981) 196 MT 167, 639 P.2d 62. See § 2-9-305 MCA for provisions of law pertaining to government employee limited immunity generally.

B. § 2-9-108 MCA Limitation on governmental liability for damages in tort.

With respect to litigation/claims in state court (not federal court) establishes no liability in excess of \$750,000 for each claim and \$1, 5 million for each occurrence.

Note: Pursuant to § 2-9-108(2) MCA these statutory limits on immunity do not extend to serious bodily injury or death resulting from negligence or to damages resulting from medical malpractice, gross negligence, willful or wanton misconduct, or an intentional tort.

C. § 2-9-111 MCA Immunity from suit for legislative acts and omissions.

A governmental entity is immune from suit for a legislative act or omission by its legislative body, or any member or staff of the legislative body, engaged in legislative acts.

Note: § 2-9-111(1) MCA defines "legislative act" for a municipal governing body's purpose as "actions by a legislative body **that result in the creation of law or declaration of public policy.**" (Emphasis added).

D. § 2-9-316 MCA Judgments against governmental entities.

Authorizes a political subdivision to satisfy a final judgment or settlement of funds that may be available from sources such as:

1. insurance;
2. government entity's general fund;

- 3. property tax authorized by law, collected by a special levy authorized in law;
 - 4. proceeds from the sale of bonds.
- E. Title 7. LOCAL GOVERNMENT, Chapter 6. FINANCIAL ADMINISTRATION AND TAXATION, Part 40. Local Government Budget Act.
- § 7-6-4015 MCA Payments for judgments.
- F. Municipal property tax judgment levies authorizations. See §§ 2-9-316, 7-6-4015 and 15-10-420(9)(a)(i) MCA.
- G. § 2-9-317 MCA No interest if judgment paid within two years-exception.
- Except as provided in 18-1-404(1)(b), if a governmental entity pays a judgment within 2 years after the day on which the judgment is entered, no penalty or interest may be assessed against the governmental entity.

VII. GENERAL PROVISIONS OF RELEVANT INTEREST TO MUNICIPAL GOVERNMENT OPERATIONS IN TITLE 1 MCA

- A. § 1-1-207(2) MCA Miscellaneous terms - peace officer defined.
- Note: See § 46-1-202 MCA.
- B. § 1-1-215 MCA Residence-rules for determining.
- C. § 1-1-216 MCA Legal holidays and business days.
- D. § 1-1-217 MCA Notice-actual and constructive.
- E. § 1-1-401 MCA People defined.
- F. § 1-1-402 MCA Citizens defined.
- G. Statutory Construction. § 1-2-101 MCA Role of the judge-preference to construction giving each provision meaning.

In the construction of a statute, the office of the **judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.** Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to al. (Emphasis added).

- H. Statutory Construction. § 1-2-102 MCA Intention of the legislature-particular and general provisions.

In the construction of a statute, the intention of the legislature is to be pursued if possible. **When a general and particular provision are inconsistent the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.** (Emphasis added).

- I. Statutory Construction. § 1-2-107 MCA Applicability of definitions.

Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

J. § 1-2-112 MCA Statutes imposing new local government duties.

If a new state law requires the direct expenditure of additional funds that is not expected of local government in the scope of their usual operations, the new law “must provide a specific means to finance the activity, service, or facility other than a mill levy.

K. § 1-2-116 MCA State agencies not to shift cost to local governments.

L. § 1-2-201 MCA Statutes-effective date.

After January 1, 1981, generally new state laws take effect on the first day of October following the passage and approval unless a different time is prescribed in the enacting legislation.

M. Title 1, Chapter 3. MAXIMS OF JURISPRUDENCE.

There are 34 statutory Maxims of Jurisprudence that at times might be useful when writing briefs or when providing municipal attorney legal opinions. Examples include:

- § 1-3-218 MCA Vigilance. The law helps the vigilant before those who sleep on their rights.
- § 1-3-222 MCA Impossibilities. The law never requires impossibilities.
- § 1-3-224 MCA Idle acts. The law neither does nor requires idle acts.
- § 1-3-225 MCA Particular versus general. Particular expressions qualify those which are general.
- § 1-3-233 MCA Reasonableness. Interpretation must be reasonable.

VIII. TITLE 2 MCA OBSERVATIONS OF POTENTIAL PROVISIONS THAT COULD BE RELEVANT TO MUNICIPAL GOVERNMENT STRUCTURE AND ADMINISTRATION

A. Title 2, Chapter 2. STANDARDS OF CONDUCT, Part 1. Code of ethics.

Sets forth a code of ethics prohibiting conflict between public duty and private interest.

1. Important definitions in § 2-2-102 MCA Definitions.

(2) "Compensation" means any money or economic benefit conferred on or received by any person in return for services rendered or to be rendered by the person or another.

(3)(a) "Gift of substantial value" means a gift with a value of \$50 or more for an individual.

Also, see § 45-7-104 MCA Gifts to public servants by persons subject to their jurisdiction.

(5) "Official act" or "official action" means a vote, decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority.

2. § 2-2-104 MCA Rules of conduct for public officers, legislators, and public employees.

Identifies conduct that public officers and public employees may not engage in, such as:

- May not disclose or use confidential information for personal economic interest;

- Accept a gift of substantial value or a substantial economic benefit tantamount to a gift that would tend to improperly influence a reasonable person in their public position with respect to the discharge of their public duties.
 - Economic benefits tantamount to a gift such as a loan at a rate substantially lower than commercial rate; or compensation for private services at a rate of compensation substantially exceeding fair market value.
3. § 2-2-105 MCA Ethical requirements for public officers and public employees.
- a. Generally, a public employee or public officer may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the public employee or public officer.
 - b. Public officers or public employees may not within 12 months following voluntary termination of office or employment obtain employment in which the officer or employee will take direct advantage, unavailable to others, of matters which the officer or employee was directly involved during a term of office or during employment.
4. § 2-2-121 MCA Rules of conduct for public officers and public employees.

Identifies acts the commission of which may be proof that the public officer or public employee breached a public duty.

- a. A public officer or public employee **may not use public facilities, equipment, supplies, personal, or funds for the public officer's or public employee's private business purposes.**
- b. A public officer or public employee **may not engage in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the public officer or public employee inspects or supervises in the course of official duties.**
- c. A public officer or public employee may not assist a person for a fee, contingent fee or other compensation in obtaining a contract, claim, license or other economic benefit from any public agency.
- d. A public officer or public employee **may not perform an official act directly or substantially affecting to the economic benefit a business or other undertaking in which the public officer or public employee either have a substantial financial interest or is engaged as counsel, consultant, representative or agent.**
- e. Pursuant to § 2-2-121(10) MCA:
 - Subsections (2)(b) and (2)(e) do not prevent a member of the governing body of a local government from performing an official act when the member's participation is necessary to obtain a quorum or to otherwise enable the body to act. The member shall disclose the interest creating the appearance of impropriety prior to performing the official act.
- f. A public officer or public employee **may not use public time, facilities, equipment, supplies, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office or the passage of any ballot issue** unless either authorized by law or properly incidental to another activity required

by law, such as the function of an elected public officer, the officer's staff in the normal course of duties.

Note: this subsection "is not intended to restrict the right of a public officer or public employee to express personal political views."

g. § 7-5-4109(1) MCA Control of conflict of interest.

The mayor, any member of the council, any city or town officer, or any relative or employee of an enumerated officer **may not be directly or indirectly interested in the profits of any contract entered into by the council while the officer is or was in office.** (Emphasis added).

Subsection (2) identifies some factual circumstances when there may be a governing body waiver to this limitation or restriction.

IX. TITLE 2, CHAPTER 3 PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS MCA

A. Part 1. Notice and Opportunity to Be Heard.

1. Legislative intent is that people are afforded Montana Constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency. § 2-3-101 MCA.
2. § 2-3-102 MCA Definitions.
 - (2) "Agency action" means the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial thereof.
 - (3) "Rule" means any agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule but does not include:
 - (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; or
 - (b) declaratory rulings as to the applicability of any statutory provision or of any rule.
3. § 2-3-103 MCA Public participation-governor to ensure guidelines adopted.
 - a. Each agency required to develop procedures for permitting and encouraging public to participate in public agency decisions of significant interest to the public. The procedures must ensure adequate notice and assist public participation prior to final agency action is taken.
 - b. The agenda for a meeting must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. § 2-3-103(1)(a) MCA.
 - c. Public matter does not include contested case and other adjudicative procedures. § 2-3-103(1)(b) MCA

B. Part 2. Open Meetings.

1. § 2-3-201 MCA Legislative intent.
 - a. It is the intent of this part that **actions and deliberations of all public agencies shall be conducted openly.**
 - b. The provisions of this part **shall be liberally construed.**
2. § 2-3-203 MCA Meetings of public agencies and certain associations of public agencies to be open to public-exceptions.
 - i. (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of government or organizations supported **in whole or in part by public funds or expending public funds**, including the supreme court **must be open to the public.** (Emphasis added).
 - ii. (2) All meetings of associations composed of public or governmental bodies that regulate the rights, duties, or privileges of any individual **must be open to the public.**
 - iii. (6) **Any committee or subcommittee appointed by a public body ... for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of this section.**

C. Title 2, Chapter 6. PUBLIC RECORDS, Part 10. General Provisions.

1. § 2-6-1001 MCA.

The purpose of the chapter is to ensure efficient and effective management of public records and public information in accordance with Mont. Const. art. II, Sections 8 through 10. (Section 8 Right of Participation, Section 9 Right to Know, and Section 10 Right of Privacy).

2. § 2-6-1002 MCA Definitions.

Key definitions include but are not necessarily limited to:

(1) "Confidential information" means information that is accorded confidential status or is prohibited from disclosure as provided by applicable law. The term includes information that is:

(a) constitutionally protected from disclosure because an individual privacy interest clearly exceeds the merits of public disclosure

...

(c) necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state; and

(d) designated as confidential by statute or through judicial decisions, findings, or orders.

(10) "Public agency" means the executive, legislative, and judicial branches of Montana state government, a political subdivision of the state, **a local government**, and any agency, department, board, commission, office, bureau, division, or other public authority of the executive, legislative, or judicial branch of the state of Montana. (Emphasis added).

(11) "Public information" means information prepared, owned, used, or retained by any public agency **relating to the transaction of official business**, regardless of form, **except for confidential information that must be protected against public disclosure under applicable law.** (Emphasis added).

(12) "Public officer" means any person who has been elected or appointed as an officer of state or local government.

(13) "Public record" means public information that is:

(a) fixed in any medium and is retrievable in usable form for future reference; and

(b) designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee.

3. § 2-6-1003 MCA Access to public information-safety and security exceptions-montana historical society exception.

(2) **A public officer may withhold from public scrutiny information relating to individual or public safety** or the security of public facilities, including public schools, jails; correctional facilities, private correctional facilities, and prisons, if release of the information jeopardizes the safety of facility, personnel, **the public**, students in a public school, or inmates of a facility/ A public officer may not withhold from public scrutiny any more information than is required to **protect individual or public safety** or the security of public facilities." (Emphasis added).

4. § 2-6-1006 MCA Public information requests - fees.

(2) Upon receiving a request for public information a public agency shall respond in a timely manner by:

(a) making the public information **maintained by the public agency available** for inspection and copying; or

(b) providing the requesting person with an estimate of the time it will take to fulfill the request if the public information cannot be readily identified and gathered and **any fees that may be charged**. (Emphasis added).

(3) A public agency may charge a fee for fulfilling a public information request. Except where a fee is otherwise provided for by law, the fee may not exceed the actual costs directly incident to fulfilling the request in the most cost-efficient and timely manner possible. **The fee must be documented**. The fee may include the time required to gather public information. **The public agency may require the requesting person to pay the estimated fee prior to identifying and gathering the requested public information**. (Emphasis added).

(4) **A public agency is not required to alter or customize public information to provide it in a form specified to meet the needs of the requesting person**. (Emphasis added).

(5) If a public agency agrees to a request to customize a records request response, the costs of the customization may be included in the fees charged by the agency.

5. § 2-6-1017 MCA Prohibition on dissemination or use of distribution lists - exceptions - penalties.

(1) ... to protect the privacy of those who deal with state and local government:

(a) a public agency may not distribute or sell a distribution list without first securing the permission of those on the list; and

(b) a list of persons prepared by a public agency may not be used as a distribution list without first securing the permission of those on the list except by that agency.

Note: It is misdemeanor to violate § 2-6-1017(1)(b) MCA.

(2) ... “distribution list” means **any list of personal contact information collected by a public agency and used to facilitate unsolicited contact with individuals on the distribution list.** (Emphasis added).

(3) This Section does not prevent an individual from compiling a distribution list by examination of records that are otherwise open to public inspection.

(4) This Section does not apply to lists of:

(a) registered electors and the new voter lists...;

(b) the names of employees governed by Title 39, Chapter 31;

(c) persons holding driver’s licenses or Montana identification cards provided under 61-5-127;

(d) persons holding professional or occupational licenses governed by several identified Sections of Montana state law;

(e) persons certified as claims examiners under § 39-71-320.

(6) This Section does not apply to the right of access by Montana law enforcement agencies.

Note: there are additional provisions to this section of Montana state law that are not as relevant as those identified above.