OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

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To Mayor Jordan Hess and the Missoula City Council:

I would like to take this opportunity to inform you that I plan to retire as City Attorney at the end of the current fiscal year, June 30, 2023. It has been a pleasure to meet and work for so many elected officials from so many walks of life and philosophical perspectives as well as work with so many skilled staff.

It has been an honor, privilege, and great pleasure to serve the City of Missoula and surrounding community since 1975. Initially, I primarily served as the City's misdemeanor prosecutor and civil litigator in other areas. Statutorily a Montana city attorney is required to represent the city at all court levels and serve as legal advisor to elected officials and staff pertaining to local government operations.

I've greatly appreciated the opportunity to work with Montana municipal officials throughout the state while participating in the Montana League of Cities and Towns (MLCT), Montana Municipal Interlocal Authority (MMIA) and Montana City Attorneys Association. Perhaps the greatest achievement for MLCT was the creation of MMIA, while I was president of MLCT. MMIA was created to provide municipalities a self-insurance pool after private insurers quit insuring law enforcement and soon thereafter quit providing liability insurance for local governments as well. I am proud to say I was a part of this achievement.

The opportunity to be involved in significant, successful litigation that benefitted both the City of Missoula as well as other Montana municipalities during my tenure as City Attorney has made this career rewarding many times over. Knowing that through our work at the City of Missoula we made a positive impact on the lives of Missoulians and those across Montana has been the honor of a lifetime and I remain thankful and humbled by the opportunity to serve. I've included an attachment highlighting some of the successful litigation I am most proud of achieving while serving as your City Attorney.

Sincerely,

OFFICE OF THE CITY ATTORNEY

Jim Nugent
City Attorney

SUMMARY REPORT OF THE MOST SIGNIFICANT AND SUCCESSFUL CIVIL LITIGATION WHEREIN I REPRESENTED THE CITY OF MISSOULA WHILE SERVING AS CITY ATTORNEY COMMENCING IN JUNE 1975

This report provides a non-exhaustive summary of successful litigation in which I represented the City of Missoula, and occasionally others, after commencing employment in late June 1975. The summary is provided to city officials for historical purposes identifying litigation, primarily before the Montana Supreme Court (MSC), during my tenure. Much of the litigation identified is the legal basis for many aspects of current City of Missoula operations.

1. ***Missoula County v. City of Missoula, Cause # 45858, Fourth Judicial District Court, 11/15/1977.*** Dispute over fees Missoula County was charging the City of Missoula for daily incarceration of prisoners arrested for violations of Montana Code Annotated (MCA) and Missoula Municipal Code (MMC). At the time, the county billed the city a daily fee for any arrestee brought in by the Missoula Police Department (MPD) charged with a violation of either MCA or MMC. The county also charged the city a daily fee for any part of a day. If an arrestee was brought in before midnight and arraigned the next morning, the county would charge the city for two days of incarceration fees. My legal research indicated that the city was not required to pay the county for violators of state laws who were cited into court by MPD because it was double taxation of city residents who also paid county property taxes for the operation of the jail. Missoula County was acting on behalf of state government operating at the local level and responsible for daily incarceration of violators of MCA. Based on my legal research, the city quit paying the county for incarceration of violators of MCA. The county sued the city over the dispute of fees. The district court held that the county could only charge the city for arrestees incarcerated solely for violating MMC. The court also held that a day was a 24-hour period so the county could not charge two days for someone arrested late at night and arraigned the next morning.

2. ***Montana Deaconess Medical Ctr. v. Johnson, 232 Mont. 474, 758 P.2d 756, 1988 Mont. LEXIS 185, 45 Mont. St. Rep. 1207.*** Several years after the successful litigation in district court related to incarceration fees, I represented MLCT and Great Falls with an amicus brief at MSC. The case involved Great Falls city police arresting a suspect for felony violations of MCA. The arrestee was rushed by police to the hospital after he overdosed on prescription drugs. The district court ruled against Great Falls with respect to who should pay the medical bills. The Great Falls city attorney requested my assistance in the matter. MLCT allowed me to write an amicus in the name of MLCT. MSC decided in favor of Great Falls and reversed the district court's decision relying in part on my amicus brief arguing that county governments are an extension of state government at the local level. As an extension of state government, the county is responsible for medical bills of arrestees charged with MCA violations needing to be taken to the hospital prior to incarceration. Double taxation of city residents was also argued.

3. ***Montana Contractors' Ass'n v. Dept of Highways, Dept of Commerce, Butte Silver-Bow Co, Cascade Co, City of Great Falls, Missoula Co, City of Missoula, 220 Mont. 392, 715 P.2d 1056, 1986 Mont. LEXIS 836.*** In this case I represented all state, county, and city defendants, wrote the legal briefs, and presented oral argument at MSC. MSC held that local governments could use gas tax monies for their street departments, street maintenance, and equipment purposes rather than being required to pass gas tax monies to private contractors.

4. Historically, the city has been involved in approximately one dozen cases involving city annexations. The litigation was primarily initiated by the Missoula Rural Fire District (MRFD) insisting that urban developed, and some undeveloped land areas located within their district, had to be detracted from the district with their approval pursuant to Mont. Code Ann. § 7-33-2127 before the city could annex the urban developed area. MRFD litigation culminated in urban developments approved by the Missoula County Commissioners that were substandard and not developed to city infrastructure standards such as platted right-of-way width, installation of public sidewalks, street curb and gutters, street standards, etc. There were at least four MSC annexation decisions involving the city prior to my commencing employment. While the city prevailed in the first three cases, in 1974, shortly before my employment, MSC ruled in favor of MRFD based on a new law at that time and would not allow city annexation of lands immediately west of the 39th Street city fire station in the Wapikia and Bellevue developed neighborhoods. I subsequently was involved in several district court city annexation cases, three of which were eventually decided by MSC. Fortunately, additional significant amendments by the Montana State Legislature to state annexation laws helped facilitate the city's still limited ability to annex urban developed areas. MSC decisions eventually provided for some city annexations that were not regularly being litigated. Perhaps two of the most significant cases for city annexation that I litigated, are identified immediately below.

    a. ***Missoula Rural Fire Dist. v. Missoula, 237 Mont. 444, 775 P.2d 209, 1989 Mont. LEXIS 145.*** MSC decision dissolved MRFD's 1974 permanent injunction against the city preventing annexation unless the land was first detracted from the rural fire district. An earlier 1974 decision upheld the district court permanent injunction that prevented the city from annexing the Wapikia and Bellevue geographic areas west of the 39th Street fire station. MLCT and major Montana municipalities successfully obtained amendments to Montana's annexation laws, but MRFD continued to rely on the permanent injunction. I petitioned the courts to dissolve the permanent injunction based on the state legislative revisions of Montana municipal annexation law. MSC held that the 1979 amendments created methods of annexation that are separate and independent of each other that allow a city to annex real property by statute without detraction from the MRFD prior to city annexation. The district court properly dissolved the permanent injunction as requested by the city.

    b. ***Missoula Rural Fire Dist. v. City of Missoula, 950 P.2d 758, 286 Mont. 387, 1997 Mont. LEXIS 292, 54 Mont. St. Rep. 1459.*** MSC held that prior city annexations of street corridors with municipal sanitary sewer lines running

through them were valid and could subsequently be used to wholly surround additional tracts of land for annexation. MSC upheld as a legitimate governmental purpose the annexation of a roadway as a contiguous parcel of land with respect to the city's annexation of portions of Reserve Street, South Avenue, Third Street West, and Mullan Road. The city subsequently relied on the contiguous roadway annexations to wholly surround and annex other tracts of land. Three large geographic areas were wholly surrounded pursuant to Resolutions 5816, 5817, and 5818. The city annexed lands located between Russell and Reserve & Paxson on the east and west and Mullan Road and South Third Street West and South Avenue and Brooks utilizing the street corridor city annexations to create city boundaries making the areas wholly surrounded by city limits. This allowed the city to utilize the wholly surround method of annexation. The territory in question was wholly surrounded when it was annexed with each side of the tracts within the city limits and impossible to reach without crossing city territory however narrow.

5. ***Clark v. Dussault, 265 Mont. 479, 878 P.2d 239, 1994 Mont. LEXIS 153, 51 Mont. St. Rep. 642.*** Missoula County requested the city submit an amicus brief which I did in the name of MLCT and the city. Clark was a Justice of the Peace. Guest was employed by the county as office manager for the Justice of the Peace Courts. Clark created a supervisory plan for Guest and the court staff in his court. Morris, the 2nd Justice of the Peace, would not implement the supervisory plan in his court operations. Discord evolved between Missoula County Commissioners and Clark. Eventually Clark placed a written reprimand in Guest's personnel file stating that she was insubordinate because she failed to implement his supervisory plan. Litigation ensued. MSC held a court's exercise of inherent power is not without limitations and the inherent power should be exercised only when established methods fail or when an emergency arises. Established methods for any discipline were contained in the county manual including a grievance procedure with a hearing before the county commissioners and had not been followed. MSC indicated that government separation of powers does not mean that there shall be no common link of connection or dependence, the one upon the other in the slightest degree and that it means that the powers properly belonging to one department shall not be exercised by the others. MSC indicated that it was not persuaded that the county commissioner's hearing of a grievance constitutes an exercise of authority belonging to the judicial branch. In addition, Guest was not a "key employee" or member of Clark's personal staff over whom he had exclusive appointment and removal authority. MSC reversed the district court ruling in favor of Clark and ruled in favor of the county commissioners.

6. ***Fair Play Missoula, Inc. v. City of Missoula, 2002 MT 179, 311 Mont. 22, 52 P.3d 926, 2002 Mont. LEXIS 348.*** MSC affirmed district court dismissal of Plaintiff's action to enjoin the City of Missoula and Play Ball Missoula, Inc. from further development of a proposed civic stadium for planning, funding, and managing the civic stadium facility.

7. ***Dilley v. City of Missoula, 2012 MT 150N, 2012 Mont. LEXIS 198, 2012 WL 2785877.*** The district court held, and MSC affirmed, the city acted within its legal authority when it purchased the Missoula Civic Stadium with tax increment financing (TIF) designated for urban renewal.

8. ***Duncan v. Missoula, 239 Mont. 201, 779 P.2d 519, 1989 Mont. LEXIS 248.*** As part of a public sidewalk replacement project, two locations were established for planting street trees adjacent to Duncan's property. Duncan objected to planting the street trees. City staff informed Duncan they would not plant any trees. Duncan's tenants and other citizens complained and petitioned to have street trees planted. The city's public works committee recommended to city council the street trees be planted. City council approved planting of street trees. Duncan attempted to argue that city staff representation that no trees would be planted constituted a contract that no planting occur. MSC held that city staff did not create a contract with Duncan because only the city council can bind the city by contract. MSC decision recognized city authority to plant street trees in public sidewalks along streets, including state highway routes located within the city, despite adjacent property owner objection.

9. ***Rattlesnake Coalition v. United States EPA, 509 F.3d 1095, 2007 U.S. App. LEXIS 28310, 53 A.L.R. Fed. 2d 723, 37 ELR 20300.*** I presented oral argument for the city at a U.S. 9th Circuit session held in Seattle, Washington. The city made improvements to its wastewater treatment and collection system and subsequently applied for and received a $5 million grant to support completion of the upgrade. Several sanitary sewer special improvement districts were also being considered in middle Rattlesnake Valley. The improvements were opposed by Loreen Folsom, Will Snodgrass, and other Rattlesnake residents. The 9th Circuit found there was insufficient federal control over city project to make it a major federal action under NEPA requiring environmental assessments and environmental impact statements. Absent a showing of federal control of the project, EPA's approval of facility and subsequent grant of $5 million to support plant did not elevate city project to status of major federal action. The court also held the city could not be a defendant in plaintiff's lawsuit because it was not a federal entity.

10. ***Rattlesnake Coalition v. City of Missoula, 2009 MT 189N, 2009 Mont. LEXIS 187.*** After the 9th Circuit ruling in favor of the city and EPA, plaintiffs unsuccessfully sued the city pursuant to Montana's environmental laws. Plaintiffs sought injunctive relief and mandatory action by the Montana Department of Environmental Quality arguing the environmental assessment failed to comply with Montana's Environmental Protection Act (MEPA). MSC held that plaintiffs did not raise any genuine issues to litigate.

11. ***Enger v. City of Missoula, 2001 MT 142, 306 Mont. 28, 29 P.3d 514, 2001 Mont. LEXIS 205.*** I successfully defended the city council's creation of a storm water control special improvement district (SID) for south Missoula. The primary legal issue was whether the city council had discretion to determine what properties benefitted from the special improvement district. MSC held the city council could reasonably determine "benefit" for purposes of SID assessments and upheld the SID assessment formula assessing hillside properties 23% of the cost and the properties on the valley floor 77% of the cost of the SID.

12. ***Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, 331 Mont. 269, 130 P.3d 1259, 2006 Mont. LEXIS 59.*** The court's decision upheld city council authority to interpret a growth policy, neighborhood plan to expand and relocate a

grocery store and provide for future expansion of a hospital. The decision also held the city council rezoning measure was not illegal spot zoning.

13. ***Associated Students of the Univ. of Mont. v. City of Missoula, 261 Mont. 231, 862 P.2d 380, 1993 Mont. LEXIS 304, 50 Mont. St. Rep. 1301.*** The court held the city council had authority to restrict motor vehicle parking and the ordinance did not violate equal protection guarantees of University of Montana students, faculty, and staff. The decision upheld legal authority of the council to create a residential parking district in residential neighborhoods west and south of the University of Montana campus.

14. ***Fourth Judicial District Court Cause No. 61545, Deschamps III et al vs Copeland et al 1985.*** Several Montana planning board laws required board members to be "freeholders" (owners of real property). U.S. Supreme Court ruled in 1964 that such a qualification for various government purposes was unconstitutional as a violation of the Fourteenth Amendment equal protection clause. Three of the four city appointees were tenants and not freeholders. The city argued the Montana planning board qualification laws were unconstitutional and the district court agreed. The court concluded there was no rational basis to exclude persons who did not own property from membership. The requirement was wholly irrelevant to the purpose and duties of the planning board and limiting membership to "freeholders" was a violation of the equal protection clause of the U.S. and Montana Constitutions.

15. ***Greens at Fort Missoula, LLC v. City of Missoula, 897 P.2d 1078, 1995 Mont. LEXIS 120, 271 Mont. 398, 52 Mont. St. Rep. 501.*** A purchaser of former public property at Fort Missoula requested and received residential rezoning. City electors petitioned for referendum to repeal residential rezoning ordinance applicable to lands at Fort Missoula. The district court granted summary judgment to the city and intervenor Fort Preservation Corp. to hold a city-wide referendum concerning Ordinance No. 2877 as a legislative action ordinance would be subject to the people's referendum power. MSC affirmed the district court ruling.

16. ***Lee v. City of Missoula Police Dep't, 2008 MT 186, 343 Mont. 487, 187 P.3d 609, 2008 Mont. LEXIS 270.*** The court held Lee, a job applicant with the Missoula Police Dept., waived his right to know when he signed an authorization to release information. Lee was offered employment contingent on the results of a background check. The signed release specifically informs the applicant the PD will not release any information to anyone including the applicant. The court upheld the city's right to not disclose information obtained pursuant to the background check. The decision also upheld the revocation of the employment offer which was specifically contingent on an acceptable background check.

17. ***DeVoe v. State, 281 Mont. 356, 935 P.2d 256, 1997 Mont. LEXIS 37, 54 Mont. St. Rep. 207.*** DeVoe initiated litigation arguing the Montana State Highway Commission (MSHC) abandoned public right-of-way diagonally southeast of the Lincolnwood subdivision. DeVoe, as adjacent property owner, was attempting to force vacation of public right-of-way to DeVoe as private property owner. The MSHC was neutral while the city intervened to preserve the excess right-of-way for potential future public use. The

court upheld the right of city to intervene stating the city established a legally protectable interest pursuant to M.R.Civ.P. and preserved excess public right-of-way for potential future use. Substantial evidence established net acreage was used for highway purposes. The city succeeded in retaining the public right-of-way for potential future use.

18. ***DeVoe v. City of Missoula, 2012 MT 72, 364 Mont. 375, 274 P.3d 752, 2012 Mont. LEXIS 76, 2012 WL 1098363.*** The court upheld a city board of adjustment stop work order and revocation of building permit. Neighbors challenged issuance of the building permit for an accessory garage to a rental when in reality DeVoe was building a large storage building which was not allowed in the single-family residential area. DeVoe was informed both orally and by letter that any building on the property was required to be an accessory use to an existing structure. The storage building was not accessory use and could not be built. MSC affirmed district court ruling against DeVoe.

19. ***Adams v. Department of Highways, 753 P.2d 846, 230 Mont. 393, 1988 Mont. LEXIS 62, 45 Mont. St. Rep. 298.*** Defendants requested the city provide an amicus brief which I did in the name of MLCT and the city. The Montana Highway Department was building the original Reserve Street bridge which significantly increased the volume of motor vehicle traffic on Reserve Street south of the Clark Fork River. The lawsuit alleged that increased volume of traffic, noise, dust, change of neighborhood, and change of view entitled property owners along Reserve Street to compensation pursuant to the legal theory of inverse condemnation. The court held property owners claiming adverse factors are not able to claim damages where there has been no actual taking or severance of the adjoining property. The Reserve Street improvements occurred within existing public right-of-way and there was no taking.

20. ***White v. State, 203 Mont. 363, 661 P.2d 1272, 1983 Mont. LEXIS 668, 43 A.L.R.4th 1.*** The Montana Department of Administration requested local governments submit amicus briefs arguing against judicial assessment of punitive and exemplary damages against local governments. The court ruled in favor of local governments holding that a rational basis exists for statutorily created Montana government immunity from punitive and exemplary damage assessments for governmental entities and that punitive damages would only punish taxpayers and would create a windfall for plaintiff/claimant. The U.S. Supreme Court previously held in *Newport v. Fact Concerts, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616, 1981 U.S. LEXIS 129* that punitive damages are by definition not intended to compensate an injured party; but rather to punish the tortfeasor whose wrongful action was intentional or malicious to deter him and others from similar extreme conduct. The court held Montana's law prohibiting the award of punitive and exemplary damages against government to be constitutional.

21. A couple of important, successful determinations before the Montana Public Service Commission (PSC) included:
    a. Requiring private Mountain Water Company to bill hundreds of thousands of dollars of annual fire hydrant assessments spread over all benefitting customers rather than have the city pay the water bill; and
    b. City allowed to assess regular wastewater treatment facilities sanitary sewer fee against unconnected developed properties located within 250 feet of a sanitary

sewer main because the sanitary sewer main infrastructure was available to serve their developed property.

This report of successful litigation is not all inclusive. I was involved, in a limited capacity, in the most significant legal achievement which was the acquisition of the community water system to city ownership which concluded in June 2017. Other successful litigation included two sanitary sewer main installation construction project arbitrations, several other successful district court litigations, and a couple more successful MSC decisions. I primarily provide this report to identify successful litigation which contributed to and/or facilitated city actions which continue to be part of city operations today. I also offer it as a historical record with respect to significant litigation successes in which I represented the City of Missoula as City Attorney