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MEMO

TO: **Ravalli County Commissioners**

FROM: George Corn

DATE: January 3, 2007

RE: Dallas Erickson's email to Commissioner Lyons of 1/2/07 re: Obscenity Ordinance.

Mr. Erickson has asked you to place the above matter on the November 2007 ballot by resolution. Some background is in order. The ordinance is one of two Mr. Erickson proposed to qualify for the ballot by the petition process. You asked my office, pursuant to the authority of Section 7-5-135, MCA, to file suit to determine the constitutionality of the proposed ordinances. Judge Langton issued a ruling on October 10, 2006, finding one ordinance constitutional and one unconstitutional. As Mr. Erickson notes in the e-mail, he then proceeded to attempt to collect the necessary signatures to place the ordinance determined constitutional by Judge Langton on the ballot. Apparently he now believes he will be unable to collect enough signatures and urges you to place the ordinance on the ballot by resolution. He believes that if you do that you can still proceed with an appeal of Judge Langton's decision.

However neither the statute nor case law allow for such a procedure. The statute was enacted to deal with the petition process and was designed to allow local governments a way to determine the constitutionally of petitions before their potential enactment. The statute is an exception to the general rule that courts in Montana have no authority to give advisory opinions and as such is to be interpreted narrowly. Section 7-5-235(4), MCA specifically requires that signatures must be collected within 90 days after a court determination of constitutionally for a matter to be placed on a ballot.

The statute makes absolutely no provision for the action suggested by Mr. Erickson. By its plain language it deals only with the petition process. It in no way suggests that commissioners could pass a resolution to put a measure on the ballot and then ask the court to determine if the proposal is constitutional.

Moreover, case law indicates that trying to appeal the measure after the failure of Mr. Erickson to get enough signatures would be a waste of time. *Yellowstone County v. Dallas*

Erickson, No. 04-203. In *Yellowstone County* the district court determined the proposed petition and obscenity ordinances were constitutional. Subsequently, the county and Mr. Erickson agreed to forgo gathering signatures and have Yellowstone County appeal the district court's decision to the Montana Supreme Court. The Montana Supreme Court refused to decide the case, stating that the issue was not justiciable or ripe for decision because "...the signatures were not collected and filed within 90 days..."

The Court reasoned that unless Mr. Erickson had gathered sufficient signatures or was in the process of gathering those signatures there was no issue for them to decide because under the language of the statute, the ordinances could not be placed on the ballot. Since there has been or apparently will be a similar failure here, it is highly likely the court will have the same response to our appeal and all efforts spent on the appeal will be wasted.

Additionally, Mr. Erickson does have a remedy. As he notes in his e-mail, he can resubmit the matter, get a judicial determination and try again to get the requested signatures. If he does, then the court will deal with the issue ,because at that point it is inarguably "justiciable."

For these reasons I advise you not to place the matter on the ballot by resolution as requested by Mr. Erickson.