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Phillips v. City of Whitefish: Legislative or Administrative, That Is the Referendum Question

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I. INTRODUCTION

Under Montana law, the power of citizens to repeal local government resolutions by referendum extends only to legislative acts.[1] In *Phillips v. City of Whitefish*,[2] the Montana Supreme Court held that a resolution amending an interlocal agreement between the City of Whitefish and Flathead County was an administrative act, despite the legislative nature of the original interlocal agreement.[3]

II. FACTUAL AND PROCEDURAL BACKGROUND

This case stems from a local control and land use dispute between the City of Whitefish, Flathead County, and the citizens of both caught in between. The City of Whitefish has implemented several regulatory policies to protect its vibrant downtown, highway corridors, and pristine natural resources, considered vital to its tourism and recreation based economy.[4] In contrast, Flathead County's much more permissive land-use planning scheme has resulted in a hodgepodge of subdivisions, big-box stores, mini-storage facilities, billboards, and stream and lakeshore setbacks.[5]

In 1967, Flathead County and the City of Whitefish created a joint planning board whereby the county agreed to cede its planning authority to the city for the one mile extraterritorial area (ETA), otherwise known as the "donut," surrounding Whitefish.[6] In 2005, the two parties not only formalized this relationship with an interlocal agreement (2005 IA), but also extended Whitefish's ETA to two miles.[7] This agreement was mutually beneficial for both parties: the 2005 IA enabled the county to save financial resources by abdicating its planning responsibilities in the donut, and the city was given the opportunity to define and protect the area's unique character.

As part of this goal, Whitefish adopted the very controversial Critical Areas Ordinance (CAO) in 2008, "which imposed zoning restrictions in the donut to protect lakes, streams, wetlands, and drainage

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1. Mont. Code Ann. § 7–5–131 (2013); *Town of Whitehall v. Preece*, 956 P.2d 743 (Mont. 1998).
2. *Phillips v. City of Whitefish*, 330 P.3d 442 (Mont. 2014).
3. *Id.* at 445–446.
4. Appellant's Opening Br., *Phillips v. City of Whitefish*, http://supremecourtdocket.mt.gov/search/getDocument?documentid=77004 at 11 (No. DA 13–0472, 330 P.3d 442 (2014)).
5. *Id.*
6. *Phillips*, 330 P.3d at 445–446.
7. *Id.* at 446.

areas from development."[8] The county opposed the CAO and, upon its adoption by the city, voted to unilaterally withdraw from the 2005 IA.[9] Since the 2005 IA expressly stated that the agreement could only be terminated by mutual consent of the parties, the City of Whitefish filed a lawsuit to enforce the agreement.[10] The district court refused to do so, finding the 2005 IA unenforceable.[11] On appeal, the Montana Supreme Court reversed the district court's ruling, imposed a preliminary injunction to prevent Flathead County from exercising planning authority in donut, and remanded the case for trial.[12]

The parties then entered into negotiations to see if a settlement could be reached.[13] After eight months and several public meetings, the parties negotiated a 2010 interlocal agreement (2010 IA) that: (1) allowed for unilateral termination as long as the terminating party gave one year's notice and agreed to participate in alternative dispute resolution; and (2) was subject to renewal by both parties after five years.[14] Most Whitefish residents were opposed to the 2010 IA: however, despite the "substantial objection from almost all of the persons who spoke in public on the matter," the Whitefish City Council passed Resolution 10–46, adopting the 2010 IA on November 15, 2010.[15] At the same meeting, the council also adopted Resolution 10–47 which "authorized the City to seek dismissal of the 2008 lawsuit."[16] Flathead County followed suit and the lawsuit was dismissed on July 11, 2011.[17]

Dissatisfied with the city's approval of Resolution 10–46, both Whitefish and donut residents decided to take action.[18] By January 2011, a referendum petition to repeal the resolution was approved under state law form and compliance standards.[19] By April 2011, citizens had gathered the required signatures and the Flathead County Election Department certified the referendum for the November election.[20] Finally, after over ten months of citizen effort, Resolution 10–46 passed by a two-to-one margin on November 8, 2011.[21]

Failing at the ballot box, the plaintiffs in this case filed a lawsuit in Flathead District Court to challenge the referendum's validity. The plaintiffs argued that the referendum sought to repeal an administrative

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[8]. *Id.*
[9]. *Id.*
[10]. *City of Whitefish v. Bd. of Co. Commrs. of Flathead Co. ex rel. Brenneman*, 199 P.3d 201, 203 (Mont. 2008).
[11]. *Id.*
[12]. *Id.* at 208.
[13]. *Phillips*, 330 P.3d at 446.
[14]. *Id.*
[15]. Appellant's Opening Br., *supra* n. 4, at 12.
[16]. *Phillips*, 330 P.3d at 446–447.
[17]. *Phillips*, 330 P.3d at 447.
[18] . *Id.*
[19]. *Id.*
[20]. *Id.*
[21]. *Id.*

action, rather than a legislative action and, as such, the citizens' referenda power did not extend to Resolution 10–46.[22] Co-defendants, the City of Whitefish and the Flathead County Commissioners, responded immediately with breach of contract claims against each other with respect to the 2005 and 2010 IAs.[23] Additionally, the district court granted a motion to intervene for four citizens and the "Let Whitefish Vote" ballot committee (Intervenors).[24] The Intervenors argued that the plaintiff's suit should be dismissed because the claim was untimely under MCA 7–5–135(1) and the doctrine of laches.[25]

On cross-motions for summary judgment, the district court held that: (1) the suit was timely under Montana law; and (2) Resolution 10–46 was an administrative act and thus not eligible for repeal by referendum."[26] The district court did not separately address the doctrine of laches claim.[27] Both the City of Whitefish and the Intervenors appealed.[28]

III. MAJORITY OPINION

In a 4–3 opinion, the Montana Supreme Court affirmed the district court's grant of summary judgement and separately addressed the laches argument.[29] First, the majority held that the plaintiff's referendum challenge was timely under MCA 7–5–135(1).[30] The statute provides that "a governing body" may initiate a suit to determine the validity and constitutionality of proposed initiative or referendum "within 14 days of the date a petition has been approved as to form."[31] However, the Court pointed out that the statute's plain meaning does not apply to non-government parties that choose to initiate an action, such as the private citizen plaintiffs in this case.[32]

The Court then held that the plaintiff's claim was not untimely under the doctrine of laches.[33] The Court cited *Cole v. State ex rel. Brown*[34] as an instance where this equitable doctrine successfully barred a claim: in that case, the plaintiffs tried and failed to challenge an initiative that had passed *nine years* earlier.[35] The Court noted that, unlike the Intervenors in this case, the argument was effective in *Cole*

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22. *Id.*
23. *Phillips*, 330 P.3d at 447.
24. Appellant's Opening Br., *supra* n. 4, at 15.
25. *Phillips*, 330 P.3d at 447.
26. *Id.* at 447–448.
27. *Id.* at 447.
28. *Id.* at 448.
29. *Id.* at 449–450, 456.
30. *Id.* at 449.
31. Mont. Code Ann. § 7–5–135(1) (2013).
32. *Phillips*, 330 P.3d at 448–449.
33. *Id.* at 450.
34. *Cole v. State ex rel. Brown*, 42 P.3d 760 (Mont. 2002).
35. *Phillips*, 330 P.3d at 449; *Cole*, 42 P.3d 760 (emphasis added).

because the defendants addressed the laches prejudice requirement, specifically regarding those who relied on the "presumptive validity" of the initiative.[36] Finally, the Court affirmed the district court's ruling that Resolution 10–46 was an administrative, rather than a legislative, act by the City of Whitefish and thus was not subject to the referendum process.[37] Applying the *Whitehall* factors the Court adopted from the Kansas Supreme Court in 1998,[38] the majority held that the factors weighed in favor of administrative action: namely that "the decision to enter the 2010 IA and resolve the 2008 lawsuit, with limited assurances about the ultimate duration and outcome of the agreement, was a decision that required specialized knowledge and experience of the City's fiscal and other affairs."[39] The Court did not address whether either interlocal agreement was valid under Montana law.[40]

IV. DISSENTING OPINION

While Chief Justice Mike McGrath and Justices Patricia Cotter and Michael Wheat concurred with the majority on the statutory and doctrine of laches timeliness issues, they dissented regarding the nature of the City's action and, consequently, the citizens' right to repeal the action by referendum.[41] The dissent also disagreed with the majority's continued use of the "vague, confusing, and awkward to apply" *Whitehall* factors, and instead advocated for a fact-driven, case-by-case approach "guided by underlying principles of separation of powers and historical examples of legislative powers."[42] Using this and the *Whitehall* approach, the dissent determined that Resolution 10–46 was plainly legislative because the 2010 IA created zoning authority and "since adoption of a zoning ordinance would be a legislative act, it follows that an act granting such authority must also be a legislative act."[43] Additionally, the dissent argued that since the resolution entailed significant policy changes and the 2005 IA was certainly a legislative act, it follows that the "amendment of a prior legislative enactment is itself a legislative act."[44]

V. ANALYSIS

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[36]. *Phillips*, 330 P.3d at 449–450.
[37]. *Id.* at 456.
[38]. *Town of Whitehall*, 956 P.2d at 749.
[39]. *Phillips*, 330 P.3d at 452, 456.
[40]. *Id.* at 453 (stating that "we are not deciding in this case whether zoning authority was the proper subject of an interlocal agreement").
[41]. *Id.* at 456 (McGrath, C.J. & Cotter & Wheat, JJ., dissenting).
[42]. *Id.* at 456–457.
[43]. *Id.* at 458.
[44]. *Id*.

A. The Plaintiff's referendum challenge was timely under Mont. Code Ann. 7–5–135(1) and the doctrine of laches

As a threshold matter, it seems clear that the Court correctly upheld its mandate to "neither insert what has been omitted, nor omit what has been inserted" with regard to the majority's plain language interpretation of Mont. Code Ann. 7–5–135(1).[45] While the statute places a time restriction of 14 days on any "governing body" that wants to file suit to determine the validity and constitutionality of a petition and proposed action, no statute bars a citizen or group of citizens from filing such a challenge.[46]

The Court's holding regarding the laches claim also seems consistent with prior case law and the doctrine's generally disfavored status as a defense.[47] While the less than vigilant plaintiffs in this case had several months to challenge the referendum and inexplicably chose to do so only after citizens had voted strongly in favor of it, the Court has nevertheless indicated that it will only bar such a claim in extreme situations, such as those found in *Cole*. It is well established that "[l]aches is not a mere matter of elapsed time": a showing of prejudice is also required.[48] However, without a sufficiently long passage of time, it seems unlikely that a party will be able to demonstrate the facts necessary to establish prejudice. Here, the Intervenors could only demonstrate the effort they had put into the election process, not how they had subsequently relied on the referendum's validity.[49] In any case, both the majority and dissent were unwilling to establish precedent they viewed as "tantamount to requiring all challenges to a ballot measure be brought prior to election."[50]

B. Resolution 10–46 was a legislative act and subject to voter referendum

Under Montana law, the people have the right to repeal legislative acts through the referendum process, including ordinances and resolutions enacted by their local government.[51] However, local governmental powers extend not only to legislative acts, but also to administrative and quasi-judicial acts.[52] Thus, the people may only

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[45]. Mont. Code. Ann. § 1–2–101.
[46]. Mont. Code Ann. § 7–5–135(1).
[47]. *Cole*, 42 P.3d at 763–764; 30A *C.J.S. Laches, Stale Demands, and Limitations* § 138 (WL current through Mar. 2015).
[48]. *In re Est. of Wallace v. McAlear*, 606 P.2d 136 (Mont. 1980); 27A Am. Jur. 2d *Laches; Lapse of time; Stale Demands* § 163 (WL current through Feb. 2015).
[49]. *Phillips*, 330 P.3d at 449 (majority).
[50]. *Id.*
[51]. Mont. Const. art. V, § 1; Mont. Const. art. III, § 5(1); Mont. Const. art. XI, § 8; Mont. Code Ann. § 7–5– 131.
[52]. Mont. Const. art. XI, § 4.

invoke their referenda power to repeal local government resolutions and ordinances that are legislative in nature.[53] In practice, courts have found it difficult to distinguish a legislative act from an administrative act due to their overlapping characteristics.[54]

In *Town of Whitehall v. Preece*, the Montana Supreme Court adopted four factors from the Kansas Supreme Court to guide the process of classifying local government actions.[55] Demonstrating the difficultly of applying these factors, both the majority and dissent applied each factor in their analysis and came to opposite conclusions on every one. The majority, while underscoring the fourth factor's cautionary language that "no one act of a governing body is likely to be solely administrative or legislative" and explaining that "these cases are not black and white," nevertheless decided to restrain the people's power in this case because they viewed the referendum as lacking a "fully legislative purpose."[56] The dissent, on the other hand, pointed out that: (1) the Kansas Supreme Court recently discarded this fourth factor policy statement because it did not help that court evaluate specific facts; and (2) the remaining factors are "confusing, and can unreasonably restrict the voters' right to participate in the referendum process."[57] These three factors are discussed in turn.

The first *Whitehall* factor essentially states that a legislative act is a new law that is permanent and general, while an administrative act executes an already existing law and is thus temporary and limited in effect.[58] The majority found dispositive that Resolution 10–46 was an amendment to an interlocal agreement, rather than a zoning ordinance, and that the unilateral termination and renewal provisions provided for only potential changes to the City's authority to zone the donut.[59] First, it is important to note that legislative acts can, and often do, take the form of amendments. Additionally, as the dissent pointed out, the Montana legislature "periodically enacts statutes that will expire on a certain date or become effective only upon the happening of a certain event."[60] Thus, the 2010 IA's amendatory nature and termination and renewal provisions don't seem to provide a sound basis to categorize Resolution 10–46 as an administrative act under this factor.

The second *Whitehall* factor ostensibly weighs an act's policy objectives.[61] Under this factor, if an action declares and provides the

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[53]. Mont. Code Ann. § 7–5–131.
[54]. *Phillips*, 330 P.3d at 451.
[55]. *Town of Whitehall*, 956 P.2d at 749.
[56]. *Phillips*, 330 P.3d at 451, 456 (majority).
[57]. *Id.* at 456 (McGrath, C.J. & Cotter & Wheat, JJ., dissenting).
[58]. *Id.* at 451, 453 (majority).
[59]. *Id.* at 453.
[60]. *Id.* at 456 (McGrath, C.J. & Cotter & Wheat, JJ., dissenting).
[61]. *Id.* at 451 (majority).

means to implement a public purpose, it is legislative.[62] If, on the other hand, the action addresses only a narrow segment of a larger policy question, it is likely administrative.[63] The majority reasoned that since the 2010 IA only constituted a "few" amendments to the 2005 IA and since these provision were conditional, the 2010 IA only had the potential to lead to future policy changes.[64] The dissent, while at the same time questioning the veracity of the factor overall, also explained that the Montana Legislature frequently enacts legislation that addresses larger policy questions.[65] The dissent also did not find the amendatory nature of Resolution 10-46 relevant since the "Montana Legislature routinely enacts statutes which are clearly legislative acts, but which are amended in future years in ways large or small."[66] Resolution 10–46 contained two amendments that constituted a substantial policy shift for the City's zoning authority simply because the goals aimed at protecting the City's downtown, highway corridors, and natural resources became subject to Flathead County's inherent threat of future termination under the 2010 IA. Since the certainty and autonomy that once existed under the 2005 IA was, in effect, eviscerated by the 2010 IA, Resolution 10–46 was a legislative act.

Finally, the third *Whitehall* factor states that "[d]ecisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy."[67] It is conceded that the decision to settle a lawsuit is an administrative act because it requires specialized expertise and discretionary judgement.[68] However, as the dissent stated, "[w]hile the decision to settle the lawsuit per se may be administrative, it was undertaken in the separate Resolution 10–47."[69] While the majority opinion spent much of its opinion rationalizing how Resolution 10-46 was inextricably tied and sufficiently related to Resolution 10-47, it seems clear that, in this instance, the Court overlooked its obligation to "neither insert what has been omitted, nor omit what has been inserted" when it mistakenly interpreted Resolution 10-46 as Resolution 10–47.[70]

However, on a broader scale, it is hard to comprehend why the majority continued to rely on the Kansas-adopted *Whitehall* factors when, in Kansas, "[t]here is no independent, constitutional right to an

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[62]. *Phillips*, 330 P.3d at 451, 453.
[63]. *Id.*
[64]. *Id.* at 454.
[65]. *Id.* at 456 (McGrath, C.J. & Cotter & Wheat, JJ., dissenting).
[66]. *Id.* at 457.
[67]. *Id.* at 451 (majority).
[68]. *Phillips*, 330 P.3d at 454.
[69]. *Id.* at 457 (McGrath, C.J. & Cotter & Wheat, JJ., dissenting).
[70]. *Id.* at 451–452, 454–455 (majority); Mont. Code. Ann. § 1–2–101.

initiative; any authority to hold a referendum must come from the legislature."[71] The Kansas referendum and initiative process is only authorized in statute and the courts have strictly applied it when judging the administrative or legislative nature of a petition.[72] As a result, "[i]n Kansas, the initiative and referendum process under K.S.A. 12–3013 has long been judged on a more demanding basis than in some other locales."[73]

In Montana, "[t]he people reserve to themselves the powers of initiative and referendum."[74] This power extends to legislative actions of local government.[75] In contrast to Kansas, these rights are reflected, but not created, in statute.[76] If Montana is to follow the "principle that initiative and referendum provisions of the Constitution should be broadly construed to maintain the maximum power in the people,"[77] we should not be following Kansas's framework that has self-admittedly "never adopted a 'liberal' view of the matters which should be subject to initiative and referendum, but quite the contrary."[78]

The majority opinion correctly pointed out that "all actions of a state legislature are inherently legislative by their very nature."[79] As such, it follows that if a local government act is sufficiently analogous to a state legislative act, it should be deemed a legislative act. It is time to dispense with the *Whitehall* factors and replace them with the simpler case-by-case, fact-driven approach advocated for by the dissent and used in other jurisdictions with similar constitutional provisions as those found in Montana.[80] Only then will the Court be able to more accurately identify and separate legislative acts from administrative acts, and more broadly, ensure that Montana's constitutional guarantee to initiative and referendum is secure and available for citizens to challenge their government.

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[71]. *City of Topeka v. Imming*, 344 P.3d 957, 967 (Kan. App. 2015).
[72]. Kan. Stat. Ann. § 12–3013 (2014); *McAlister v. City of Fairway*, 212 P.3d 184, 193–194 (Kan. 2009).
[73]. *McAlister*, 212 P.3d at 193.
[74] Mont. Const. art. V, § 1.
[75]. Mont. Const. art. III, § 5(1); Mont. Const. art. XI, § 8.
[76]. Mont. Code Ann. § 7–5–131.
[77]. *Chouteau Co. v. Grossman*, 563 P.2d 1125, 1128 (Mont. 1977).
[78]. *City of Lawrence v. McArdle*, 522 P.2d 420, 427 (Kan. 1974).
[79]. *Phillips*, 330 P.3d at 455 (majority).
[80]. *See e.g. Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013); Colo. Const. art. V, § 1(9) (guaranteeing that "[t]he initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities").