

Comments on FCBF's comments by James Conner, [www.flatheadmemo.com](http://www.flatheadmemo.com):

Page 4, No. 4: This paragraph suggests that a Post Office Box is not a physical address, but that a street address is. Making this distinction is an error of category. All addresses of real places, and that still includes U.S. Post Offices, are physical addresses.

Page 4, No. 5. The commissioners were warned that they should survey voters living in the zoning annulus, not just the owners of the lands in the annulus.

The next four pages are FCBF's comments.

PO Box 771 • 35 4<sup>th</sup> Street West

Kalispell, Montana 59903



T: 406.756.8993 • F: 406.756.8991

[citizens@flatheadcitizens.org](mailto:citizens@flatheadcitizens.org)

October 6, 2011

Citizens for a Better Flathead  
PO Box 771  
Kalispell, MT 59903

Flathead County Commissioners  
800 South Main  
Kalispell, Montana, 59901

Re: Proposed County action to provide a mail-in ballot survey to Whitefish Doughnut property owners

Dear County Commissioners,

Citizens for a Better Flathead appreciates the opportunity to comment today, and wishes to place on the public record our concerns regarding insufficient notice, lack of a public process for an issue of significant public concern, and refusal of the county to provide requested documents prior to the discussion and action by this commission on your 10:00 am agenda item today (10/6/2011) — “Consideration of Ballot Survey/Whitefish Doughnut Area.”

**Issue of Significant Concern to the Public:**

Clearly the issue of who has the jurisdiction over planning, zoning, and subdivision decisions in the two-mile area around the City of Whitefish is an issue of significant public concern. This issue has been the subject of a long series of meetings, public hearings, and negotiations and legal/court challenges between the City of Whitefish and the County for over three years now. Public turnout and comments at meetings and public hearings over this period have demonstrated that this is an issue of significant public concern. Additionally, Whitefish City residents, who are also county residents whom you represent, have successfully petitioned to have a referendum on recent changes to the Interlocal Agreement that governs the joint planning agreement and process in this two-mile area around the city on the upcoming ballot. Furthermore, county residents in this two-mile area have repeatedly and formally requested that you establish an elected community council for this area as provided by state law and as you have done for Bigfork and Lakeside. You have not taken this requested action nor have you allowed it to be the subject of a requested initiative for this purpose.

**Issues of Significant Public Concern must provide opportunity for public participation:**

MCA 2-3-111. Opportunity to submit views — public hearings. (1) Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit

data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public. (2) When a state agency other than the board of regents proposes to take an action that directly impacts a specific community or area and a public hearing is held, the hearing must be held in an accessible facility in the impacted community or area or in the nearest community or area with an accessible facility.

History: En. 82-4228 by Sec. 3, Ch. 491, L. 1975; amd. Sec. 24, Ch. 285, L. 1977; amd.

There is no public hearing provided as part of your consideration of a Ballot Survey of the Whitefish Doughnut area on your agenda for 10/6/11.

### **Reasonable Opportunity To Submit Comment Requires Reasonable Notice:**

On September 29, 2011, you faxed a letter to the City of Whitefish notifying them that you have decided to “allow doughnut property owners themselves to decide” the question of “who they prefer to regulate them: the City of Whitefish or Flathead County.” You conclude that letter by stating that you “expect to announce the details of this election process soon.” This letter and the decision and actions that it establishes has not appeared on a county agenda providing any public notice of this action. Furthermore, your letter and the decisions reflected in it were not approved as we believe is required by resolution process established in laws governing county government including MCA 7-5-121 Resolution Requirements. No opportunity was provided to the city for comment despite the fact that you are legally joined in an Interlocal Agreement governing agreement calling for cooperation. No opportunity was provided to city or county residents to comment on your decision.

On October 3, 2011, I requested from the county elections office a copy of the proposed survey, but was told their office wasn't involved in the drafting and that I should contact the county attorney's office. On October 4, 2011, I contacted the county attorney's office by phone and, after finding that they also did not have a copy of the survey, I registered a complaint that this issue had not yet appeared on the county's agenda and that this letter from the county to the City of Whitefish on 9/28/11 represented a decision on an issue of significant public concern that had not been placed on the commissioner's agenda with adequate notice for meaningful public comment. On October 5, 2011, this issue was placed on the commissioner's agenda, but with no opportunity for public comment and with little more than 24 hours for notice—clearly not adequate notice for an issue of significant concern to the public as provided for in MCA 2-3-103 and 104.

Note that opinions of the Montana Attorney General also support the requirement for public participation and notice: “Applicability of Open Meeting and Public Participation Laws to County Commission Meetings – Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decision making process.” 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

### **Montana Constitution Protects the Public's Right to Know.**

On October 5, 2011, I went to the county commissioners' office and as no commissioner was in their office, I requested of the staff a copy of the proposed survey that was now on the commissioners' agenda for October 6<sup>th</sup> and a copy of the property owners that they proposed to mail this survey to and any other documents related to this agenda item. I was again directed to the county elections office for these documents. The

county elections office advised me that they could not release a copy of the draft survey or the list it would be mailed to until after it had received final approval from the county commissioners. I stated that I believed that these documents were public information and should be made available to the public to allow for the public to at least have some opportunity to consider these documents and to submit comment before the final decision was made by the county commissioners. I then requested that the elections officer call the county attorney's office and confirm if she was correct in withholding these documents. She did so and was told that she was correct in withholding these documents from the public.

At a minimum, the "reasonable opportunity" standard articulated in Art. II, Sec. 8, Mont. Const., and this section for the right to participate demands compliance with the right to know contained in Art. II, Sec. 9, Mont. Const., I believe I should have been given these documents for review prior to the commissioners' decision. The decision of the court in Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002), also supports our position that I should have been provided these documents.

**The Procedure for a local government body to refer an ordinance or resolution to the electors is established in state law MCA 7-5-132 (2)**

We believe that the county in proposing to conduct a "mail-in ballot survey" to "property owners" would be in fact doing so in violation of state law. We would urge the county to comply with state law that establishes the procedure to follow when seeking voter input on an existing resolution or ordinance, in this case the existing Interlocal Agreement between the county and the City of Whitefish. Furthermore, We believe that the county's proposal to conduct a "mail-in ballot survey" violates protections in state law that require such questions to be submitted to registered voters (MCA 7-5-132 and 7-5-136) not property owners, that the ballot set forth fully the ordinance or resolution sought to be repealed or retained (MCA 7-5-132(b)), be in the form prescribed in Title 13, Chapter 27 of the MCA, and be filed within the time prior to the election to allow for adequate time for voter consideration of the issue proposed (MCA 13-27-104 and 7-5-136 (2)).

Additionally, we have concerns that the proposed ballot survey process has the following flaws:

1. By requesting the "vote" of property owners rather than registered voters those owning multiple lots within the doughnut area will likely receive more votes violating constitutional safeguards of one person one vote.
2. If property is in the name of multiple owners or corporations, do they each receive a vote?
3. Signatures of registered voters may be verified in compliance with election procedures whereas those of property owners may not be verifiable, or the county likely does not have the capacity to do this.
4. Mailing ballots to property owners relies on physical addresses, which may or not have a mail receptacle disadvantaging those who use a PO Box for mail and resulting in a loss of opportunity to vote. Registered voters are required to provide both a physical address and a mailing address.
5. Mailing ballots to property owners disenfranchises voters who are not property owners including family members or relatives who are not a listed property owner, but who would otherwise be eligible to vote. It also disenfranchises renters. Additionally, it gives decision making authority to some property owners who do not live in the state or who are registered to vote outside of the doughnut, or to banks or realtors or corporations who hold property for largely investment purposes.
6. If the question proposed in the survey is one of asking should the county or the city govern in the doughnut, we feel this question does not recognize the joint planning between the city and county that is outlined in the existing Interlocal Agreement and thus misrepresents the current agreement.

Additionally, your letter again fails to acknowledge the potential of an elected community council as a tool to provide more direct representation of doughnut residents.

**The timing and use of this proposed ballot survey by the County Commissioners may well constitute a violation of MCA 2-2-121 Rules of Conduct for Public Officers and Public Officials when considered in conjunction with the legal issues raised above.**

This statute states:

“ (3)(a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, 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 a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office. With respect to ballot issues, properly incidental activities are restricted to:

(i) the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations;”

**In conclusion, we would respectfully request that the Flathead County Commissioners abandon this proposed ballot survey for the reasons raised in this letter and instead comply with state laws including MCA 7-5-132 that provide proper procedures to follow when seeking public input on a resolution or ordinance and county action based on such input.** Additionally, we ask that you postpone any discussion or decision today on your agenda item due to lack of timely public notice, reasonable opportunity to be heard on an issue of significant public input, and failure to provide access to documents that are necessary for the public to be able to meaningfully participate.

We appreciate and ask for your careful consideration of our comments. Citizens for a Better Flathead’s mission is to foster informed and active citizen participation in the decisions shaping the Flathead’s future, and to champion the democratic principles, sustainable solutions, and shared vision necessary to keep the Flathead *Special Forever!* We represent over 1500 voices for sound planning in the Flathead.

Sincerely,

Mayre Flowers, Executive Director