

VOLUME NO. 34

Opinion No. 47

**ELECTIONS - Voters, taxpayer qualifications; ELECTIONS - Petitioners, taxpayer qualifications; COUNTY CLERKS AND RECORDERS - Lists of electors. Article IX, section 2, Constitution of Montana; sections 16-1601, 16-1709, 16-4302, 23-2701.1 and 23-3012, R.C.M. 1947.**

- HELD:**
- 1. Taxpayer qualifications for elections as provided for in Article IX, section 2, Constitution of Montana, are invalid.**
  - 2. Taxpayer qualifications for petitioning are presumed valid.**
  - 3. It is no longer mandatory for the county registrar to stamp "taxpayer" beside the name of an elector as required by section 23-3012, R.C.M. 1947.**

June 29, 1972

Mr. J. Fred Bourdeau  
Cascade County Attorney  
County Courthouse  
Great Falls, Montana 59401

Dear Mr. Bourdeau:

You have requested my opinion on the following matter concerning elections in Montana. You state:

“It is not clear to this office which if any elections for the creation of a public debt or liability or other purpose may now be validly limited to taxpayers or freeholders. The reason this request is made is that if any election may be so limited, it is necessary for the office of the County Clerk and Recorder to search the tax rolls. This is an expensive and time-consuming process and we wish to avoid it where it is not necessary.”

Section 23-3012, Revised Codes of Montana, 1947, provides that:

“(1) Immediately after registration is closed, the registrar shall prepare lists of all registered electors. He shall also prepare a precinct register for each precinct and deliver it to the judges of election prior to the opening of the polls.

“(2) The registrar shall stamp “taxpayer” beside the name of an elector who is a taxpayer to show he is qualified to vote in an election **at which voting is validly limited by the constitution to taxpayers.**” (Emphasis supplied)

Because of decisions of the Supreme Court of the United States, the Montana legislative assembly found it necessary to state the policy of the state regarding the question of which electors may vote at an election to create a debt or liability. Section 23-2701.1, R.C.M. 1947, provides:

“Section 2 of article IX of the Montana constitution provides that in order to entitle a person to vote upon a question which may be submitted to a vote of the people or electors, if the question concerns the creation of any levy, debt or liability, he must, in addition to possessing other qualifications, be a taxpayer whose name appears on the last preceding completed assessment roll. Recent decisions of the supreme court of the United States hold that similar provisions in the constitutions and statutes of other states are in conflict with the equal protection clause of the fourteenth amendment to the constitution of the United States. The ability of the state and of its counties, cities, towns and school districts and other political subdivi-

sions to provide funds needed for essential governmental purposes depends in substantial part upon their ability to create valid debts and liabilities and, when the same are required by law or the constitution to be submitted to a vote of the people or electors, to record and canvass such vote in such manner as to determine finally and conclusively whether or not the debt or liability has been approved by the required majority vote of the electors qualified and offering to vote thereon. It is therefore the policy and purpose of this law to eliminate all statutory electors' qualifications for voting on the creation of any public debt or liability except such qualifications as are validly by or pursuant to the Montana constitution; to provide an adequate procedure for hearing and determination of any issue raised with reference to such qualifications; and to limit to a reasonable time the period within which such issues may be raised."

Subsequent to the enactment of the above-quoted statutes, the Supreme Court of Montana dealt with the question of taxpayer qualification as set forth in Article IX, section 2 of the Montana Constitution. The court said in *State ex rel. Ward v. Anderson*, Mont. , 491 P. 2d 868, at page 870:

"In 1970 in *City of Phoenix, Arizona v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523, the United States Supreme Court held that the provisions of the Arizona constitution and statutes excluding nonproperty owners from elections for the approval of the issuance of general obligation bonds violated the equal protection clause of the Fourteenth Amendment of the United States Constitution.

"Earlier, in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, the Court held that a state may not restrict the right to vote in revenue bond elections to property taxpayers.

"These decisions make it clear that that portion of Article IX, Section 2, of the Montana Constitution, quoted above (the taxpayer qualification portion), is invalid. The Montana Legislature recognized this by enacting Chapter 234, Laws of 1971, which allows all qualified electors to vote on local bond issues, and by voting to submit a proposed amendment to Article IX, Section 2, which will, if approved by the voters, delete the invalid requirement. Chapter 159, Laws of 1971.

"As of now, that portion of Article IX, Section 2, of the Montana Constitution which restricts the franchise in certain elections to taxpayers is invalid." (Bracketed words supplied)

Pursuant to the decision in **Ward**, it would thus appear that there is no election at which voting is validly limited by the constitution to taxpayers. Further, section 23-2701.1, *supra*, states that:

“It is the policy and purpose of this law to eliminate all statutory electors’ qualifications for voting purposes on the creation of any public debt or liability except such qualifications as are validly by or pursuant to the Montana constitution; . . .” (Emphasis supplied)

Thus, in the case of an election to create a public debt or liability, there are no longer any requirements that the elector be a taxpayer. However, the provisions of section 23-2701.1, *supra*, and the decision in **Ward** have not eliminated the necessity for a county clerk and recorder to certify under certain circumstances the names of taxpayers as they appear on the last completed assessment roll.

By way of illustration, the creation of a public hospital district is one instance when the taxpayer classification is necessary before action may be taken. Section 16-4302, R.C.M. 1947, provides in part:

“Proceedings for creation of a hospital district shall be initiated by a petition, signed by not less than thirty per centum (30%) of the qualified electors of the proposed hospital district, who are taxpayers upon property within the proposed hospital district and whose names appear on the last completed assessment roll for state and county taxes. . . . The complete petition, addressed to the board of county commissioners of the county in which the proposed district is situated, shall be filed with the county clerk, who shall within fifteen (15) days thereafter, carefully examine the same and the county records showing the qualifications of the petitioners, . . .” (Emphasis supplied)

While not exclusive, other examples of situations in which taxpayer or freeholder status must be determined for non-election purposes include the creation of special improvement districts and weed control districts under sections 16-1601 and 16-1709, R.C.M. 1947, respectively. Taxpayer qualifications for petitioning have not been specifically ruled on by the Montana Supreme Court nor the United States Supreme Court and, therefore, must be presumed to be valid and constitutional. *State ex rel. Keast v. Krieg*, 145 Mont. 521, 528, 402 P.2d 405 (1965).

Based upon the expressed policy and purpose of the legislature in section 23-2701.1, *supra*, and the phrasing of section 23-3012, *supra*, it would appear that the intention of the legislature was that the “taxpayer” designation beside an elector’s name need be carried only so long as the constitutional taxpayer qualification for elections remains valid. However, as pointed out above, there are other instances when

the taxpayer qualification may be validly necessitated. Thus, while section 23-3012, supra, would no longer appear to require the keeping of the taxpayer lists referred to therein, the clerk and recorder might find it less costly and time-consuming to maintain the list from year to year rather than searching the records when a situation such as that described in the creation of a hospital district arises.

THEREFORE, IT IS MY OPINION that:

1. Taxpayer qualifications for elections provided for in Article IX, section 2, Constitution of Montana, are no longer valid.
2. Taxpayer qualifications for petitioning have not been ruled invalid by the Montana Supreme Court and must therefore be presumed valid.
3. It is no longer mandatory to stamp "taxpayer" beside the name of an elector on a list of registered electors as required by section 23-3012, R.C.M. 1947.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General