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Legal Opinion 2016-029

TO: Mayor John Engen; City Council; Dale Bickell; Chief Administrative Officer; Steve Johnson; Laurie Pfau; Leigh Griffing; Finance Director; Dept. City Clerk; Ginny Merriam

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE December 20, 2016

RE: Montana law and City of Missoula Charter provisions for filling a vacancy in a City Council office

FACTS:

Monday evening, December 19, 2016, Ward 2 City Council member Harlan Wells publicly announced he was soon resigning from office in order to accept employment in Helena, Montana. City Council member Harlan Wells was elected to the City Council in Ward 2 in November 2015.

ISSUES:

- (1) How is a vacancy in a City Council elected office filled in Montana?
- (2) How soon must the city council fill a vacancy in a City Council elective office?
- (3) How many city council members must vote in favor of a City Council election/selection to successfully fill a City Council vacancy?
- (4) How long is the City Council office held by the person elected/selected/appointed to fill a vacancy in a City Council office?

CONCLUSIONS:

- (1) Pursuant to Mont. Code Ann. §§ 7-4-4112(1) and (3) as well as 7-5-4121(2), pending a city council election, the city council shall elect/select/appoint, by a majority vote of its current City Council membership, a person from the same City Council Ward to hold the City Council office until a successor is elected and qualified by the appropriate City electors.

- (2) Pursuant to Mont. Code Ann. § 7-4-4112 and ARTICLE VIII § 2 of the Missoula City Charter, the city council shall, within 30 days of the vacancy appoint someone from the city council ward where the vacancy exists to hold the office until an election of a qualified person occurs.
- (3) If there are twelve city council members at the time of the vote, it will take seven votes to successfully fill the position. However, if the position is vacant at the time of the vote, it will take a majority of the remaining eleven, or six votes to successfully fill the vacant position.
- (4) The office is held by the person appointed by the city council until a successor is elected and qualified at the next general municipal election.

LEGAL DISCUSSION:

Several provisions of the City of Missoula's Charter, effective January 1, 1997 (as amended 2007) pertain to city council member eligibility, residency and terms of office. Article II, § 3 of the city's charter provides in pertinent part: "Each ward shall be represented on the City Council by two City Council members who shall reside in that ward." Article II, § 4 provides:

4. **Term of office.** Each City Council member shall be elected in odd numbered years for a term of four years. Terms of City Council members within each ward shall be staggered so the terms of the City Council members from each ward shall overlap.

Four year terms for city council members with staggered terms are consistent with the provisions of state municipal government law. Mont. Code Ann. §§ 7-4-4402, 7-3-222 and 7-3-224.

Article II, § 5 Missoula City Charter provides:

5. **Eligibility.** Only registered voters who are residents of the City shall be eligible to hold the office of City Council member. Both candidates for the office of City Council member, and City Council members must reside in the ward they represent.

Pursuant to Mont. Code Ann. § 7-1-114(1)(d), pertaining to *Mandatory provisions* of state law applicable to local governments, "A local government with self-government powers is subject to . . . all laws regulating the election of local officials."

It should be noted pursuant to City Council Rule 32(F), if the city council member vacating their elected position is still holding office at the time of the selection of a successor the "vacating Council member may vote for their replacement." (*Emphasis added*)

Mont. Code Ann. § 7-4-4112 provides:

7-4-4112. Filling of vacancy. (1) When a vacancy occurs in any elective office, this position is considered open and subject to nomination and election at the next general municipal election in the same manner as the election of any other person holding the same office, except the term of office is limited to the unexpired term of the person who originally created the vacancy. Pending an election and qualification, the council shall, by a majority vote of the members, appoint a person within 30 days of the vacancy to hold the office until a successor is elected and qualified.

(2) If all council positions become vacant at one time, the board of county commissioners shall appoint persons within 5 days to hold office as a city council member. The appointed city council member shall then appoint persons to any other vacant elective offices.

(3) A vacancy in the office of city council member must be filled from the ward in which the vacancy exists.

ARTICLE VIII § 2 Missoula City Charter basically restates section 7-4-4112 MCA. ARTICLE VIII § 2 states:

2. Filling of vacancies. (1) When any vacancy occurs in any elective office, unless otherwise provided for by state or federal law, this position shall be considered open and subject to nomination and election at the next general City election in the same manner as the election of any other person holding the same office, except the term of office shall be limited to the unexpired term of the person who originally created the vacancy. Pending such election and qualification the City Council shall, by a majority vote of the members, appoint a person within 30 days of the vacancy to hold the office until the successor is elected and qualified.

(2) If all City Council positions become vacant at one time, the board of county commissioners shall appoint, in accordance with state law, persons within 5 days to hold office as City Council members. The appointed City Council members shall then appoint persons to any other vacant elective offices in the manner provided by state law.

(3) A vacancy in the office of City Council member must be filled by an elector from the ward in which the vacancy exists.

It must be noted that the city council appointment of a person to fill a vacancy in an elective office is only valid until a successor is elected and qualified at the next municipal election.

Article VIII, § 2 Missoula City Charter provides:

2. Filling of vacancies. (1) When any vacancy occurs in any elective office, unless otherwise provided for by state or federal law, this position shall be considered open and subject to nomination and election at the next general City election in the same manner as the election of any other person holding the same office, except the term of office shall be limited to the unexpired term of the person who originally created the vacancy. Pending such election and qualification the City Council shall, by a majority vote of the members, appoint a person within 30 days of the vacancy to hold the office until the successor is elected and qualified.

...

(3) A vacancy in the office of City Council member must be filled by an elector from the ward in which the vacancy exists.

Mont. Code Ann. § 7-5-4121 provides:

7-5-4121. Conduct of council business. (1) A majority of the members of the council constitute a quorum for the transaction of business, but a less number may meet and adjourn to any time stated and may compel the attendance of absent members, under such rules and penalties as the council may prescribe.

(2) The ayes and noes must be called and recorded on the final passage of any ordinance, bylaw, or resolution or the making of any contract. The voting on the election or appointment of any officer must be *viva voce*. A majority of the whole number of the members elected is requisite to appoint or elect an officer, and such vote must be recorded

The Montana Supreme Court indicated in *State ex. Rel. Wilson v. Willis*, 47 M 548, 133 P 962 (1913), that the statutory requirement for a vote of "a majority of the members" of the city council to fill a municipal elected office means a majority of those constituting the actual membership of the body at the time the vote occurs. Therefore, if the city council office is not currently vacant, seven of the twelve city council members must vote in favor of the appointment to successfully fill the vacancy. However, if the city council position is vacant at the time the vote occurs, six of the remaining eleven city council members must vote in favor of the appointment to successfully fill the vacancy.

CONCLUSIONS:

(1) Pursuant to Mont. Code Ann. §§ 7-4-4112(1) and (3) as well as 7-5-4121(2), pending a city council election, the city council shall elect/select/appoint, by a majority vote of its current City Council membership, a person for the same City Council Ward to hold the City Council office until a successor is elected and qualified by the appropriate City electors.

- (2) Pursuant to Mont. Code Ann. § 7-4-4112 and ARTICLE VIII § 2 of the Missoula City Charter, the city council shall within 30 days of the vacancy appoint someone from the city council ward where the vacancy exists to hold the office until an election of a qualified person occurs.
- (3) If there are twelve city council members at the time of the vote, it will take seven votes to successfully fill the position. However, if the position is vacant at the time of the vote, it will take a majority of the remaining eleven, or six votes to successfully fill the vacant position.
- (4) The office is held by the person appointed by the city council until a successor is elected and qualified at the next general municipal election.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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