

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2017-009

TO: Mayor John Engen; City Council; Dale Bickell; Marty Rehbein; Kirsten Hands; Kelly Elam; Mike Haynes; Denise Alexander; Mary McCrea; Laval Means; Donna Gaukler; Ellen Buchanan; Jessica Miller; Heidi Bakula; Rod Austin; Tiffany Brander; Mike Brady; Scott Hoffman

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE March 16, 2017

RE: City local government public board or commission positions may be declared vacant if board or commission member ceases to discharge duties of office for three (3) consecutive months or alternatively openly neglects and refuses to discharge duties of office.

FACTS:

Concern has been expressed to the city clerk's office that a member of a city commission has not attended the commission meetings for approximately nine (9) months.

ISSUE(S):

Does Montana state law provide any guidance with respect to when a public office might be declared vacant?

CONCLUSION(S):

Yes, sections 2-16-501 and 7-4-4111 MCA both provide statutory guidelines or criteria as to when a public government office might be determined to be vacant. Subsections 2-16-501(7) and 7-4-4111(8) MCA both provide that a public office may be determined to be vacant if the incumbent ceases to discharge the duties of the office for a period of three (3) consecutive months.

LEGAL DISCUSSION:

Persons appointed to government boards, commissions, or authorities are representatives of the appointing government entity. Often these appointed representatives are commonly referred to as officers of the government; since they are representing the government, even though, generally, these representatives do not receive any salary or monetary compensation for their public service. At the municipal local government level, these representatives are generally either elected by the governing body (city council) or appointed by the mayor (generally with the approval of the city council).

Title 2, chapter 16 Montana Code Annotated(MCA) is entitled PUBLIC OFFICERS. Title 2, chapter 16, part 5 MCA is entitled “VACANCY AND SUCCESSION”. Section 2-16-501 MCA is entitled “VACANCIES CREATED” and provides as follows:

2-16-501. Vacancies created. An office becomes vacant on the happening of any one of the following events before the expiration of the term of the incumbent:

- (1) the death of the incumbent;
- (2) a determination pursuant to Title 53, chapter 21, part 1, that the incumbent suffers from a mental disorder and is in need of commitment;
- (3) resignation of the incumbent becoming effective;
- (4) removal of the incumbent from office;
- (5) the incumbent's ceasing to be a resident of the state or, if the office is local, of the district, city, county, town, or township for which the incumbent was chosen or appointed or within which the duties of the incumbent's office are required to be discharged;
- (6) except as provided in **10-1-1008**, absence of the incumbent from the state, without the permission of the legislature, beyond the period allowed by law;
- (7) the incumbent's ceasing to discharge the duty of the incumbent's office for the period of 3 consecutive months, except when prevented by sickness, when absent from the state by permission of the legislature, or as provided in 10-1-1008;
- (8) conviction of the incumbent of a felony or of an offense involving moral turpitude or a violation of the incumbent's official duties;
- (9) the incumbent's refusal or neglect to file the incumbent's official oath or bond within the time prescribed;
- (10) the decision of a competent tribunal declaring void the incumbent's election or appointment. *(Emphasis added)*

A similar statutory provision is set forth in Montana municipal government state laws as well in section 7-4-4111 MCA entitled “DETERMINATION OF VACANCY IN MUNICIPAL OFFICE”. Section 7-4-4111 MCA provides as follows:

7-4-4111. Determination of vacancy in municipal office. An office becomes vacant on the happening of any of the following events before the expiration of the term of the incumbent:

- (1) the death of the incumbent;
- (2) a determination pursuant to Title 53, chapter 21, part 1, that the incumbent is mentally ill;
- (3) the incumbent's resignation;
- (4) the incumbent's removal from office;
- (5) the incumbent's absence from the city or town continuously for 10 days without the consent of the council;
- (6) the incumbent's open neglect or refusal to discharge duties;
- (7) the incumbent's ceasing to be a resident of the city or town or, in the case of a city council member, ceasing to be a resident of the city council member's ward. This subsection does not apply to an appointed municipal officer who resides outside the city or town limits with the approval of the city or town governing body and within a distance of the city or town approved by the governing body.
- (8) the incumbent's ceasing to discharge the duty of office for a period of 3 consecutive months, except when prevented by illness or when absent from the city or town by permission of the governing body;
- (9) the incumbent's conviction of a felony or of any offense involving moral turpitude or a violation of official duties;
- (10) the incumbent's refusal or neglect to file an official bond within the time prescribed;
- (11) the decision of a competent tribunal declaring void the incumbent's election or appointment. *(Emphasis added)*

The Montana Attorney General has relied on Montana state law provisions such as those quoted above to determine that an appointed local government urban renewal agency commission member loses their seat on the board if the person ceases to be a resident of the municipality that created the board. See 41 Attorney General Opinion 1 (1985) holding that it is a condition of both appointment and continued service on the municipal urban renewal agency board of commissioners that each commissioner be a resident of the municipality. The attorney general discusses both sections 2-16-501 as well as 7-4-4111 MCA, noting that arguably section 7-4-4111 MCA applies to municipal officer appointments such as the urban renewal agency board; but section 2-16-501 MCA clearly applies since it explicitly applies to an office becoming vacant pursuant to the factual circumstances identified in section 2-16-501 MCA.

Pursuant to subsection 7-4-4111(6) MCA a municipal office may also be determined to be vacant based on the incumbent's open neglect or refusal to discharge duties.

Another alternative means of addressing the neglect of duties or abandonment of office could occur pursuant to section 7-4-4113 MCA entitled "REMOVAL OF APPOINTED OFFICER". Section 7-4-4113 MCA provides:

"7-4-4113. REMOVAL OF APPOINTED OFFICER. The council, upon written charges to be entered upon their journal, after notice to the party, and after trial by the council, may remove any nonelected officer by vote of two-thirds of all the members-elect."

Note that the statutory phrase "by vote of two-thirds of all the members-elect" requires a vote of at least two-thirds of the entire city council governing body, or at least eight (8) of the twelve (12) city council members.

CONCLUSION(S):

Yes, sections 2-16-501 and 7-4-4111 MCA both provide statutory guidelines or criteria as to when a public government office might be determined to be vacant. Subsections 2-16-501(7) and 7-4-4111(8) MCA both provide that a public office may be determined to be vacant if the incumbent ceases to discharge the duties of the office for a period of three (3) consecutive months.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN:ajg