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Legal Opinion 2010-001

TO: John Engen, Mayor; City Council; Bruce Bender; Marty Rehbein; Nikki Rogers; Kelly Elam; Brett Ramharter; Gail Verlanic; Anne Guest; Ellen Buchannan; Chris Behan; Donna Gaukler; Jackie Corday; Steve King; Kevin Slovarp; Mike Painter; Jason Diehl; Jeff Logan; Roger Millar; Mike Barton; Mark Muir; Mike Brady; Chris Odlin; Gregg Willoughby; Scott Hoffman; Dept. Atty

FROM: Jim Nugent, City Attorney

DATE January 15, 2010

RE: City Council votes requiring at least a majority of the total number of actual city council members or an extraordinary majority vote of city council members in order for a proposed action to be adopted

FACTS:

Statutory provisions in Montana state law, city charter, city ordinance or city council rules expressly require a favorable city council vote of at least a majority of the whole number of total city council members or an extraordinary majority vote of the entire city council to approve the specific item or motion pending before the city council. The purpose of this legal opinion is to provide updated laws and to inform our new city council member and new city administrative officers as well as remind incumbents of the many statutory provisions, city council rules and ordinance provisions that expressly require a favorable city council vote by a majority or extraordinary majority of the entire city council membership in order for a particular item to be successfully approved by the city council.

ISSUE:

In what circumstances is the city council required to have a favorable vote of at least a majority of the whole number of total city council members or an extraordinary majority of the city council membership in order for the proposed action to be favorably adopted?

CONCLUSION:

Numerous provisions in Montana statutes, city charter, city ordinance and city council rules require a successful city council vote to have either an extraordinary majority of its membership or at least a majority of its entire membership to vote favorably in order for a proposed action to be successfully approved or adopted.

LEGAL DISCUSSION:

The following Montana State statutes, city charter, city ordinances and city council rule provisions require a favorable vote of an extraordinary majority or a majority of the total city council membership in order for the proposed action to be favorably adopted by the city council.

1. Mont. Code Ann. § 7-8-4201 – Disposal of municipal property.

7-8-4201. Disposal or lease of municipal property. (1) Subject to the provisions of subsection (2), the city or town council may sell, dispose of, donate, or lease any property belonging to the city or town.

(2) (a) Except for property described in subsection (3), the lease, donation, or transfer must be made by an ordinance or resolution passed by a two-thirds vote of all the members of the council.

(b) Except for property acquired by tax deed or property described in subsection (3), if the property is held in trust for a specific purpose, the sale or lease must be approved by a majority vote of the electors of the municipality voting at an election called for that purpose. The election must be held in conjunction with a regular or primary election.

(3) If a city or town owns property containing a historically significant building or monument, the city or town may sell or give the property to nonprofit organizations or groups that agree to restore or preserve the property. The contract for the transfer of the property must contain a provision that:

(a) requires the property to be preserved in its present or restored state upon any subsequent transfer; and

(b) provides for the reversion of the property to the city or town for noncompliance with conditions attached to the transfer.

(4) This section may not be construed to abrogate the power of the board of park commissioners to lease all lands owned by the city that were acquired for parks within the limitations prescribed by 7-16-4223.

(5) A city or town may donate land or sell the land at a reduced price to a corporation for the purpose of constructing:

(a) a multifamily housing development operated by the corporation for low-income housing;

(b) single-family houses. Upon completion of a house, the corporation shall sell the property to a low-income person who meets the eligibility requirements of the corporation. Once the sale is completed, the property becomes subject to taxation.

(c) improvements to real property or modifying, altering, or repairing improvements to real property that will enable the corporation, subject to the restrictions of Article X, section 6, of the Montana constitution, to pursue purposes specified in the articles of incorporation of the corporation, including the sale, lease, rental, or other use of the donated land and improvements.

(6) Land that is transferred pursuant to subsection (5) must be used to permanently provide low-income housing. The transfer of the property may contain a reversionary clause to reflect this condition. (Emphasis added.)

Note: this state law requires "a two-thirds vote of all the members of the Council"; not simply a two-thirds vote of those city council members present or present and voting. At least eight Missoula City Council members must vote to approve the lease, donation or transfer of municipal property. (Emphasis added.)

2. Mont. Code Ann. § 76-2-305 - Rezoning where 25% or more of the property being zoned or property owners of those lots 150 feet from a lot included in a proposed change protest in writing a zoning regulation, amendment or repeal.

76-2-305. Alteration of zoning regulations -- protest. (1) A regulation, restriction, and boundary may be amended, supplemented, changed, modified, or repealed. The provisions of 76-2-303 relative to public hearings and official notice apply equally to all changes or amendments.

(2) An amendment may not become effective except upon a favorable vote of two-thirds of the present and voting members of the city or town council or legislative body of the municipality if a protest against a change pursuant to subsection (1) is signed by the owners of 25% or more of:
(a) the area of the lots included in any proposed change; or
(b) those lots 150 feet from a lot included in a proposed change.
(Emphasis added.)

If a statutorily valid protest is submitted, the zoning "amendment shall not become effective except by the favorable vote of two-thirds of the present and voting members of the city or town council." (Emphasis added.) Also see former section 19.72.030 Missoula Municipal Code and 20.85.050(H)(3) Missoula Municipal Code New Zoning Code.

3. Mont. Code Ann. § 76-2-306 - City council time extension extending interim zoning ordinances.

76-2-306. Interim zoning ordinances. (1) The city or town council other legislative body of such municipality, to protect the public safety, health and welfare and without following the procedures otherwise required preliminary to the adoption of a zoning ordinance, may adopt as an urgency measure an interim ordinance prohibiting any uses which may be in conflict with a contemplated zoning proposal which the legislative body is considering or studying or intends to study within a reasonable time.

(2) Such interim ordinance shall only be applicable within the city limits and up to 1 mile beyond the corporate boundaries of the city or town and shall take effect upon passage; provided, however, a hearing is first held upon notice reasonably designed to inform all affected parties and in no event shall notice be less than publication in a newspaper of general circulation at least 7 days before the hearing.

(3) Such interim ordinance shall be of no further force and effect 6 months from the date of adoption thereof. However, after notice pursuant to 76-2-303 and pursuant to public hearing, the legislative body may extend such interim ordinance for 1 year. Any such extension shall require a two-thirds vote for passage and shall become effective upon passage. Not more than two such extensions may be adopted. (Emphasis added.)

4. Mont. Code Ann. § 7-5-4121 - City council voting on the election or appointment of a city officer.

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. (Emphasis added.)

"A majority of the whole number of" city council members elected must vote for the election or appointment of a City officer in order for the election or appointment to be effective. Also see the following Montana Supreme Court decisions: State v. Swanberg, 299 P.2d 446 (1956); State v. Rogers, 93 Mont. 355, 18 P.2d 617 (1933); and State ex re. Peterson v. Peck, 91 Mont. 5, 4 P.2d 1086 (1931).

5. Mont. Code Ann. § 7-4-4112 - City council election to fill a vacancy in any elected city office.

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. (Emphasis added.)

This statute expressly requires a favorable vote of "a majority vote of the members," and not simply a majority vote of the city council members present. The Montana Supreme Court has stated that in the situation where there is an actual existing vacancy in the city council membership itself at the time the city council votes to fill the vacancy the required vote is a majority of those constituting the remaining actual membership at the time of the vote. See State ex rel. Wilson v. Willis, 133 P.962, 964 (1913).

6. Missoula City Charter, Article III, Section 9, Mont. Code Ann. §§ 7-5-4206 and 7-3-214(2) - City council override of mayoral veto of an ordinance or resolution or any part of an ordinance or resolution requires two-thirds vote of entire city council.

Missoula City Charter, Article III, The Mayor, Section 9 provides:

9. Vetoes. The Mayor shall have the authority to veto any ordinance or resolution, in whole or in part, of the City Council. The Mayor shall return any vetoed item to the next regular meeting of the City Council with any objections in writing. The Mayor's veto is subject to an override by a two-thirds vote of the full City Council at the next regularly scheduled meeting of the City Council following issuance of the veto. (Emphasis added.)

Initially, it should be noted that Mont. Code Ann. § 7-5-4205(3) empowers a mayor to "(3) veto any objectionable part of a resolution or ordinance and approve the other parts" in essence a mayoral line item veto power. Two separate statutory provisions in Montana law, §§ 7-5-4206 and 7-3-214(2), expressly establish a requirement that at least a two-thirds vote of all the elected city council members is necessary to override a mayoral veto.

7-5-4206. Procedure to veto ordinance or resolution. (1) In case an ordinance or resolution does not meet the mayor's approbation, the mayor has power to return the same to the next regular meeting of the council, with all objections in writing. No ordinance or resolution so vetoed by the mayor must go into effect unless the same be afterwards passed by two-thirds vote of the whole number of members of the council.

(2) If the mayor fails to return any resolution or ordinance as aforesaid, the same takes effect without further action. (Emphasis added.)

Mont. Code Ann. § 7-3-214(2) provides that the executive (mayor) may:

(2) veto ordinances and resolutions, subject to override by a two-thirds vote of the commission (council). (Emphasis added.)

7. Impact fees for "other public facilities" not specifically statutorily identified in subsection 7-6-1601(7) MCA. Implemented after the adoption date of the state impact fee law

7-6-1601. Definitions. As used in this part, the following definitions apply:

(1) (a) "Capital improvements" means improvements, land, and equipment with a useful life of 10 years or more that increase or improve the service capacity of a public facility.

(b) The term does not include consumable supplies.

(2) "Connection charge" means the actual cost of connecting a property to a public utility system and is limited to the labor, materials, and overhead involved in making connections and installing meters.

(3) "Development" means construction, renovation, or installation of a building or structure, a change in use of a building or structure, or a change in the use of land when the construction, installation, or other action creates additional demand for public facilities.

(4) "Governmental entity" means a county, city, town, or consolidated government.

(5) (a) "Impact fee" means any charge imposed upon development by a governmental entity as part of the development approval process to fund the additional service capacity required by the development from which it is collected. An impact fee may include a fee for the administration of the impact fee not to exceed 5% of the total impact fee collected.

(b) The term does not include:

(i) a charge or fee to pay for administration, plan review, or inspection costs associated with a permit required for development;

(ii) a connection charge;

(iii) any other fee authorized by law, including but not limited to user fees, special improvement district assessments, fees authorized under Title 7 for county, municipal, and consolidated government sewer and water districts and systems, and costs of ongoing maintenance; or

(iv) onsite or offsite improvements necessary for new development to meet the safety, level of service, and other minimum development standards that have been adopted by the governmental entity.

(6) "Proportionate share" means that portion of the cost of capital system improvements that reasonably relates to the service demands and needs of the project. A proportionate share must take into account the limitations provided in 7-6-1602.

(7) "Public facilities" means:

- (a) a water supply production, treatment, storage, or distribution facility;
- (b) a wastewater collection, treatment, or disposal facility;
- (c) a transportation facility, including roads, streets, bridges, rights-of-way, traffic signals, and landscaping;
- (d) a storm water collection, retention, detention, treatment, or disposal facility or flood control facility;
- (e) a police, emergency medical rescue, or fire protection facility; and
- (f) other facilities for which documentation is prepared as provided in 7-6-1602 that have been approved as part of an impact fee ordinance or resolution by:
 - (i) a two-thirds majority of the governing body of an incorporated city, town, or consolidated local government; or
 - (ii) a unanimous vote of the board of county commissioners of a county government. (Emphasis added.)

8. Mont. Code Ann. § 7-5-4103 – Council rules and discipline.

7-5-4103. Council rules and discipline. The council may determine the rules of its proceedings, punish its members for improper conduct, and expel any member for the same by a two-thirds vote of the members elected. (Emphasis added.)

9. Mont. Code Ann. §7-4-4105 – Authority to abolish appointive municipal offices.

7-4-4105. Authority to abolish appointive municipal offices. The city or town council may abolish, by a majority vote of the council, any office, except that of city judge, the appointment to which is made by the mayor with the advice and consent of the council and may discharge any officer so appointed. (Emphasis added.)

10. Mont. Code Ann. § 7-4-4113 - City council removal of appointed officer.

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. (Emphasis added.)

11. Mont. Code Ann. §§ 7-5-104 and 7-5-4204 - City council enactment of emergency ordinances.

7-5-104. Emergency ordinance. In the event of an emergency, the governing body may waive the second reading. An ordinance passed in response to an emergency shall recite the facts giving rise to the emergency and requires a two-thirds vote of the whole governing body for passage. An

emergency ordinance shall be effective on passage and approval and shall remain effective for no more than 90 days. (Emphasis added.)

7-5-4204. Details relating to emergency measures. In the case of emergency measures, the emergency must be expressed in a preamble or in the body of the measure and the measure must receive a two-thirds vote of all the members elected. In emergency ordinances, the resolutions shall include only such measures as are immediately necessary for the preservation of peace, health, and safety and shall not include:

- (1) a franchise or license to a corporation or individual;
- (2) any provisions for the sale of real estate;
- (3) any lease or letting of any property for a period exceeding one year; or;
- (4) the purchase or sale of personal property exceeding \$5,000 in value.

(Emphasis added.)

Enactment of emergency ordinances requires that at least eight members of the 12 member Missoula City Council vote to approve.

12. Mont. Code Ann. § 7-6-4032 - Emergency expenditures.

7-6-4032. Emergency expenditures. (1) Emergency budget appropriations must be adopted by two-thirds of the members of a governing body who are present at a meeting. (Emphasis added.)

(2) Emergency expenditures are limited to and must be charged to the adopted emergency budget appropriations.

(3) The governing body may submit the question of funding emergency warrants at an election as provided by law.

13. Mont. Code Ann. § 7-14-4623 - City council authority to effect a transfer of parking commission property to city.

7-14-4623. Transfer of parking commission property to municipality. The legislative body of a city, at any time after the activation of a parking commission, may adopt by a two-thirds vote thereof a resolution transferring the property of the commission to the city. The city may, through such department as it may determine, exercise its powers in regard thereto by virtue of the constitution or this or other general law, but no such transfer shall be made in contravention of any covenant or agreement made with the holders of any revenue bonds of the commission theretofore issued and then outstanding. (Emphasis added.)

14. City council vote to have a special election to disincorporate city.

7-2-4902. Disincorporation by election. (1) Any city or town may be disincorporated in the manner provided in this section.

(2) If the registered electors of a city or town equal in number to at least 15% of the number of electors registered at the last municipal general election petition the board of county commissioners of the county where the city or town is situated to disincorporate the city or town or if the city governing body by a two-thirds vote of all its members resolves to disincorporate, then the board shall order a special election to be held within the city or town on the question of

disincorporating the city or town. The election must be held in conjunction with a regular or primary election. (Emphasis added.)

15. Mont. Code Ann. § 7-5-4303 - Emergency exemptions from bidding or advertising requirements for certain contracts.

7-5-4303. Exemptions from bidding or advertising requirements for certain contracts. (1) The provisions of 7-5-4302 as to advertisement for bids shall not apply upon the happening of any emergency caused by fire, flood explosion, storm, earthquake, riot, insurrection, or other similar emergency, but in such case the council may proceed in any manner which, in the judgment of three-fourths of the members of the council present at the meeting, duly recorded in the minutes of the proceedings of the council by aye an nay vote, will best meet the emergency and serve the public interest. Such emergency shall be declared and recorded at length in the minutes of the proceedings of the council at the time the vote thereon is taken and recorded.

(2) When there are sufficient funds in the budget for supplies or equipment, a city or town may, without bid, purchase such supplies or equipment from government agencies available to cities or towns when the same can be purchased by such city or town at a substantial saving to such city or town. (Emphasis added.)

Note that in this instance it is "three-fourths of the members of the council present at the meeting" not of the entire or whole governing body. (Emphasis added.)

16. Mont. Code Ann. § 19-3-201 – Contracts with political subdivisions concerning public employees retirement system coverage.

19-3-201. Contracts with political subdivisions. (1) Any municipal corporation, county, or public agency in the state may become a contracting employer and make all or specified groups of its employees members of the retirement system by a contract entered into between the board and the legislative body of the contracting employer. The contract may include any provisions that are consistent with chapter 2 and this chapter and necessary in the administration of the retirement system as it affects the contracting employer and its employees.

(2) The approval of the contract is subject to the following provisions, in addition to the other provisions of chapter 2 and this chapter:

(a) The legislative body of the contracting employer shall adopt a resolution of intention to approve the contract and containing a summary of the major provisions of the retirement system. The contract may not be approved unless the employees proposed to be included in the retirement system adopt the proposal by a majority affirmative vote in a secret ballot. The ballot at the election must include the summary of the retirement system as set forth in the resolution. The election must be conducted as prescribed by the legislative body of the contracting employer. Approval of the contract must be by the affirmative vote of two-thirds of the members of the legislative body within 40 days after the adoption of the resolution.

(b) The contract must specify that the provisions of the retirement system apply to all employees on the effective date of the contract and to all employees hired after the effective date of the contract. An employee's

membership in either the defined benefit plan or the defined contribution plan is determined on an individual basis as provided in this chapter.

(c) The contract may be amended in the manner prescribed in this section for the original approval of contracts. The contract must be approved by the board. The board may disapprove of a contract if, in the board's sole discretion, the contract adversely affects the interests of the retirement system. Any amendments to the retirement system made pursuant to Montana laws immediately apply to and become a part of the contract.

(3) The termination of the contract is subject to the following provisions, in addition to the other provisions of this chapter:

(a) The legislative body of a contracting employer shall adopt a resolution giving notice to its employees that it intends to terminate retirement system coverage.

(b) All employees covered under the retirement system must be given notice of the termination resolution and be permitted to vote for or against the resolution by secret ballot.

(c) If a majority of covered employees votes for termination, the legislative body, within 20 days after the approval of the resolution by the employees, may adopt by a two-thirds majority a resolution terminating coverage under the system effective the last day of that month and forward the resolution and a certified copy of the election results to the board.

(d) Upon receipt of the termination resolution, the board may request an actuarial valuation of the liabilities of the terminating agency to the retirement system, and the board may withhold approval of the termination of contract until satisfactory arrangements are made to provide funding for any excess accrued liabilities not previously funded by the terminating agency. (Emphasis added.)

17. Establishment of Municipal Court.

Mont. Code Ann. subsection 3-6-101(2) pertaining to the establishment of a municipal court provides that:

(2) A city may have a municipal court only if the governing body of the city elects by a two-thirds majority vote to adopt the provisions of this chapter by ordinance and, in the ordinance provides the matter in which and time when the municipal court is to be established and is to assume continuing jurisdiction over all pending city court cases. If a city judge is not an attorney and his office is abolished because a municipal court is established, the ordinance must provide that the time when the establishment of the municipal court takes effect is the date on which the municipal court judge elected at the next election held under 3-6-201 begins his term of office. The ordinance must be consistent with the provisions of this chapter. (Emphasis added.)

18. Missoula Municipal Code § 5.08.120 - City council action refusing to issue or revoking a city business license.

The Missoula City Council has established an extraordinary majority vote requirement for itself with respect to either the refusal to issue or the revocation of a city business license. Section 5.08.120 MMC provides that:

5.08.120 Right to refuse or revoke license. Whenever the council deems it in the public interest, it may, by resolution adopted by two-thirds vote of

all of the members of the council and approved by the mayor, refuse to authorize the issuance of any license provided for in this chapter, the council may, upon a two-thirds vote of all members of the council and approved by the mayor, revoke any license issued under this chapter when it is deemed in the public interest to do so. (Emphasis added.)

Note: not only is a two-thirds vote of the entire city council required, but also the mayor must approve of the city council's decision.

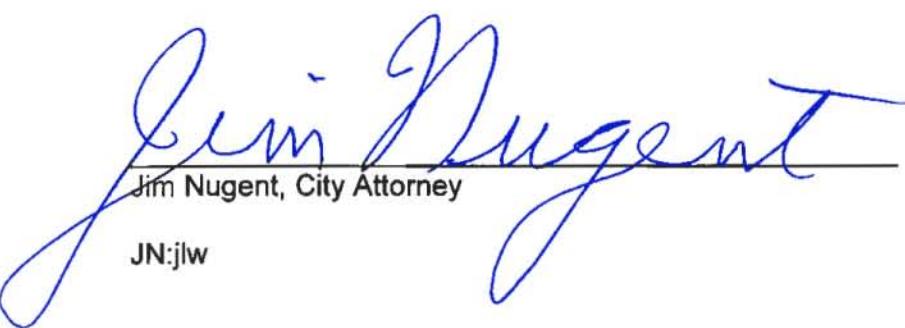
19. City Council Rules Provisions.

Several city council rule provisions require action or votes of more than a simple majority of city council members present and voting. For examples, see (A) Rule 2, Eight City Council Members may call a Special Meeting; (B) Rule 7, Suspension of Rules; (C) Rule 8, Amendment of City Council Rules; (D) Rule 11(B), Exceptions to Closing of Agenda; (E) Rule 14(D) Public Hearings: suspension of City Council rules to override a City Council member's right to return a public hearing item to City Council committee; (F) Rule 20, Reconsideration; (G) Rule 27(B), Emergency Ordinances; (H) Rule 28, Election of City Council Officers (City Council President a majority of the full council); and (I) Rule 32(G) Appointment of the Council Members to boards or commissions, a majority of the council members elected is required to approve appointment of city council members to boards and commissions.

CONCLUSION:

Numerous provisions in Montana State statutes, city charter, city ordinance and city council rules requires a successful city council vote to have either an extraordinary majority of its membership or at least a majority of its entire membership to vote favorably in order for a proposed action to be successfully approved or adopted.

OFFICE OF THE CITY ATTORNEY


Jim Nugent, City Attorney

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