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**OFFICE OF THE CITY ATTORNEY**

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**Legal Opinion 2010-002**

**TO:** John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Roger Millar, OPG Director; Mike Barton, OPG; Steve King, Public Works; Kevin Slovarp, City Engineer; Marty Rehbein, City Clerk

**FROM:** Jim Nugent, City Attorney

**DATE** January 15, 2010

**RE:** De facto holdover appointed public officers or officials when no successor is qualified and timely legally appointed in order to assure continuation of public government functions.

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**FACTS:**

Recently there have been city council member and city clerk inquiries with respect to the status of a hold over government officer appointee when neither reappointment has occurred, nor has a qualified successor yet been duly appointed.

**ISSUE:**

What is the status of a public officer or official holding an appointed government position when their term has expired and they are not yet either reappointed or a duly qualified successor has not been timely approved or appointed?

**CONCLUSION:**

General public policy is that in the public interest in order to assure continuation of government functions, incumbent public officers holdover in their appointed government position until either they are reappointed or their qualified successor is duly selected and approved for appointment to succeed the public officer.

## **LEGAL DISCUSSION:**

Charles S. Rhyne in his book The Law of Local Government Operations when discussing public officers holding over in office states:

### **§ 13.11 Holding Over.**

In general, an incumbent holds over after the conclusion of his term until the election and qualification of a successor. The doctrine of holding over is designed to assure the continuation of public functions, and the courts will try to harmonize holdover statutes with constitutional provisions. . . . The period of holding over is considered a part of the officer's term, and he is entitled to compensation up to the time he ceases to discharge the duties. Holdover provisions apply to an incumbent whenever there is a failure to elect a successor. . . (Emphasis added.)

Charles S. Rhyne, *The Law of Local Government Operations* § 13.11 at 236.

McQuillin identifies hold over government officials or officers as de facto officers. McQuillin provides in pertinent part as follows with respect to the issue of holdover public officers:

### **§ 12.105. Hold-overs.**

Officers who hold over after the expiration of their term under some color of right, no successor having been appointed or chosen, and continue to exercise the functions of their office are de facto officers.

Absent provisions to the contrary, the public interest requires that public offices should be filled at all times without interruption. Under this policy, an elected or appointed officer may remain in office after the expiration of its term until a successor qualifies, whether or not this is provided for by the statute creating the office. Stated otherwise, the rights of a holdover officer terminate when the rights of the successor vest. . . . (Emphasis added.)

....

In one example, the acts of a board of equalization, upon which some of the members were holding over after the expiration of their terms, no other persons having been appointed to the positions, having been recognized by the taxpayers as legal, were valid as the acts of a de facto board. (Emphasis added.)

McQuillin, *Municipal Corporations* § 12.105 (3<sup>rd</sup> Ed. Revised) at 536-537.

Black's Law Dictionary, Eighth Edition at page 448 defines the term "de facto" as meaning "actual; existing in fact; having effect even though not formally or legally recognized."

McQuillin also states when discussing de facto officers:

An officer de facto is to be distinguished from an officer de jure. The latter is one regularly and properly elected or appointed and qualified and holding office during a constituted term, while the former is one who has the reputation or appearance of being the officer he or she assumes to be but who, in fact, under the law, has no right or title to the office he or she assumes to hold. One is

distinguished from a mere usurper or intruder by the fact that the former holds by some color of right or title while the latter intrudes upon the office and assumes to exercise its functions without either the legal title or color of right to such office.

Where one is actually in possession of a public office and discharges its duties, the color of right that constitutes him or her a de facto officer may consist in an election or appointment, holding over after the expiration of term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office.

... Where there is an office, all that is required to make an officer de facto is that the individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. . . . are de facto officers whose acts are binding on the public.

. . . the peace and repose of society require that one's official acts so far as others are concerned should be valid. This is true of all officers. (Emphasis added.)

McQuillin, *Municipal Corporations* § 12.102 (3<sup>rd</sup> Ed. Revised) at 526-530.

63 Am. Jur. 2d, *Public Officers and Employees*, § 23, explains the de facto officer legal principle as follows:

**§ 23. Generally; definition.**

The de facto doctrine was engrafted upon the law as a matter of policy and necessity to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. The doctrine's purpose has been said to be to protect the public's reliance on an officer's authority and to ensure the orderly administration of government by preventing technical challenges to an officer's authority. (Emphasis added.)

Several Montana Supreme Court decisions pertaining to holdover government officers or officials have been issued. Montana Supreme Court decisions pertaining to holdover government officers or officials are discussed by Montana Attorney General Joe Mazurek in 1998 Mont. AG LEXIS6, 1998 Mont. Op. Att'y Gen. No. 16; 47 Op. Att'y Gen. 16 (1998) issued to the town of Whitehall. Attorney General Mazurek stated at pages 3 and 4 of his attorney general opinion:

**Holding Over in Office**

In State ex rel. Sandquist v. Rogers, 93 Mont. 355, 18 P.2d 617 (1933), the Court considered whether the city engineer was allowed to discharge his duties until a successor was appointed and qualified. In Rogers, the newly elected mayor twice attempted to nominate persons to assume the duties of city engineer. Both nominations were rejected by the city council. Rogers, the acting city engineer, was directed by the council to continue his duties

but the mayor refused to sign warrants needed to pay Rogers' salary. The Court held that Rogers was allowed to hold his office until a successor was appointed and qualified. In reaching its holding, the Court followed the prevailing common law rule:

The general rule of law is that an officer shall hold over until his successor is appointed and qualified, unless by the language of the statute such holding over is expressly or by clear implication prohibited.

State ex rel. Sandquist v. Rogers, 93 Mont. at 362, 18 P.2d at 618. The rule followed in Rogers is still the prevailing rule which is followed in a large number of states. See 3 McQuillin, Municipal Corporations § 12.110, at 529-37 (3d ed. 1990).

In State ex rel. Olsen v. Swanberg, the Court addressed the governor's appointment of the chairperson of the Industrial Accident Board. The appointment required approval of the Senate, but because the legislature was not in session when the appointment was made, the appointment was not approved by the Senate. The term of office of the acting chairperson, Swanberg, had expired. Nonetheless, the Court held that Swanberg (rather than the governor's appointee) was still the office holder. The Court stated:

It follows that Mr. Swanberg holds office as a member and chairman of the Industrial Accident Board for the specific term of four years and thereafter until his successor has been appointed and qualified.

State ex rel. Olsen v. Swanberg, 130 Mont. at 208, 299 P.2d at 450.

In Dewar v. City of Great Falls, 178 Mont. 21, 582 P.2d 1171 (1978), a police officer who was charged with theft challenged the jurisdiction of the police commission which suspended him. One of the issues on appeal was whether members of the commission had validly held over after expiration of their terms and before qualification and appointment of their successors. The Court, holding that the members of the commission had validly held over after expiration of their terms, relied upon the Court's decision in State ex rel. Sandquist v. Rogers, 93 Mont. at 362, 18 P.2d at 617,

wherein it is plainly stated that every officer must continue to discharge the duties of his office although his term has expired, until his successor has qualified. This right is qualified only by express or clear implication of prohibition in the language of the statute.

Dewar v. City of Great Falls, 178 Mont. at 24, 582 P.2d at 1173 (citations omitted).

The policy underlying the common law rule is the strong public interest in continuing the work of important governmental offices when a qualified officer is holding over pending appointment and approval of a successor. Although the statutes are silent regarding the right of appointed officers to hold over, the present statutory scheme does not abrogate the common law rule or the policy underlying the rule. A prohibition against holding over is not clearly provided by statute and, in my opinion, a statutory prohibition against holding over cannot be implied.

See also State ex rel. Olsen v. Swanberg, 130 Mont. at 206, 299 P.2d at 448-49.

THEREFORE, IT IS MY OPINION:

1. A vacancy in the office of town attorney is not created when the attorney holds over following expiration of the term of office.
2. A qualified town attorney lawfully holding over in the office continues to hold the office until the mayor nominates a successor and the council approves the appointment.


*(Emphasis added.)*

As the Montana Attorney General Opinion notes “the general rule of law is that an officer shall hold over until his successor is appointed and qualified.”

**CONCLUSION:**

General public policy is that in the public interest in order to assure continuation of government functions, incumbent public officers holdover in their appointed government position until either they are reappointed or their qualified successor is duly selected and approved for appointment to succeed the public officer.

OFFICE OF THE CITY ATTORNEY



Jim Nugent, City Attorney

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