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Legal Opinion 2011-025

TO: Mayor John Engen, City Council, Bruce Bender, Brentt Ramharter, Marty Rehbein, Nikki Rogers, Kelly Elam, Ginny Merriam, Gail Verlanic

CC: Dept. Atty.

FROM: Jim Nugent, City Attorney

DATE November 21, 2011

RE: A majority of the entire City Council is required to elect a municipal officer to fill a vacancy in a City elected office.

FACTS:

There is a vacancy in the elected Municipal Court judgeship with the retirement of elected Municipal Court judge Donald Louden. The City Council is scheduled to elect an interim Municipal Court judge pending the next City municipal election in 2013 for the Municipal Court judgeship.

ISSUES:

1. What minimum number of City Council votes is necessary for the election of an interim Municipal Court judge until the 2013 municipal election?
2. Is the City Council election of an interim Municipal Court judge by voice vote or paper ballot?

CONCLUSIONS:

1. A majority of the entire City Council is required for the City Council to elect an interim Municipal Court judge pursuant to Montana state law, city charter, and city council rules. Since there are 12 City Council members, at least 7 City Council members must vote for the election of whoever is selected as interim Municipal Court judge.
2. Pursuant to 7-5-4121 MCA, the election of an interim Municipal Court judge is required to be by voice vote.

LEGAL DISCUSSION:

City Council Rule 32(e) sets forth the procedure for selection of someone to fill a vacancy in a city elected office. Rule 32(e) is entitled “City council procedures for filling a vacancy in an elected City office.” Rule 32(e) provides as follows.

“E. At the City Council meeting at which the selection of an individual to fill a vacancy in an elected City office is scheduled as an item of business, any City Council member may place the name of any applicant who is a qualified person and who was interviewed for the position by the City Council into nomination for the vacancy. Once all nominations have been received, nominations shall be closed, and City Council voting shall be *viva voce* pursuant to alphabetical roll call vote with the first City Council member's name called moved to last for the immediately subsequent roll call if another vote is required. At the end of each roll call vote, the presiding officer shall make inquiry as to whether anyone wants to change their vote prior to tallying the vote. New nominations may not be made unless there have been two (2) successive roll call votes wherein the votes cast were identical each time. New nominations may include the name of any qualified person whether or not that person has applied for and has been interviewed for the vacant office. In accordance with 7-4-4112 MCA and Article VIII. Addition [sic,] Provisions, 2 Filling of vacancies, Missoula City Charter, a majority vote of the members is required.” (Emphasis added).

7-4-4112 and 7-5-4121 MCA as well as the City of Missoula charter require that at least a majority vote of the entire city council membership is necessary to elect someone to fill an elected or appointed municipal government office. 7-4-4112 and 7-5-4121 MCA state as follows.

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).

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).

The City of Missoula charter in Article VIII, “Additional Provisions” restates the final sentence from 7-5-4121(1) MCA that provides that a majority of the members of the city council must for an individual in order for the vacancy to be filled.

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.

Viva voce is Latin for “with living voice, by word of mouth, orally, in reference to votes, the term means that a voice vote was held rather than a vote by ballot.” See Black’s Law Dictionary, 8th ed., p. 1604. 7-5-4121(2) MCA pertaining to the conduct of city council business, requires that the city council votes to fill vacancies in elected office are to be *viva voce*.

CONCLUSIONS:

1. A majority of the entire City Council is required for the City Council to elect an interim Municipal Court judge pursuant to Montana state law, city charter, and city council rules. Since there are 12 City Council members, at least 7 City Council members must vote for the election of whoever is selected as interim Municipal Court judge.

2. Pursuant to 7-5-4121 MCA, the election of an interim Municipal Court judge is required to be by voice vote.

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/s/

Jim Nugent, City Attorney

JN:mdg