OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2013-014

TO: Mayor John Engen, City Council, Marty Rehbein, Bruce Bender, Brentt Ramharter

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE   June 28, 2013

RE: City Council option of scheduling municipal primary election by passing a resolution not more than 10 days after the close of filing when number of candidates for municipal election do not meet certain statutory minimum thresholds for filing by candidates.

FACTS:

Pursuant to Montana nonpartisan election law, if the number of candidates for office does not meet certain statutory thresholds, the election administrator may determine that a primary election need not be held. However, if the election administrator makes a statutory determination that a primary election need not be held, it then becomes the governing body's (city council) decision as to whether to require a primary election.

ISSUE(S):

1.   At the close of filing to file for elective municipal office in nonpartisan municipal elections, if the election administrator indicates that statutorily a primary election for a municipal election need not be held, what is the city council's role at that point?

2.   How soon must the city council act after the deadline for filing for elective office?

CONCLUSION(S):

1.   If the election administrator indicates that statutorily a primary election for a municipal election need not be held, the governing body (city council) may require that a primary election be held.

2. The city council must act within ten (10) days after the closing of filing for elective office. If the city council desires a municipal primary election be held, the city council must within 10 days after the closing of filing pass a resolution providing for a municipal primary election.

LEGAL DISCUSSION:

Title 13 MCA is entitled *Elections*. Title 13, Chapter 14, MCA is entitled *Nonpartisan Elections*. Pursuant to the City elector adopted City Charter, City municipal elections are nonpartisan elections. Mont. Code Ann. §13-14-115 pertains to the preparation and distribution of nonpartisan primary ballots as well as the statutory minimum threshold of candidates determination as to whether a primary election is automatically statutorily required for a nonpartisan primary election. The key statute, Mont. Code Ann. § 13-14-115, provides:

> **13-14-115. Preparation and distribution of nonpartisan primary ballots -- determination on conducting primary.** (1) The election administrators shall arrange, prepare, and distribute primary ballots for nonpartisan offices, designated "nonpartisan primary ballots". The ballots must be arranged and prepared as provided in 13-10-209 and be without political designation. (2) (a) The election administrator of a political subdivision may determine that a primary election need not be held if:
> (i) the number of candidates for an office exceeds three times the number to be elected to that office in no more than one-half of the offices on the ballot; and
> (ii) the number of candidates in excess of three times the number to be elected is Not more than one for any office on the ballot.
> (b) If the election administrator determines that a primary election need not be held pursuant to subsection (2)(a), the administrator shall give notice to the governing body that a primary election will not be held.
> (3) **The governing body may require that a primary election be held if it passes a resolution not more than 10 days after the close of filing by candidates for election stating that a primary election must be held.** *(Emphasis added.)*

Pursuant to Mont. Code Ann. § 13-14-115(2) it appears that if there are more than three candidates for office in no more than one-half of the offices on the ballot and the number of candidates is not five or more for any single office on the ballot, the election administrator is required to determine that no primary election is statutorily necessary. The election administrator determines whether a primary election needs to be held pursuant to the statutes. If the election administrator determines that a primary election need not be held, the city council then has discretion to make a decision whether the city council desires to have a primary municipal election in that election year.

Title 1, chapter 1, part 3, MCA, is entitled *Rules concerning time*. Mont. Code Ann. § 1-1-306 entitled *Computation of time – which days counted* provides:

1-1-306. Computation of time -- which days counted. The time in which any act provided by law is to be done is computed by excluding the first day and including the last unless the last day is a holiday, and then it is also excluded.

Pursuant to Mont. Code Ann. § 1-1-216(1)(a) Sunday is identified as a holiday. Thus, pursuant to Mont. Code Ann. §§ 13-14-115, 1-1-306 and 1-1-216, if Thursday June 27, 2013, is the closing deadline for nonpartisan candidates for city office to file for nonpartisan election, when calculating the 10 calendar days, June 27 is not counted. The 10th calendar day would be Sunday, July 7, 2013, which may be excluded pursuant to the above identified statutes. Thus, pursuant to Mont. Code Ann. §§ 1-1-306 and 1-1-216, Monday, July 8, 2013, becomes the final day by which the city council must make a determination about scheduling a municipal election in 2013, if a nonpartisan municipal election is not statutorily required pursuant to Mont. Code Ann § 13-14-115.

Pursuant to Montana law, when calculating a statutory time period, commence counting the day after the day that triggers the counting. If the final day of the statutory time period calculation ends on a Sunday, statutorily the next regular business day is calculated as the conclusion of the statutory time period.

CONCLUSION(S):

1. If the election administrator indicates that statutorily a primary election for a municipal election need not be held, the governing body (city council) may require that a primary election be held.

2. The city council must act within ten (10) days of the closing of filing for elective office if the city council desires a municipal primary election be held the city council must within 10 days after the closing of filing pass a resolution providing for municipal primary election.

OFFICE OF THE CITY ATTORNEY

/s/ _____
Jim Nugent, City Attorney

JN:tfa

MISSOULA
COUNTY

June 28, 2013

Mayor John Engen
City of Missoula
435 Ryman
Missoula, MT 59802

HAND DELIVERED

Re: City Primary Election

Dear Mayor Engen:

I have determined that no primary election will be held on September 10, 2013 unless I receive a resolution passed by the City of Missoula calling for the election. The City of Missoula has 10 days after the close of filing to pass this resolution (MCA 13-14-115 (3)). The deadline to file was June 27, 2013 at 5:00 p.m.

I have determined that a primary election need not to be held pursuant to Montana Statute 13-14-115 "(2) (a) The election administrator of a political subdivision may determine that a primary election need not be held if:
    (i) the number of candidates for an office exceeds three times the number to be elected to that office in no more than one-half of the offices on the ballot; and
    (ii) the number of candidates in excess of three times the number to be elected is not more than one for any office on the ballot." I have attached a list of the candidates that filed.

Please feel free to contact me if you have any questions.

Sincerely,

Vickie M. Zeier
Missoula County Clerk & Recorder/Treasurer

Cc: Jim Nugent, City Attorney
    Dori Brownlow, Deputy County Attorney
    Rebecca Connors, Chief Deputy Clerk & Recorder

Ward 1 – 4 year term

- BRYAN VON LOSSBERG
- PATRICK HARLAN MADDISON

Ward 2 – 4 year term

- JORDAN HESS

Ward 3 – 4 year term
- EMILY BROCK BENTLEY
- PAUL BOHAN
- MARILYN F ROLLIN

Ward 4 – 4 year term

- JON WILKINS

Ward 5 – 4 year term

- ANNELISE NOELLE HEDAHL
- DAVID"DOC" MOORE

Ward 6 – 4 year term

- MARILYN MARLER
- DR ERNEST SZECHENYI

Mayor – 4 year tearm

- JOHN ENGEN
- MICHAEL HYDE
- DEAN MCCOLLOM
- PEGGY ANN CAIN

Municipal Judge

- KATHLEEN JENKS
- LETA J WOMACK
- MARK MICHAEL MCLAVERTY