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Legal Opinion 2014-022

TO: Mayor John Engen; City Council; Bruce Bender; Dale Bickell; Marty Rehbein; City Department Heads; Denise Alexander; Laval Means; Mary McCrea

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE July 15, 2014

RE: Potential Determination of Vacancy in Municipal Office Pursuant to Section 7-4-4111 MCA, if an Incumbent is Absent from City Continuously for Ten (10) Days without Consent of City Council.

FACTS:

A volunteer alternate appointee to a city land use board created by the city council has informed city development services staff that the person will be out of the city continuously for approximately seven months. Volunteers to city boards and commissions are city public officers; since they are not public city employees.

ISSUE(S):

Pursuant to Montana municipal government law does a volunteer alternate city land use board member's continuous absence from the city for approximately seven (7) months create a vacancy in that municipal office?

CONCLUSION(S):

Pursuant to subsection 7-4-4111(5) MCA pertaining to determinations of vacancies in municipal offices, an incumbent's absence from the city continuously for ten (10) days without the consent of the city council statutorily causes that municipal office to become vacant.

LEGAL DISCUSSION:

Volunteer appointees to city boards, commissions, committees, authorities, etc., are not city employees. However, they are public representatives or agents of the city with respect to their volunteer roles. Basically they are a public officer representing the city in their public officer respective roles.

Section 7-4-4111 MCA is 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)

Pursuant to Missoula City council rule 31 entitled “ABSENCES OF CITY OFFICERS FROM THE CITY FOR A CONTINUOUS TIME PERIOD OF TEN (10) DAYS OR MORE”, the Missoula City Council has established a process for a city officer to seek city council consent or permission to be absent from the city for a continuous time period of ten (10) continuous calendar days if the city council concurs in allowing the absence. City council rule 31 provides as follows:

Rule 31. Absences of City Officers from the City for a Continuous Time Period of Ten (10) days or More. A City officer desiring to be absent from the City continuously for ten (10) calendar days or more shall be directed to the City Council members and the Mayor. The City Clerk shall forward a copy of the City officer's request to be absent to each City Council member and the Mayor. If six (6) or more Council members have an objection to the absence, they may object, in writing or via email, within three (3) calendar days after a copy of the request for absence has been sent to the City Council membership. If no written objection is filed, the request shall be deemed approved. Pursuant to Section 7-4-4111, MCA entitled, “Determination of Vacancy in an Elected City Office,” this provision shall be applicable to all City officers who are elected or

appointed to a term of office, and this shall be the City Council's mechanism for giving its consent pursuant to Section 7-4-4111(5), MCA, and shall provide for objecting parties to show cause for objection to request for absence.

CONCLUSION(S):

Pursuant to subsection 7-4-4111(5) MCA pertaining to determinations of vacancies in municipal offices, an incumbent's absence from the city continuously for ten (10) days without the consent of the city council statutorily causes that municipal office to become vacant.

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/s/

Jim Nugent, City Attorney

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