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VOLUME NO. 45

OPINION NO. 1

CITIES AND TOWNS - Commission-manager form of government: power to appoint city department heads;
LOCAL GOVERNMENT - Commission-manager form of government: power to appoint city department heads;
MUNICIPAL GOVERNMENT - Commission-manager form of government: power to appoint city department heads;
MONTANA CODE ANNOTATED - Title 7, chapter 3; sections 7-3-102, 7-3-114, 7-3-304, 7-3-304(13), 7-3-305, 7-3-305(2), 7-3-4362, 7-3-4363, 7-3-4402, 7-3-4403, 7-3-4441, 7-3-4463 to 7-3-4466;
MONTANA CONSTITUTION - Article XI, sections 3(1), 9(1);
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 48 (1986), 41 Op. Att'y Gen. No. 37 (1985).

HELD: A city council in a council-manager form of government may adopt an ordinance authorizing the council rather than the city manager to appoint heads of city departments.

March 8, 1993

Mr. Robert L. Jovick
Livingston City Attorney
P.O. Box 1245
Livingston, MT 59047-1245

Dear Mr. Jovick:

You have requested my opinion concerning the following question:

May a city council in a city with the council-manager form of government adopt an ordinance whereby the city council rather than the city manager appoints heads of city departments?

I conclude that the city council in a council-manager form of government may adopt an ordinance pursuant to MCA § 7-3-304 authorizing the council rather than the city manager to appoint the heads of city departments.

The Montana Constitution requires the Legislature to provide for the adoption of statutory alternative forms of local government

and for a local government review process. 41 Op. Att'y Gen. No. 37 (1985). Specifically, Article XI of the Constitution provides in pertinent part:

Section 3. Forms of Government. (1) The legislature shall provide methods for governing local government units and procedures for incorporating, classifying, merging, consolidating, and dissolving such units, and altering their boundaries. The legislature shall provide such optional or alternative forms of government that each unit or combination of units may adopt, amend, or abandon an optional or alternative form by a majority of those voting on the question.

....

Section 9. Voter review of local government. (1) The legislature shall, within four years of the ratification of this constitution, provide procedures requiring each local government unit or combination of units to review its structure and submit one alternative form of government to the qualified electors at the next general or special election.

In 1975, the Legislature implemented the above constitutional mandate and enacted a statutory scheme which allowed the electorate to choose alternative forms of local government. See MCA Tit. 7, ch. 3, pts. 1 to 7. MCA § 7-3-102 offers the electorate five basic alternative forms of local government, plus a charter form. One of the options under MCA § 7-3-102 is a commission-manager or council-manager form of government. In 1977, the city of Livingston chose to adopt a council-manager form of government. Prior to 1977, Livingston operated under a council-mayor form of government.

You have asked whether the Livingston city council may adopt an ordinance in which the council rather than the city manager appoints the heads of city departments. There are two sets of statutes that define the power of the city manager to appoint department heads. Those statutes can be found in MCA Title 7, chapter 3, parts 3, 43 and 44. To answer your question it is necessary to examine the statutory powers of the city manager under both part 3 and parts 43 and 44.

Under MCA Title 7, chapter 3, part 3, the duties of the city manager, including the power to appoint department heads, is controlled by MCA § 7-3-304, which provides:

Duties of manager. The manager shall:

- (1) enforce laws, ordinances, and resolutions;

- (2) perform the duties required of him by law, ordinance, or resolution;
- (3) administer the affairs of the local government;
- (4) direct, supervise, and administer all departments, agencies, and offices of the local government unit except as otherwise provided by law or ordinances;
- (5) carry out policies established by the commission;
- (6) prepare the commission agenda;
- (7) recommend measures to the commission;
- (8) report to the commission on the affairs and financial condition of the local government;
- (9) execute bonds, notes, contracts, and written obligations of the commission, subject to the approval of the commission;
- (10) report to the commission as the commission may require;
- (11) attend commission meetings and may take part in the discussion, but he may not vote;
- (12) prepare and present the budget to the commission for its approval and execute the budget adopted by the commission;
- (13) appoint, suspend, and remove all employees of the local government except as otherwise provided by law or ordinance;
- (14) appoint members of temporary advisory committees established by the manager. [Emphasis added.]

MCA § 7-3-304(13) by its clear language contemplates that the city manager has the power to appoint and remove all city employees "except as otherwise provided by law or ordinance." Accordingly, I conclude that under MCA § 7-3-304(13) the city council could enact an ordinance which would curtail the city manager's power to appoint department heads and instead give the council the authority to appoint them.

In addition, MCA § 7-3-305 also supports my conclusion that the city council through an ordinance may eliminate the city manager's authority to appoint department heads. MCA § 7-3-305 states in pertinent part:

(1) Employees appointed by the manager and his subordinates shall be administratively responsible to the manager.

(2) Neither the commission nor any of its members may dictate the appointment or removal of any employee whom the manager or any of his subordinates are empowered to appoint. [Emphasis added.]

Under MCA § 7-3-305(2), the city council cannot dictate the appointment of any employees whom the city manager is "empowered to appoint." The clear implication of this language is that the city manager's power to appoint and remove is not exclusive, and that some employees must, under some circumstances, be subject to appointment and removal by someone other than the city manager. The provisions of MCA § 7-3-305(2) emphasized above have meaning only if MCA § 7-3-304(13) is interpreted to allow the city council to make other provisions for the appointment and removal of city employees.

MCA §§ 7-3-304 and 7-3-305 are in pari materia, and they must be construed together in a manner which gives effect to all parts of both statutes, if such a construction is possible. Crist v. Segna, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981). In my opinion, MCA §§ 7-3-304(13) and 7-3-305(2) can only be harmonized by holding that MCA § 7-3-304(13) authorizes the city council by ordinance to restrict the city manager's powers with respect to the hiring and retention of employees. Thus, if the Livingston city council passed an ordinance limiting the city manager's power to make appointments, there would be no restrictions under MCA § 7-3-305(2) on the council's authority to dictate the appointment of employees.

Prior to the enactment of the statutes defining the commission-manager form of government under MCA Title 7, chapter 3, part 7, there existed a statutory scheme for "Municipal Commission-Manager Government" under MCA Title 7, chapter 3, parts 43 and 44. A number of statutes under parts 43 and 44 place the authority of appointing city employees solely with the city manager and, unlike MCA §§ 7-3-304 and 7-3-305, these statutes do not provide the city council with the power to limit the city manager's authority to appoint employees. See MCA §§ 7-3-4362, 7-3-4363, 7-3-4402, 7-3-4403, 7-3-4441, 7-3-4463 to 4466. These statutes vest the city manager with the apparently unrestricted authority to appoint, remove and manage city employees and do not provide for the city council to limit that authority. Raynes v. City of Great Falls, 215 Mont. 114, 118-19, 696 P.2d 423, 426 (1985).

In Raynes, the Court held that the city manager in the commission-manager form of government had the sole power to affirm, modify, or veto the police commission's decision to discharge a police officer. Raynes, 215 Mont. at 119. The Court explained that a

city manager's authority under the municipal commission-manager form of government was "broad and pervasive." Specifically, the Court stated:

[A]n elected commission is required to appoint a city manager, section 7-3-4361, MCA, who shall be the administrative head of the municipal government and be responsible for the efficient administration of all departments. Specifically, he/she is empowered to appoint and remove all subordinate officers and employees of the departments in both the classified and unclassified service.

Raynes, 215 Mont. at 118-19.

The report of the Raynes decision does not indicate that the City of Great Falls had adopted an ordinance restricting the power of the city manager with respect to the hiring and retention of city employees. The court in Raynes, therefore, did not consider the restrictive language on the city manager's power to appoint city employees under MCA §§ 7-3-304 and 7-3-305. Specifically, the court in Raynes did not explore the clause "except as otherwise provided by law or ordinance" under MCA § 7-3-304(13), and the possibility that the city council could pass an ordinance enabling it to limit the city manager's authority to appoint heads of departments. Furthermore, the court was not presented with the issue of whether the city council could enact such an ordinance.

There is a clear conflict between the statutes under MCA Title 7, chapter 3, part 3 and MCA Title 7, chapter 3, parts 43 and 44 concerning the scope of the city manager's appointment power, which the court in Raynes did not address. The enactment of parts 43 and 44, however, preceded the enactment of part 3. Earlier statutes, to the extent of any repugnancy, are controlled by later statutes. 41 Op. Att'y Gen. No. 48 at 200, 202 (1986), citing State ex rel. Wiley v. District Court, 118 Mont. 50, 55, 164 P.2d 358, 361 (1946). Accordingly, I conclude that the later statutes under part 3, including MCA §§ 7-3-304 and 7-3-305, control the scope of a city manager's authority to appoint employees under the commission-manager form of government. Id.

This conclusion is also supported by statutory language found in MCA § 7-3-114. The municipal commission-manager forms of government enacted under parts 43 and 44, that did not adopt an alternative form of government, are controlled by the statutes listed under MCA § 7-3-114. See 41 Op. Att'y Gen. No. 48 (1986). MCA § 7-3-114 states:

Statutory basis for municipal commission-manager government. (1) For the purpose of determining the statutory basis of existing units of local government after May 2, 1977, each unit of local government

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organized under the general statutes authorizing the municipal commission-manager form of government shall be governed by the following sections:

- (a) 7-3-301;
- (b) 7-3-302(1);
- (c) 7-3-303;
- (d) 7-3-304;
- (e) 7-3-305;
- (f) 7-3-312(3);
- (g) 7-3-313(1);
- (h) 7-3-314(2);
- (i) 7-3-315(2);
- (j) 7-3-316(2);
- (k) 7-3-317(2);
- (l) 7-3-318.

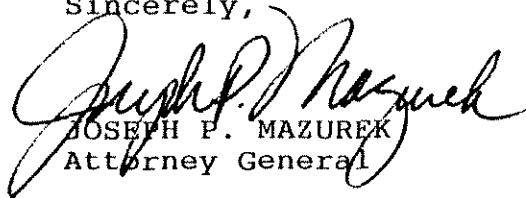
(2) This form has terms of 4 years for all elected officials. The size of the commission shall be established by ordinance, but it may not exceed five members. [Emphasis added.]

Accordingly, municipal commission-manager forms of government authorized under MCA Title 7, chapter 3, parts 43 and 44, are controlled by MCA § 7-3-114 and governed by the specific sections listed under MCA § 7-3-114. Two of these sections, MCA §§ 7-3-304 and 7-3-305, allow the city council to limit the city manager's authority to appoint heads of city departments.

THEREFORE, IT IS MY OPINION:

A city council in a council-manager form of government may adopt an ordinance authorizing the council rather than the city manager to appoint heads of city departments.

Sincerely,


JOSEPH P. MAZUREK
Attorney General

JPM/MW/dh