

DISTRIBUTED BY:
CROSBY OPINION SERVICE
2210 East 6th Ave.
Helena, MT 59601
406-443-3418

VOLUME NO. 45

OPINION NO. 15

CITIES AND TOWNS - Election or appointment of city judge after adoption of commission-manager form of government;
ELECTIONS - Election or appointment of city judge after adoption of commission-manager form of government;
JUDGES - Election or appointment of city judge after adoption of commission-manager form of government;
LOCAL GOVERNMENT - Alternative forms of commission-manager government;
MUNICIPAL GOVERNMENT - Alternative forms of commission-manager government;
PUBLIC OFFICERS - Election or appointment of city judge after adoption of commission-manager form of government;
MONTANA CODE ANNOTATED - Title 7, chapter 3; sections 7-3-125, 7-3-4301, 7-3-4305, 7-3-4462, 7-4-4102;
OPINIONS OF THE ATTORNEY GENERAL - 45 Op. Att'y Gen. No. 1 (1993), 41 Op. Att'y Gen. No. 48 (1986).

HELD: When a city of the third class adopts a commission-manager form of government established in Mont. Code Ann. tit. 7, ch. 3, pt. 3, the city is not bound by Mont. Code Ann. § 7-3-4462 requiring an election of the city judge, but rather may continue to appoint its city judge under an ordinance passed pursuant to Mont. Code Ann. § 7-4-4102.

October 22, 1993

Ms. Katherine Curtis
Columbia Falls City Attorney
P.O. Box 329
Columbia Falls, MT 59912

Dear Ms. Curtis:

You have requested my opinion on an issue which I have rephrased as follows:

Where a city has adopted the commission-manager form of government described in title 7, chapter 3, part 3, may it continue by ordinance to appoint, rather than elect, the city judge?

On November 3, 1992, the voters of the City of Columbia Falls (hereinafter referred to as "the City") voted to alter its council-mayor form of government and adopt the commission-manager form of government described in Mont. Code Ann. tit. 7, ch. 3, pt. 3. The position of city judge was neither addressed nor considered when the new form of government was adopted. The City is currently operating under an ordinance which provides for the appointment of the city judge.

Your question arises from the language of Mont. Code Ann. § 7-3-4462 which provides in pertinent part:

- (1) In each municipality having a commission-manager form of government, a city judge shall be elected every 4 years in a nonpartisan election held in conjunction with the regularly scheduled municipal election.

You note that this section seems to conflict with Mont. Code Ann. § 7-4-4102(3) which expressly allows a city of the third class to determine by ordinance whether the office of city judge shall be filled by appointment by the governing body or by election. The underlying question then is whether the City necessarily became subject to the requirement in Mont. Code Ann. § 7-3-4462, requiring the city judge to be elected, when it adopted a commission-manager form of government.

It must first be recognized that there are a number of different forms of government which a local government may adopt. This choice was created by the 1972 Montana Constitution which required the legislature to provide optional or alternative forms of government that each local government unit or units could adopt, amend, or abandon. Mont. Const. art. XI, § 3. The new Constitution further required the legislature to develop the procedures for each local government unit to review its structure and submit one alternative form of government to the qualified electors at the next general or special election. Mont. Const. art. XI, § 9.

In accordance with these mandates, the legislature defined the alternative forms of government and established the procedures for changing the form of local government. See Mont. Code Ann. § 7-3-101 (purpose of Mont. Code Ann. tit. 7, ch. 3, pts. 1-7 is to comply with Mont. Const. art. XI, § 3(1)). Under these procedures, a local government is given the option of adopting five basic alternative forms of government or a charter form of government. Mont. Code Ann. tit. 7, ch. 3, pts. 1-7. Within each form of government, the local government is also provided a list of suboptions to further define the structure and nature of its

government. For example, in establishing a commission-manager form of government the voters may choose between self-government and general government powers (Mont. Code Ann. § 7-3-302), how members of boards are appointed (Mont. Code Ann. § 7-3-312), how commission members are selected (Mont. Code Ann. § 7-3-313), what type of election to have (Mont. Code Ann. § 7-3-314), and other similar options relating to how the chairman is selected, the terms of commission members and the size of the commission (Mont. Code Ann. § 7-3-315 to -317). Under the commission-manager form of government there are, therefore, numerous suboptions which may be selected by the local government in establishing its actual structure and operation.

When these new options and suboptions were established by the legislature, the old statutory bases for the existing forms of municipal government were nonetheless retained. For example, the old commission-manager form of government is still described in Mont. Code Ann. tit. 7, ch. 3, pts. 43 and 44, and the strong and weak mayor forms of government are described in parts 41 and 42. Three municipal governments--Bozeman, Great Falls and Helena--had adopted the old commission-manager form of government prior to the enactment of Mont. Code Ann. §§ 7-3-101 to -709. Helena and Great Falls have since adopted charters pursuant to Mont. Code Ann. § 7-3-701. Only the City of Bozeman continues to operate under the old commission-manager statutes. It is important to recognize that this older set of statutes defines a commission-manager form of government that is separate and distinct from the new commission-manager form of government detailed in Mont. Code Ann. tit. 7, ch. 3, pt. 3.

It becomes apparent that there are two different forms of a commission-manager government when the provisions establishing each form are compared. In order to adopt the commission-manager form of government established in title 7, chapter 3, part 3, the voters must prepare a petition in compliance with Mont. Code Ann. § 7-3-125. The petition must be signed by 15 percent of the electors and must be accompanied by a certificate which contains the "plan of government" in which all of the suboptions are detailed. See Mont. Code Ann. § 7-3-142.

In distinct contrast to these procedures, parts 43 and 44 of title 7, chapter 3, require a wholly different process in order to adopt the old municipal commission-manager form of government. Mont. Code Ann. § 7-3-4301(1) provides: "Any municipality may abandon its organization and reorganize under the provisions of this part and part 44 by proceeding as hereinafter provided." In 1991, when the City was proposing to change its new form of

government, Mont. Code Ann. § 7-3-4305 defined the process of adopting the old commission-manager form as follows:

(1) Upon a petition being filed with the city or town council, signed by not less than 25% of the qualified electors of such municipality registered for the last preceding general municipal election, praying that the question of reorganization under this part and part 44 be submitted to the qualified electors of such municipality, said city or town council shall thereupon and within 30 days thereafter order a special election to be held, at which election the question of reorganization of such municipality under the provisions of this part and part 44 shall be submitted to the qualified electors of such municipality.

Thus, in order to adopt the form of government set forth in parts 43 and 44, the petition proposing the change in government must explicitly propose reorganization under those parts and contain signatures from 25 percent of the municipality's registered voters.

With respect to the facts underlying your question, the City went through those procedures set forth in Mont. Code Ann. § 7-3-125 and proposed adoption of the commission-manager form of government contained in title 7, chapter 3, part 3. The petition explicitly stated that the proposed plan of government was that described in title 7, chapter 3, part 3. Signatures from only 15 percent of the registered electorate were required in order to bring the matter to a vote. The City, therefore, did not follow any of the procedures required by Mont. Code Ann. § 7-3-4305 and cannot be considered to have adopted any of the provisions in the commission-manager form of government set forth in Mont. Code Ann. tit. 7, ch. 3, pts. 43 and 44.

Mont. Code Ann. § 7-3-4462 is part of the statutes defining the structure of the old commission-manager form of government. The City would only be bound by this statute had it adopted the commission-manager form of government described in parts 43 and 44 of title 7, chapter 3. Since the City did not adopt that form of government, it is not bound by this section and is not required to provide for the election, rather than the appointment, of its city judge. The City may therefore continue pursuant to Mont. Code Ann. § 7-4-4102(3) to determine by ordinance whether the city judge is appointed or elected.

This conclusion is consistent with prior Attorney General's Opinions which have recognized that the recent statutory scheme

45 Op. Att'y Gen. No. 15
Page 5
October 22, 1993

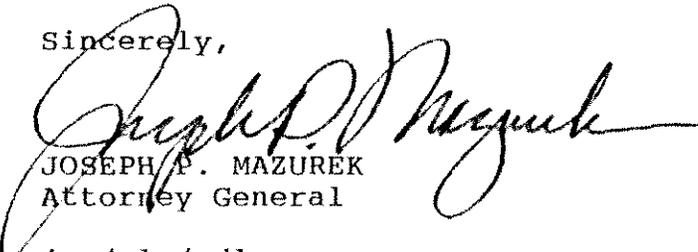
defining new forms of government necessarily controls when the new and the old schemes are in conflict. See, e.g., 45 Op. Att'y Gen. No. 1 (1993) (municipal commission-manager forms of government controlled by the later statutes); 41 Op. Att'y Gen. No. 48 at 200, 202 (1986) (earlier statutes, to the extent of any repugnancy, are controlled by the later statutes). Here, however, I need not rely upon this reasoning because your question does not involve reconciling a conflict between the old and the new schemes. Rather, the City clearly adopted only the new commission-manager form of government defined in title 7, chapter 3, part 3, and therefore is not bound by the older statutes.

I have received a large number of signed petitions requesting that I give the opinion that the city judge must be elected. Under Mont. Code Ann. § 7-4-4102(3), the governing body of a city of the third class has the authority to determine by ordinance how the city judge is selected. Although the City's ordinance currently provides for the appointment of its city judge, nothing in the statutes precludes the City from amending this ordinance in order to provide for the election of the city judge.

THEREFORE, IT IS MY OPINION:

When a city of the third class adopts a commission-manager form of government established in Mont. Code Ann. tit. 7, ch. 3, pt. 3, the city is not bound by Mont. Code Ann. § 7-3-4462 requiring an election of the city judge, but rather may continue to appoint its city judge under an ordinance passed pursuant to Mont. Code Ann. § 7-4-4102.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/elg/pdl