

## 47 Op. Att'y Gen. No. 20

CITIES AND TOWNS - Quorum requirements for town council meeting;  
MUNICIPAL GOVERNMENT - Authority of town council to adopt quorum provisions by ordinance;  
MONTANA CODE ANNOTATED - Sections 7-3-203, -4221(1)(b), 7-5-4101, -4102, -4121;  
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 84 (1986).

HELD:

1. In a commission-executive form of local government, the presence of the president of the town council, serving as acting mayor in the absence of the mayor, and two of the remaining three members of the council is sufficient to constitute a quorum for the transaction of business.
2. A town with a weak-mayor form of municipal government does not have authority to adopt by ordinance the quorum provisions of Mont. Code Ann. § 7-3-4221(1)(b).

October 19, 1998

Mr. Eric Rasmusson  
Boulder Town Attorney  
P.O. Box 587  
Boulder, MT 59632

Dear Mr. Rasmusson:

You have requested my opinion on several questions concerning the number of town council members necessary to constitute a quorum. I have restated the questions as follows:

1. Where the mayor is absent from a town council meeting in the Town of Boulder and the president of the council serves as acting mayor, is the acting mayor considered a member of the council for purposes of determining whether sufficient members are present to constitute a quorum?
2. May the Town of Boulder adopt by ordinance the quorum provisions of Mont. Code Ann. § 7-3-4221(1)(b)?

Your letter of inquiry states the following facts which I assume to be true for purposes of this opinion. The Town of Boulder operates under a weak-mayor (or "commission-executive") form of government with a four-person town council. See Mont. Code Ann. tit. 7, ch. 3, pt. 2. One of the councilpersons serves as president of the town council. On June 1, 1997, the office of mayor became vacant as a result of the mayor's resignation, and the president of the town council became "acting mayor" pursuant to a town ordinance which provides that in the absence of the mayor the president of the council "shall exercise all the powers and discharge all duties" of the mayor and shall be styled the "acting mayor" while performing the duties of the mayor.

At the meeting on June 23, prior to the appointment of a successor to the mayor, the president of the council and two other council members were present. The fourth councilperson was absent from the meeting. The president of the council served as acting mayor during the meeting. Following the meeting a question arose as to whether the decisions made at the meeting were valid in view of the quorum requirements of state law and the provisions of Boulder's ordinances.

Montana Code Annotated § 7-5-4121(1) provides that "[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." In your letter of inquiry you observe parenthetically that Mont. Code Ann. § 7-3-4221(1)(b) sets forth a different method for determining a quorum for a council meeting; however, you correctly conclude that this statute applies only to cities that have reorganized as a municipal-commission

government under the provisions of Mont. Code Ann. title 7, chapter 3, part 42, and therefore does not apply to a weak-mayor municipal government such as Boulder's.

A majority of a four-person council would be three members, so the attendance of three members at a meeting of the Boulder Town Council would ordinarily be sufficient to constitute a quorum for the transaction of business. However, when one of the council members is serving as acting mayor, the question then arises as to the status of that council member for purposes of determining whether a quorum is present. Your letter notes that the acting mayor, who is required by ordinance to exercise the powers and discharge the duties of the mayor at a town council meeting, performs an executive function quite different from the legislative function of a council member. Although the mayor is the presiding officer of the council, the mayor is not expressly made a member of the council and does not vote on any question except to break a tie vote; in addition, the mayor has authority to veto the council's resolutions and ordinances, and otherwise performs executive duties apart from the council. See Mont. Code Ann. §§ 7-3-203, 7-5-4102. It would appear that one person could not serve both as mayor and as council member simultaneously at a town council meeting without raising concerns about the proper separation of municipal powers, and it may be argued that a council member who becomes acting mayor loses, at least temporarily, his or her status as a member of the council.

Your letter also acknowledges the opposing view that a member of the town council who serves as acting mayor in the absence of the mayor remains a councilperson and should not be divested of the position to which he or she was elected, even temporarily, simply by discharging the mayor's duties. Divesting the acting mayor of his or her status as a councilperson would arguably create a temporary vacancy in the council and might serve to deprive the electors of their legislative voice in council matters.

Montana's statutory law does not provide an answer to your inquiry, and there are no reported decisions of the Montana Supreme Court which address or shed light on the matter. I am therefore guided by the common-law principles concerning the method of determining or reckoning a quorum. See 62 C.J.S. Municipal Corporations § 399 (1949); 56 Am. Jur. 2d Municipal Corporations §§ 163, 176 (1971). The common-law principles derived from these secondary legal sources are summarized below and provide a basis for resolving the inquiry.

At common law and under state statutes such as Montana's, a majority of the duly elected members of a municipal council constitute a quorum, although more than a majority may be required to be present in order for the council to take particular actions. See, e.g., Mont. Code Ann. § 7-5-4121(2). In reckoning a quorum in the absence of a controlling statutory provision, the general rule is that the total number of all of the duly elected and qualified members of the council is taken as the basis. While the mayor or chief executive may be included in the count under some statutes (see Mont. Code Ann. § 7-3-4221), the mayor is not made a member of the council and is not included in the number on which the quorum is reckoned under other statutes such as Mont. Code Ann. § 7-5-4121, which applies to the Town of Boulder. However, even though the mayor is not counted in the determination of a quorum under such a statute, a member of the council who acts as mayor or presiding officer pro tempore in the absence of the mayor is counted in determining whether or not a quorum is present. *Shugars v. Hamilton*, 92 S.W. 564 (Ky. 1906).

The *Shugars* case also illustrates the common-law principle that a member of a municipal council who serves as mayor pro tempore retains the right to vote as a member of the council. Thus the president of the council, when serving as acting mayor in the absence of the mayor, may vote on a measure with the other members of the council and then, as acting mayor, cast the deciding vote in case of a tie. *Id.*, 92 S.W. at 565.

It is therefore my opinion that the presence of the president of the council, serving as acting mayor, and two other members of the council was sufficient to constitute a quorum at the meeting of the Boulder Town Council on June 23, 1997.

You have also asked whether the Town of Boulder may adopt by ordinance the quorum provisions of Mont. Code Ann. § 7-3-4221(1)(b), which states that in cities having a mayor and four councilmen, the mayor and two councilmen or three councilmen shall constitute a quorum for a council meeting. I assume for purposes of this question that the Town of Boulder is governed by a municipal government with general

government powers. As discussed above, this statute applies to cities that have abandoned their organizations and have reorganized under the municipal-commission form of government, in which the mayor has an equal vote with the councilmen on all questions coming before the council and thus exercises legislative as well as executive functions in the city government. The statute would not ordinarily apply to the Town of Boulder, which has a commission-executive form of government.

A town council such as Boulder's has the power to enact ordinances not repugnant to the statutory provisions set forth in title 7, chapter 5, part 41. Mont. Code Ann. § 7-5-4101. The quorum provisions of Mont. Code Ann. § 7-3-4221(1)(b) would conflict with Mont. Code Ann. § 7-5-4121, which states that a majority of the members of the town council constitute a quorum and does not include the mayor as a member of the council for the determination of a quorum. An ordinance adopting a lesser quorum requirement would be repugnant to Mont. Code Ann. § 7-5-4121 and would not come within the ordinance authority of the town council. Generally, a municipal ordinance must be in harmony with the laws of the state; whenever an ordinance comes into conflict with a statute, the ordinance must give way. 41 Op. Att'y Gen. No. 84 (1986); *City of Billings v. Weatherwax*, 193 Mont. 163, 630 P.2d 1216 (1981); *State ex rel. Libby v. Haswell*, 147 Mont. 492, 414 P.2d 652 (1966).

THEREFORE, IT IS MY OPINION:

1. In a commission-executive form of local government, the presence of the president of the town council, serving as acting mayor in the absence of the mayor, and two of the remaining three members of the council is sufficient to constitute a quorum for the transaction of business.
2. A town with a weak-mayor form of municipal government does not have authority to adopt by ordinance the quorum provisions of Mont. Code Ann. § 7-3-4221(1)(b).

Sincerely,

JOSEPH P. MAZUREK  
Attorney General

jpm/jp/dm