July 27, 2004

Mr. John Flynn
Broadwater County Attorney
P.O. Box 96
Townsend, MT 59644

Re: Tenure and Salary of Townsend City Judge

Dear Mr. Flynn:

You have requested an opinion of the Attorney General on several questions related to the tenure and salary of the Townsend City Judge. Your questions arise from the following situation.

In 1983, the City of Townsend designated the Broadwater County Justice of the Peace to act as City Judge pursuant to Mont. Code Ann. § 3-11-205 (1). The incumbent in the office of Justice of the Peace continued to act in the capacity of City Judge from 1983 until the then-incumbent Justice resigned the City Judge position effective June 30, 1996.

In June of 1996, the City Council appointed Judge Tori Marion to serve as City Judge, filling the vacancy left by the resignation of the Justice of the Peace. Judge Marion has continued to serve in office since that time, but the records of the City Council apparently contain no evidence that Judge Marion was reappointed between July 1, 1996, when her initial appointment became effective, and December 30, 2002, when the minutes of the City Council reflect that Judge Marion was sworn in by the mayor for an additional four-year term commencing in January 2003 and ending December 31, 2006.

In July 2003, during the city budget preparation process, the City Council considered means by which the costs of City Court operations might be reduced. One option they considered was a return to the pre-1996 arrangement in which the office of City Judge would be filled by the incumbent Broadwater County Justice of the Peace. Your letter states that discussions occurred between the Council and Judge Marion culminating in a reduction in the City Court budget, including a diminution in her salary. Judge Marion has submitted written comments in which she denies having voluntarily agreed to the reduction. In any event, it appears that the Fiscal Year 2004 City Budget incorporated the reduction in Judge Marion's compensation.

Your letter poses multiple questions that I have rephrased as follows:

1. Did the reduction of Judge Marion's salary in Fiscal Year 2004 occur during a "term of office" for purposes of the provision of Article VII, § 7(1) providing that judicial "salaries shall not be diminished during terms of office?"
2. During a "term of office," could the City Council effectively remove Judge Marion from office by exercising its authority under Mont. Code Ann. § 3-11-205(1) to designate the Justice of the Peace as the City Judge?
3. If the reduction occurred during a term of office, did Judge Marion validate the Council's action by waiving the benefit of Mont. Const. Art. VII, § 7(1)?
4. Does the City Council have the authority to set the office hours of the City Judge and to require her presence during those office hours when not on the bench?

Since your questions are quite fact specific and involve some questions of constitutional law on which this office ordinarily would not issue a formal opinion, it has been determined that an informal letter of advice is the appropriate vehicle for responding to your questions.

I. TERM OF OFFICE

A.

The question of when Judge Marion's term of office commenced has controlling significance for each of the first three questions posed above. That is, unless Judge Marion's current term of office began contemporaneously with the commencement of Fiscal Year 2004, it would seem to follow that the reduction of her salary must have occurred during a "term of office" in violation of Article VII, § 7(1). Moreover, as discussed below, a mid-term decision by the Council to transfer Judge Marion's duties to the Justice of the Peace has the effect of shortening her term of office. And, if these actions did not occur mid-term, the issue of waiver is moot.

Under Montana law, a "term of office" refers to a period of specified duration during which an official holds authority to exercise the power of the office. State ex rel. Racicot v. District Court, 243 Mont. 379, 386, 794 P.2d 1180, 1184 (1990); State ex rel. Morgan v. Knight, 76 Mont. 71, 76, 245 P. 267, 268 (1926). In the case of city judges, the "term of office" is specified by statute as four years. Mont. Code Ann. § 3-11-201(2) ("An elected or appointed city judge shall hold office for a term of four years and until the qualification of a successor.")

While Mont. Code Ann. § 3-11-205(1) gives the City Council the authority to designate a Justice of the Peace within the county to serve as City Judge, as discussed in Part II, infra, no statute appears to give the Council the authority to change the length of the term of office of the City Judge. That term is fixed by statute, and it does not change simply because the office may have become vacant, nor because the incumbent holds over in office beyond the end of the term due to the fact that a successor has not been chosen or qualified. See 47 Op. Att'y Gen. No. 16 (1998) (no vacancy in office of town attorney when successor not appointed). Thus, when the Council chose to fill the office of City Judge by designating the Justice of the Peace to serve, that

decision did not change the beginning and ending dates of the term of the office. Rather, when an office becomes vacant, the general rule is that the successor fills the office for the unexpired portion of the term. State ex rel. Morgan v. Knight, 76 Mont. 71, 79, 245 P. 267, 270 (1926) (stating "Clearly one who is appointed to fill a vacancy in an elective office fills out the unexpired term only, unless…he may hold over until his successor is elected and qualified," and applying this rule to vacancy in appointive office of city attorney).

The Montana Supreme Court's decision in Morgan is especially helpful in resolving the issues you pose. In that case, Trippett was appointed to a two-year term as city attorney in Anaconda upon the election and accession to office of a new mayor in May 1923. Trippett died on March 18, 1924, and on that date the mayor appointed Morgan to fill the vacancy. On May 4, 1925, a new mayor took office following the 1925 municipal election, and the new mayor appointed Knight to the city attorney position. The issue in the case was whether Morgan was entitled to serve a two year term running from his appointment in March of 1924 (in which case there would have been no vacancy for the new mayor to fill by appointment in May of 1925), or whether his appointment was to fill the unexpired portion of Trippett's two year term that would have ended with Knight's appointment in May of 1925.

In resolving the dispute, the Court reviewed the general principles of law governing the filling of vacancies in appointed positions having a specified term of years. The Court first held that a "term of office" is a fixed period of time that does not change when a vacancy occurs. 76 Mont. at 76. Since the statutes did not fix the date on which the term of the appointed office commenced, the Court then instructed that resort to the history of the office is appropriate in determining the commencement date of each term. Id.

In the case of the office of Anaconda City Attorney, the position had been elective prior to 1895, with a term of two years commencing on the first Monday of May, in keeping with the then practice of holding city elections in April of every odd-numbered year. When the 1895 legislature made the office appointive, the first appointment to a two year term occurred in May of 1895, and the office was filled by re-appointment in early May every two years thereafter, up to and including the appointments of Trippett in 1923 and Knight in 1925. The Court held that this past practice established that the two-year term of office commenced with the appointment of a city attorney in May of each odd-numbered year following the municipal elections. 76 Mont. 76-77.

The Court concluded by considering the duration of Morgan's appointment. The Court noted the general rule with respect to elective offices that an appointment to fill a vacancy generally is effective only for the unexpired portion of the term, and held that the same rule should apply to appointive positions in which a term of office is specified by statute. 76 Mont. at 79-80. Thus, the Court concluded that Morgan's appointment was effective only until the end of the term of office in May 1925, and that Knight's appointment was valid.

A historical analysis of the office of Townsend City Judge establishes the nature and duration of the term of office. As noted above, the statutory length of the term is fixed at four years. You inform me that elections occurred for the office of City Judge in April of 1977 and in November of 1981 (there having been an intervening change in law moving city elections from April to November in odd-numbered years). The judge elected in 1981, who would have taken office by law on the first Monday in January 1982, Mont. Code Ann. § 7-4-4107 (1981), resigned effective June 30, 1983, at which time the City Council designated the Justice of the Peace to serve as City Judge. You state that there appears to be no record of succeeding appointments by the City Council of the Justice of the Peace as City Judge in 1985, 1989, or 1993. When the Justice of the Peace resigned the office of City Judge in 1996, the Council appointed Judge Marion, effective June 30, 1996. There again appears to be no record of reappointments of Judge Marion until December of 2002, when the Council reappointed her, ostensibly for a four-year term ending December 31, 2006.

Following the reasoning of the Morgan case, the term of office for the City Judge was established by statute and past electoral practice to be a period of four years beginning on the first Monday of January of 1982, 1986, 1990 and so forth. This appears clear from the fact that elections for the four-year term were held in April 1977, and again in November 1981. This means that when the City Judge position became vacant in June 1983, the designation of the Justice of the Peace to fill the position would have been for the remainder of the term then in effect, or until the first Monday of January 1986. And since, under Morgan's reasoning, "[e]ach term follow[s] the other in regular succession, each one commencing where the other ended," 76 Mont. at 76, in my opinion Judge Marion's initial appointment in June 1996 was a mid-term appointment for the remainder of a term that began on the first Monday in January, 1994, and ended on the first Monday in January, 1998. A succeeding term of office would have begun then, ending on the first Monday of January 2002.

B.

The question then arises as to Judge Marion's right to hold office in the absence of reappointments for the 1998 and 2002 terms of office. Under Mont. Code Ann. § 3-11-201(2) "[a]n …appointed city judge shall hold office for a term of four years ***and until the qualification of a successor***." (Emphasis added). This language confers on the appointed officer the right to hold office until a successor has been appointed and qualified for office. State ex rel. Sandquist v. Rogers, 93 Mont. 355, 362, 18 P.2d 617, 618 (1933); 47 Op. Att'y Gen. No. 16 (1998); see Wood v. Butorivich, 220 Mont. 484, 488-89, 716 P.2d 608, 610-11 (1986) (police commissioner actions not invalid due to failure to reappoint him as required). The statutory language furthers the important public policy against leaving positions vacant and the public's business undone. In the absence of evidence that a successor City Judge was appointed and qualified or that Judge Marion ceased during this period to be qualified to hold office, Judge Marion was entitled to continue to hold office.

C.

The final sub-issue under this question involves the validity and effect of the Council's re-appointment of Judge Marion in December 2002. I am informed that the Council voted to re-appoint Judge Marion at a meeting on December 30, 2002. The City Council minutes state that "the term is from 1/03 to 12/31/06."

Under the above discussion, it appears that Judge Marion's initial appointment had expired with the end of the term for which she was appointed, viz. on the first Monday in January 1998. From that point forward until December 2002, she held office as a holdover because no successor had been appointed and qualified. Sandquist, 93 Mont. at 362. If the Council had appointed a qualified successor prior to December 2002, that person would have held the office until the end of the un-expired portion of the term. However, no such appointment had been made. Therefore, when the Council acted in December 2002, Judge Marion was still acting as a holdover, and the Council had the authority to make an appointment to the position.

The remaining question is whether the Council's attachment of a term of office running from January 2003 through December 2006 affects the validity of the appointment. Under the above discussion, the four-year term of office for the City Judge position had ended on the first Monday in January, 2002, and another four-year term had begun on that date, notwithstanding Judge Marion's tenure as a holdover judge. Thus, the proper action for the Council in filling the office should have been to appoint a person to fill the unexpired portion of the term, i.e., an appointment that would be immediately effective for the term ending the first Monday in January, 2006. It therefore appears that in December 2002 the Council made an appointment, ostensibly for a full four-year term, when there actually remained only roughly three years in the then existing term of office.

Under the above analysis, the attempt to attach a full four-year term to the appointment was unlawful. However, the weight of authority supports the view that an attempt by the appointing authority to make an appointment for a term other than the one provided by law does not void the appointment, but only restricts it to the period of time the law allows. Newman v. Fair Lawn, 157 A.2d 314, 318-19 (N.J. 1960). While the cases in this line all involve attempts to make an appointment for less than the statutory term, I see no reason why the principle should not apply in cases such as this, where the appointing authority mistakenly attempts to confer a tenure longer than that allowed by law. The Council clearly acted in December 2002 with the intention of retaining Judge Marion as City Judge and clothing her with the power to act in that capacity. It would be my opinion that her appointment in December 2002 authorized her to hold the office until the term of office expired the first Monday in January 2006.

It follows from the foregoing that Judge Marion was in a term of office when the city adopted its FY 2004 budget that included a reduction in her salary. The reduction of her salary contravenes the clear language of the constitutional provision, and unless some defense exists to the claim, in my opinion the reduction was unlawful.

II. DESIGNATION OF JUSTICE OF THE PEACE.

As noted above, Mont. Code Ann. § 3-11-205 (1) allows the City Council to "designate a justice of the peace…to act as city judge." It would be my opinion, however, that the Council could not exercise this authority in a manner that would deprive a sitting City Judge of the office in the middle of a term. The Montana Constitution provides for the removal of judges by various methods including impeachment, Mont. Const. Art. V, § 13(1), or through judicial discipline, Mont. Const. Art. VII, § 11. Other statutory methods may be available as well. See, e.g., Mont. Code Ann. § 2-16-601 et seq. (Montana Recall Act). However, in my opinion a local government legislative body cannot otherwise act to deprive the holder of an office with a specified term. See State ex rel. Gibson v. Friedley, 34 N.E. 872 (Ind. 1893) (legislature cannot abolish court during incumbent judge's term).

The Montana Supreme Court, in its leading opinion interpreting Art. VII, § 7(1) of the Montana Constitution, lends considerable support to this view. In Coate v. Omholt, 203 Mont. 488, 662 P.2d 591 (1983), the Court considered a challenge to the constitutionality of a statute that forfeited a portion of the salary of a judge who held a matter under submission without making a decision for more than 90 days. The Court first held that the statute violated separation of powers by placing the legislature in control of a fundamental aspect of the judicial function - when to render a decision. The Court went on to hold that the statute would also be invalid under Art. VII, § 7(1) by reducing the salary of the judge during a term of office.

In reaching the latter holding, the Court made two observations that are particularly pertinent here. First, the Court emphasized that public policy strongly supports maintenance of separation between the legislative and judicial powers. The Court stated:

> A constitutional provision prohibiting diminution of salaries during the term of office is designed to remove from the lawmakers temptation to exert control over the other branches by promise of reward in the form of increased compensation or threats of punishment by way of reduced salaries.

203 Mont. at 500; see also State ex rel. Jackson v. Porter, 57 Mont. 343, 347, 188 P. 375, 376 (1920) (same); 38 Op. Att'y Gen. No. 90 (1980) (decrease in hours of justice of the peace accompanied by reduction in compensation would violate Art. VII, § 7(1)). While there is no evidence before me to suggest that the Council's action with respect to Judge Marion's salary was in any way motivated by an intent to punish or intimidate her in the performance of her duties, a construction of Mont. Code Ann. § 3-11-205 (1) that would permit the exercise of the option in mid-term would allow such pressure to be brought to bear. A court would not presume that the legislature would have intended such a result.

Second, the Coate Court emphasized that a statute should not be construed to allow a legislative intrusion on judicial independence indirectly that would not be permissible if enacted directly. 203 Mont. at 500 (rejecting argument that statute did not violate Art. VII, § 7(1) because the

ultimate enforcement of the salary forfeiture rested with the Supreme Court, not a legislative or executive branch agency.) A reading of the statute that would permit the Council to designate the Justice of the Peace to serve as City Judge in mid-term would allow the Council to accomplish indirectly several things that it cannot do directly, including depriving the incumbent judge of compensation she would otherwise be entitled to by law and removing her from office without cause sufficient to justify impeachment, judicial discipline pursuant to the Judicial Standards Commission process, or, for that matter, recall.

If the Council had chosen to exercise its authority under Mont. Code Ann. § 3-11-205(1) as discussed in connection with the adoption of the FY 2004 budget, the effect would have been to divest Judge Marion of her powers and duties as City Judge and to vest those powers and duties in the Justice of the Peace. In my opinion, if the Council wishes to pursue the option of assigning the duties of the City Judge to the Justice of the Peace under Mont. Code Ann. § 3-11-205 (1), it may implement such a change only effective at the end of a term or, as it did when it implemented the change in 1983, when the position has otherwise become vacant.

III. WAIVER.

You next ask whether, assuming the adoption of the FY 2004 budget reduced Judge Marion's salary in violation of Art. VII, § 7(1), she should be deemed to have waived the violation by agreeing to accept the reduced salary. You point to Attorney General Greely's opinion in 38 Op. Att'y Gen. No. 90 (1980) for support. In that opinion, this office considered whether a county could in mid-term adopt a change in the operation of its Justice Court, dividing the duties of the existing court, presided over by a single full-time judge, into a court with two part-time judges, and assigning the incumbent judge to one of the part-time positions at reduced compensation. Attorney General Greely held that the county could implement the change only if it did so between terms. He also suggested, however, that the Justice could waive the protections of Art. VII, § 7(1).

This office cannot render an opinion as to whether Judge Marion has waived the protections of the constitutional provision in this case. Attorney General Greely's opinion emphasized that only a voluntary waiver could be effective in curing a violation of Art. VII, § 7(1). 38 Op. Att'y Gen. No. 90 at 311 ("The key factor involved is the voluntary waiver for without such a waiver no action may be taken.") Voluntariness is a question of fact, and in this case Judge Marion has disputed the issue of whether she voluntarily agreed to accept a reduced salary. The suggestion that she may have been moved to accept a reduction to avoid transfer of her judicial duties to the Justice of the Peace, a move that in my opinion would not have been lawful for the reasons stated in Part II above, indicates that real and difficult questions of fact may be presented as to whether Judge Marion agreed, and if so whether her agreement was voluntary. I express or imply no opinion as to the proper resolution of those factual issues.

This office firmly adheres to the rule that we will not resolve disputed issues of fact in the context of the opinion process. Accordingly, I must decline to resolve the waiver question.

IV. OFFICE HOURS.

Your final question asks whether the Council has the authority to set the office hours of the City Court and require the judge's presence in the office during those hours. These questions are largely resolved by a prior opinion of this office. In 43 Op. Att'y Gen. No. 61 (1990), the Harlem City Attorney asked whether the governing body of a third class city or town had the authority to set business hours for the City Court. Attorney General Raciciot held that the City Council had the authority to set hours during which the office of the Court must be open, within the constraints provided by Mont. Code Ann. § 7-4-102. Thus, it appears the Council has the authority to determine the hours during which the office of the Court must be open.

You also ask whether the Council has the authority to require that the City Judge be present in the Court office during those hours of operation set by the Council when she is not on the bench. In the above opinion, Attorney General Racicot suggested the answer to that question was in the negative, stating that "the requirement that the court be open for the transaction of business does not necessarily translate into a requirement that the presiding judge be present during those hours." 43 Op. Att'y Gen. No. 61 at 277.

In Coate, the Supreme Court emphasized that legislative power may not be allowed to intrude on the inner workings of the judiciary. While it would be my opinion that the Council may establish a minimum number of hours for which the City Judge will be compensated for the performance of judicial functions and devise reasonable means and methods to ensure the Judge's accountability for those hours, see Mont. Code Ann. § 3-11-201 (providing for establishment of city judge's compensation by ordinance), I also believe those means and methods may not include provisions that intrude inappropriately on the independence of the judiciary. It would therefore be my opinion that the Council would not have the authority to dictate that the City Judge's judicial powers may only be exercised while the judge is present in the office of the Court, or to require the Judge's presence in the office of the Court when, in the judge's judgment, her presence was not required for the exercise of judicial duties.

I summarize my opinions in response to your questions as follows:

1. The reduction in Judge Marion's salary enacted through the adoption of the FY 2004 city budget diminished her compensation in violation of Article VII, § 7(1), by reducing her compensation during her term of office.

2. For purposes of the constitutional provision, her term of office began the first Monday in January 2002, and the four-year term will end the first Monday in January 2006.

3. While Judge Marion was serving in the capacity as a holdover office-holder from January to December 2002, the Council's action in appointing her in December 2002 made her the office-holder for the remainder of the then-existing term of office, which will end on the first Monday in January 2006.

4. This is true despite the fact that the Council's action purported to change her term of office to one that would run from January 2003 through December 2006. The enactment of an incorrect term as part of the appointment did not void the appointment, but the appointment is only effective for the lawful statutory term of office.

5. The Council has statutory authority to designate the Justice of the Peace as the City Judge. However, it may not make this action effective during the term of office of an incumbent City Judge. To do so would have the effect of removing the Judge from office without following the legal requirements for doing so.

6. While this office has recognized that a judge may waive the protection of Mont. Const. Art. VII, § 7(1) by voluntarily agreeing to accept a reduction in salary for working fewer hours, this office cannot issue an opinion as to whether Judge Marion voluntarily waived the protection of the constitutional provision in this case. Such a waiver must be voluntary, and voluntariness is a question of fact that we cannot resolve in the opinion process.

7. The City Council has the authority to set the hours of operation for the City Court, and in setting the compensation of the City Judge may tie compensation to a certain number of hours of work and establish reasonable means of assuring accountability for those hours. The Council may not require the judge's presence in the Court offices during office hours.

I hope you find the foregoing helpful. This letter of advice may not be considered a formal opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Counsel

cdt/jaj
c: Karen Sedlock, Commission on Courts of Limited Jurisdiction
Judge Tori Marion