

September 4, 2007

Mr. W.G. Gilbert III
Dillon City Attorney
125 North Idaho
Dillon, MT 59725

Dear Mr. Gilbert:

You have requested an opinion from the Attorney General interpreting provisions of the Dillon City Charter dealing with the question of the voting rights of the mayor. Since the matter is governed by well-settled legal principles and involves a matter of local law a letter of advice rather than a formal opinion has been deemed the appropriate response to your inquiry.

The City of Dillon operates under a self-government charter. Your question involves two charter provisions. The first, Charter Section 2.07, provides:

The council shall have a president who shall be elected by the members of the council from their own number for a term established by ordinance. The president of the council shall preside when the mayor is absent, and may only vote as other members of the council.

The second, Charter Section 3.10(1) provides: “The mayor shall decide all tie votes of the council, but shall have no other vote.” Your question is whether a 4-4 vote of the council over the selection of the president is a “tie vote” of the council, triggering the mayor’s power to break “all tie votes.”

As a self-governing city operating under a charter Dillon is not generally obligated to follow state statutes dictating how a general power government conducts its business. Mont. Code Ann. § 7-1-103. However, the legislature has provided for the breaking of ties under the mayor-council form of government in language strikingly similar to that used in the Dillon charter. Mont. Code Ann. § 7-5-4102(2) provides: “The mayor is the presiding officer of the council and must . . . decide all ties by his vote. The mayor has

no other vote.” The Montana Supreme Court has interpreted this language or similar language in two cases that provide significant guidance on the instant question.

In State ex rel. Young v. Yates, 19 Mont. 239, 47 P. 1004 (1897), the Court considered the question of whether an earlier version of Mont. Code Ann. § 7-5-4102(2) empowered the mayor to vote to break a 4-4 tie among the council on the question of the confirmation of mayor’s appointment of the city jailer. The Court concluded that the mayor had the right to vote to break the tie. In State ex rel. O’Hern v. Loud, 92 Mont. 307, 14 P.2d 432 (1932), the Court reaffirmed its prior decision in a case involving the confirmation by the council of the mayor’s nomination for the office of city attorney under a statute virtually identical to Mont. Code Ann. § 7-5-4102(2). The Court observed that the mayor

has certain duties, rights and powers granted to him of an executive nature, yet he presides over and is a constituent part of the whole council exercising its legislative powers, but withal he has no right to vote except where the body over which he presides, the board of aldermen, tie in a vote or proceeding. A nomination to an office which requires confirmation by the members of the council, before becoming effective, necessarily demands a vote of the members constituting the city council who can vote. But, inasmuch as the mayor cannot vote unless there is a tie, the right to vote is necessarily restricted to the aldermen until that condition arises, when, by reason of a tie vote, the mayor may exercise his power, and confirm or reject.

92 Mont. at 311, quoting Young, 19 Mont. at 241.

The common law rule appears to be that

[t]he word tie, as applied to an appointment by election, signifies a state of equality between two or more competitors for the same position. . . . A tie is that which is tied. It is a knot; and when provision is made, in regulating legislative procedure, for a casting vote by the presiding officer in case of a tie, the object is to allow him to untie this knot.

Wooster v. Mullins, 64 Conn. 340, 30 A. 144, 144-45 (1894). I find no provision in the Charter that suggests that the 4-4 vote between two candidates for the office of council president is not a “tie vote” under Charter § 3.10(1). It has been suggested that the language in Charter § 2.07 providing that the president “shall be elected by the members of the council” eliminates the mayor from the process. The above-quoted language from

the Montana Supreme Court's decisions in Young and Loud suggests that this argument would not be persuasive to a Court because for some limited purposes the mayor is considered part of the council.

It has also been suggested that a vacancy in the office of council president is a "vacancy on the council" for purposes of the application of Charter § 2.10. That section provides that when a council member position becomes vacant the office is filled by election at the next general election but that "[p]ending such election . . . the Council shall appoint, by the affirmative vote of five (5) Council members," a replacement to serve until the election. Under this argument, there could be no "tie vote" for the office of council president because the election would always require five votes of the eight member council to fill.

In my opinion, this provision is inapplicable to the election of a council president. Charter § 2.10 and its implementing city ordinance, 2.08.140, apply "[w]hen a vacancy occurs in the office of council member." Charter § 2.02 provides that there are eight "council members." They serve overlapping four year terms, Charter § 2.04, and are elected by district, Charter § 2.05. The office of council president is dealt with in an entirely separate provision of the charter, § 2.07, and clearly is a distinct office with specific attributes that differ from those of a council member. The president is not chosen by the voters and is not elected from a district. The president has powers and duties that are distinct from those of council members generally, with the exception that the council president retains the right to "vote as other members of the council." Charter § 2.07. The Charter clearly considers the offices of "council member" and "council president" to be distinct. It is therefore my opinion that the five vote requirement in Charter § 2.10 does not apply to the selection of the council president.

It has been submitted that members of the 1994-1996 City of Dillon Study Commission believe that the five vote requirement applies. While meaning no disrespect to the Study Commission members, the law does not afford their views, expressed long after the Charter has been drafted and adopted as a response to a particular dispute, any significant weight in interpreting the document today. See generally Sutherland Statutory Construction, § 48.16 at 366 (5th ed. 1992) ("In construing a statute the courts refuse to consider testimony about the intent of the legislature by members of the legislature which enacted it. This is especially true if . . . the statements are made some years after the legislation was passed.")

Based on the foregoing discussion it is my opinion that a 4-4 vote on the question of whether a particular member of the council should be selected as council president is a

Mr. W. G. Gilbert III
September 4, 2007
Page 4

“tie vote” that the mayor may break under Dillon City Charter § 3.10(1). This letter of advice may not be considered an official opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym